

CASE NO: 3PD/193/16

IN THE SUBORDINATE OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT HOLDEN
AT LUSAKA.

(Criminal jurisdiction).

THE PEOPLE

VS

MATHEWS MWEWA, CLEMENT BWALYA, JOSEPH MBEWE AND MIRRIAM MAMBWE.

BEFORE: HON. MUBITA. A; MAGISTRATE III

For the State: Samuel Limbwambwa (PP)

For the Accused: In person

JUDGEMENT

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. Whoolmington V DPP (1935) AC 462



The four accused persons stand charged with two counts of theft contrary to section 272 of the Penal Code Chapter 87 of the Laws of Zambia.

COUNT ONE:

Particulars of the offence were that, Mathews Mwewa, Clement Bwalya, Joshua Mbewe, and Mirriam Mambwe, on 8th December, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, did steal a radiator and a distributor altogether valued at K 2800 the property of Betty Phiri.

COUNT TWO:

Particulars of the offence were that, Mathews Mwewa, Clement Bwalya, Joshua Mbewe, and Mirriam Mambwe, on 8th December, 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together, did steal a distributor valued at K 2000 the property of David Nyola Zimba.

When called upon to take plea, A1 admitted the charge and was convicted and A2, A3 and A4 denied the charge. However, at the close of the prosecution case, the accused were found with a case to answer and were placed on their defence. The provisions of section 207 of the Criminal Procedure Chapter 88 of the Laws of Zambia were complied with. Accused number two elected to give sworn evidence, A3 elected to give sworn evidence and A4 elected to remain silent and all 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.

Section 272 of the Penal Code Chapter 87 of the Laws of Zambia provides 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."

Section 264 (1) of the Penal Code chapter 87 of the Laws of Zambia provides that:

"Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen"

Section 264 (2) of the Penal Code chapter 87 of the Laws of Zambia provides that:

Every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.

Section 265 (1) of the Penal Code chapter 87 of the Laws of Zambia provides that:

2. 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.
3. A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say:



(a) an intent permanently to deprive the general or special owner of the thing of it;

From the foregoing, the prosecution must prove all the elements of the offence charged that:

1. There was taking and moving of the items
2. The items were capable of being stolen
3. The items belonged to another person and the accused had no claim of right in the same.
4. The taking was fraudulent and the intention of the accused was to permanently deprive the owner of the property
5. It was the accused who stole the items.

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

PW1 was **Zimba Nyola David** who testified that on 8th December, 2016, as he was home sleeping, he received a call from constable Mazyambi who told him that she had apprehended suspects who stole a distributor from the car. He said the car was a Toyota Spacio registration number AAL 2293 and white in colour. He averred that the vehicle was parked near the house with all the doors locked and he had the car keys with him in the house. He testified that when he woke up he found constable Mazyambi outside and said she was led by the suspects to where they stole the distributors. He testified that when he checked the bonnet of the car, he found that it was open and the distributor was not there. He averred that one of the suspects Mathews Mwewa admitted responsibility. He averred that Mathews was in the company of Clement Bwalya. He said he came to know the driver after interviews, who was driving a Toyota Spacio grey in colour and was in the company of Mirriam. He said he was told that they worked together, but did not know the exact part she played in



the commission of the offence. He testified that A2 and A3 were participants in the commission of crime because the driver could be called to go to any area where they wanted to commit crime and Mathews Mwewa said they had been working together for a long time.

A2 was identified by touching and mentioning the name.

He identified the distributor as being black in colour and that the cables were silver and charcoal grey. It was valued at K 2000.

When cross examined by accused number two he said that he knew the person who committed the offence. He further said he was not the one who arrested them.

When cross examined by accused number three he said he provided transport whenever they committed an offence.

There was no cross examination by A4.

There was no re-examination.

PW2 was **Mazyambi Ruth** of John Howard who testified that on 8th December, 2016 she was on duty from 17:00 to 08:00 hours. While on duty, she took patrol with other officers and around 03:00 hours, they saw a vehicle parked at Jack roundabout with two occupants. She said the first was a male in charge of a vehicle and the other was a woman seated at the back. She testified that the woman revealed that they were four in number and two had gone to steal and among them was the husband. She said they went back to Jack roundabout and saw two people coming towards the vehicle and arrested them. The apprehended people had three distributors and one radiator. She came to know the accused as Mathews Mwewa, Clement Bwalya, Joshua Mbewe and Mirriam Mambwe



of Kanyama. She said after interviews, Mathews and Clement led them to the place at the house of David where they stole the items from, but failed to locate the other area where they stole the other distributor.

She averred that after questioning them she made up her mind to arrest them for the subject offence and handed them over to the CIO with the exhibits.

She identified the distributors as being silver and charcoal grey in colour and had cables. She further said the radiator was grey with some silver colour around. She identified the distributor for David Nyola Zimba.

A2, A3 and A4 were identified by pointing.

There was no cross examination by A2.

When cross examined by A3, she said he was seated in the front seat of the vehicle.

There was no cross examination by A4.

PW3 was number 12509, Detective Inspector **Isaac Phiri** who testified that on 8th December, 2016 he was at John Howard Police and said he was the arresting officer in the matter. He said that when he reported for work, he was handed over the suspects, one female and three males. He testified that he was also handed over three distributors, one radiator, three knives and one screw driver. He further said he also received a Toyota Spacio ALX 1185

On 9th December, 2016 A4 and Mwewa led him to Soweto market to show him where they sold stolen items. He said he was in the company of the Officer in Charge at John Howard and Detective Mbozi. He testified that A3 was the driver of the vehicle and an



aider in the commission of crime. He further said A4 was also an aider and was so willing when leading them to the place where they sold the items. He said the officer who handed them to him told him that A1 and A2 had gone to steal and A3 and A4 were waiting for them.

Under warn and caution statement in Nyanja the language understood better, they all gave free and voluntary replies admitting the charge. He then made up his mind to jointly charge and arrest the four for theft contrary to section 272 of the Penal code chapter 87 of the Laws of Zambia. Since the accused denied the charge, the warn and caution statement was dispensed with.

He identified the radiator as being grey and black in colour. He said the distributors were grey and black. The knives were silver and the screw driver was also grey. He testified that these items were in his custody and submitted as part of his evidence. They were marked from P1 for the distributor, P2 for the two distributors, P3 for the radiator, P4 for the screw drive and P5 for the knives

The accused were identified by pointing and how each participated in the commission of the crime.

There was no cross examination by A2.

There was no cross examination by A3.

There was no cross examination by A4

There was no re-examination.

PW4 was **Betty Phiri** who testified that on 9th December, 2016 she went to John Howard Police to complain that two items were stolen from the vehicle and these were a radiator and



distributor. She testified that on 8th December, 2016 the brother asked for the car. Around 05:00 hours the brother called and told her that the car was open and the radiator and distributor were not there. She averred that the items were removed from a Toyota Spacio blue in colour, registration number ALE 2163. The value of the items was K2800 and all were recovered.

She identified the accused by pointing.

She said that the radiator was grey in colour and a lid on top. The distributor had greyish cables

There was no cross examination by A2.

There was no cross examination by A3.

There was no cross examination by A4

There was no re examination.

End of the prosecution evidence.

DW1 was accused number two, **Clement Bwalya** who testified that on 8th December, 2016 was booked by Mathews Mwewa who was going to John Howard and charged him K100.00. He said it was around 01:00 to 2:00 hours. He testified that upon reaching John Howard he removed K50.00 and the driver refused, and told him that it was supposed to be K100.00. He testified that Mwewa told them to wait and that he could bring the K50.00. He said Mwewa left them with his wife and as they were waiting they apprehended.

There was no cross examination by A3

There was no cross examination by A4

When cross examined by the State he indicated that he lived in Kanyama Site and Service and was a casual worker. He said on the material day Joshua Mbewe asked him to work with him in the



night and that was the first time. When asked why he picked on him, he said Joshua Mbewe was a neighbor. He said Mathews Mwewa found them at Total filling station in Kanyama and booked them; and told them that he was going home in John Laing. He said Mathews was with his wife and came to know this information at the Police Station. He denied having gone with Mathews Mwewa to steal and instead, said that he was standing outside the car. He denied being found with Mathews at the time of being apprehended. He said he did not know what Mathews was found with at the time of being apprehended. He later indicated that Mathews had spare parts for the car but did not know where he got them from. He said at the time of booking them, he had nothing in his hands, but came to have the items while in John Howard. He admitted that the parts came from the vehicles for the witnesses who came to testify in court. He indicated that Mathews was convicted on 16/12/16 because he stole a radiator and distributor. He admitted that the things were stolen on 8/12/16 when they were together.

There was no re examination

DW2 was accused number three, **Joshua Mbewe** who testified that on 8th December, 2016, Mathews Mwewa booked a taxi going to John Howard and the payment was K100.00. Upon reaching John Howard he wanted to give him K50.00 and he refused it. He said Mathews then went to get some money and left them waiting. He said he was with Clement Bwalya and the wife to Mathews Mwewa. As they were waiting, they were apprehended by the Police

There was no cross examination by A2.

There was no cross examination by A4.

When cross examined by the State he said he had been a taxi driver for four years and had been operating from Kanyama Total



filling station. He said he used to work alone, but at times could ask for a co-driver and could call any one. He said A2 had requested to work with him in the night because he was a neighbor, but he did not operate with him all the time. He indicated that he operated in the night and it was the first time to be booked by Mathews. He said Mathews went with his wife by the names of Miriam and he came to know about it at the police. He admitted being found in the car with a lady at the time of being apprehended. He said A1 had gone while A2 was seated on the boot of the car.

He admitted being apprehended together with A1 and A2 and it was along the road; and the time was between 01:00 and 02:00 hours. He indicated that the items were found with Mathews Mwewa and that the same were not in the car as they moved from Kanyama. He said it was the same Mathews whom they were apprehended with. He said he just took them as customers to John Howard and did not know that they were going to steal. He admitted that transporting a thief was an offence.

There was no re examination.

DW3 was A4 **Mirriam Mambwe** and elected to remain silent.

The defence closed their case.

STATEMENT OF FACTS.

Having heard from both the prosecution and the defence, the following issues were not in dispute that: The incident happened on 8th December, 2016. The Police Officers were on the night patrol on the material day. A vehicle was found parked at the roundabout in John Howard. It was about 01:00 to 02:00 hours. A3 and A4 were found seated inside the car. One radiator and three distributors were stolen from different vehicles. The accused



were four in number and lived in different places. A1 and A2 led PW2 to the house of PW1 where they stole the distributor from. The accused were found with knives and a screw driver. The matter was reported to John Howard Police.

COUNT ONE.

It was not in dispute that the incident happened on 8th December, 2016 at around 01:00 to 02:00 hours. PW 2 testified that she went on night patrol with colleagues and saw a vehicle parked at Jack roundabout. She testified that there were two occupants inside the car, one seated in the front seat and another at the back. She testified that they went back to the roundabout and saw two people going towards the car. Upon arresting them, they had three distributors and one radiator. PW 4 testified that she had given the car to the brother to use the previous day. Around 05:00 hours she received a call from the brother who told her that the car was open and radiator; and distributor were missing. She went there to confirm and really found that the two items were not there in the car registration number ALE 2163. This evidence confirms that there was the taking and moving of the items and hence proved beyond all reasonable doubt.

It was also not in dispute that the radiator and distributor were stolen from PW2's vehicle. According to section 264 (2) of the Penal Code Chapter 87 of the Laws of Zambia, things capable of being stolen include, **"Every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it."** From this section the word inanimate refers to anything without life. According to the available evidence, the items stolen from the vehicle do not have life. But the moment they were moved for the



purpose of stealing them, they become capable of being stolen and hence meeting the requirements of section 264 (2) of the Penal Code Chapter 87 of the Laws of Zambia.

PW5 testified that he had requested for the car from the sister, PW3 to use on 8th December, 2016. He said he parked it at the yard. He averred that when he opened the window for the bedroom, he saw that the bonnet for the car was open. He informed the owner of the car of what had happened. He said when he went to the Police he identified P3 the radiator and P4 the distributor. It was the testimony of PW4 that after receiving the information from her brother, she went to confirm what had happened and found that the items were not there. She positively identified P3 as grey in colour with a lid on top and P4 as having greyish cables. This evidence was not disputed by the accused. This means that the two items P3 and P4 belonged to PW4 as the lawful owner and the accused had no claim of right in the same.

Having established that PW4 is the owner of P3 and P4, it can also be said that if the accused were not apprehended, the two items were not going to be taken back to the owner. The accused had no permission from the owner to remove any parts from her vehicle. This means that the taking was fraudulent and the intention of the accused was to permanently deprive the owner of the property.

It has now to be established whether the accused stole the items for PW4. PW2 testified that after finding the vehicle that was parked at the roundabout with two occupants, DW4 told them that A2 and A1 had gone to steal and of them was the husband. She further testified that when they went back to the roundabout, they saw two people going towards the vehicle. She said when they apprehended them, they had one radiator and three

distributors .The radiator and one distributor were identified by PW4 and PW5.On the contrary ,DW1 said that he was a taxi driver and was booked to take A1 and his wife home. DW2 also said he was a co-driver who requested to work with DW1 in the night on the material day.DW1 and DW2 testified that A1 was supposed to pay them K 100.00, but when they reached the destination, he produced a K50.00. Both testified that A1 then told them to wait with his wife as he went to get a K50.00 balance.DW2 said that when being apprehended DW1 was outside the car and was seated on the boot. On the contrary, PW2 said the two who were going towards the car were Mathews (A1) and Clement Bwalya (A2). Furthermore PW2 said that he was led by A1 and A2 to the house where they stole the items from.PW3 also testified that A1 and A4 led him with other officers to Soweto market to show them where they sale the stolen items. Though A2 and A3 denied having committed the offence, there is overwhelming that they participated in one way or the other.DW1 (A2) directly participated in the actus reus as he was together with A1 and falls under section 21(1) (a) of the Penal Code which provides that, **"when an offence is committed, each of the following is deemed to have taken part in the committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say, every person who actually does the act or makes the omission which constitutes the offence."**DW2 was an aider in the commission of the offence as he provided transport wherever there was need to do the same and falls under section 21(1) (c) of the Penal Code, which provides that **"when an offence is committed, each of the following is deemed to have taken part in the committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say, every person who aids or abets another person in committing the offence"**. Although DW4 was found with DW1 and



DW2, and might have known what the agenda was, but the role she played in the commission of the offence was not clearly established by the prosecution.

From the foregoing, the only conclusion any reasonable tribunal can make is that DW1 and DW2 were also principal offenders and committed the offence.

COUNT TWO.

It was not in dispute that the incident happened on 8th December, 2016 at around 01:00 to 02:00 hours. PW 2 testified that she went on night patrol with colleagues and saw a vehicle parked at Jack roundabout. She testified that there were two occupants inside the car, one seated in the front seat and another at the back. She testified that she and the colleagues went back to the roundabout and saw two people going towards the car. Upon arresting them, they found three distributors and one radiator with them. PW1 testified that on 8th December, 2016, whilst sleeping, received a call around 03:00 hours from Constable Mazyambi. The message was that she took two suspects who entered his yard and stole a distributor from the vehicle a Spacio car and white in colour. He testified that as he came out, he found Constable Mazyambi with two suspects who led her to where they stole the items from. He averred that when he checked the vehicle he found that the bonnet was open and the distributor was not there. This evidence confirms that there was the taking and moving of the items and hence proved beyond all reasonable doubt.

PW1 averred that the bonnet for the car was open and the distributor was not there. According to section 264 (2) of the Penal Code Chapter 87 of the Laws of Zambia, things capable of being stolen include, **"Every inanimate thing which is the**



property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it." From this section the word inanimate refers to anything without life. According to the available evidence, the item (distributor) stolen from the vehicle does not have life. But the moment it was moved for the purpose of stealing it, it become capable of being stolen and hence meeting the requirements of section 264 (2) of the Penal Code Chapter 87 of the Laws of Zambia.

It was not in dispute that the two suspects took Constable Mazyambi to where they stole the items from. One of such places was the house for PW1. PW1 testified that when he was called he woke up and found that the bonnet for the car was open and the distributor was not there. He identified the distributor as being black in colour and cables were silver and charcoal grey. There was no other evidence to the contrary that there was another owner of the stolen item. Therefore, PW1 was the rightful owner of the distributor and the accused had no claim of right in the same.

Since it has already been established that PW1 is the rightful owner and did not allow the accused to remove the part from the car, it can only be said that, if the accused were not apprehended, they would have not returned the distributor to the owner. Therefore, the taking was fraudulent and the intention was to permanently deprive the owner of the property.

It has now to be established whether the accused stole the item for PW1. PW2 testified that after finding the vehicle that was parked at the roundabout with two occupants, DW4 told them that A2 and A1 had gone to steal and one of them was the husband. She further testified that when she and the colleagues went back to



the roundabout, they saw two people going towards the vehicle. She said when they apprehended them, they found one radiator and three distributors .One distributor was identified by PW1.PW1 testified that Constable Mazyambi went with the two suspects who led her to his house. This evidence was in tandem with what PW2 testified. On the contrary, DW1 said that he was a taxi driver and was booked to take A1 and his wife home. DW2 also said he was a co-driver who requested to work with DW1 in the night on the material day.DW1 and DW2 testified that A1 was supposed to pay them K 100.00, but when they reached the destination he produced a K50.00. Both testified that A1 then told them to wait with his wife as he went to get a K50.00 balance.DW2 said that when being apprehended DW1 was outside the car and was seated on the boot. On the contrary PW2 said the two who were going towards the car were Mathews and Clement Bwalya and were carrying the stolen items among which was the distributor for PW1. Furthermore PW 2 was led by A1 and A2 to the house where they stole the items from.PW3 also testified that A1 and A4 led him with other officers to Soweto market to show them where they sale the stolen items. Though A2 and A3 denied having committed the offence, there is overwhelming evidence that they participated in one way or the other in the commission of the offence. DW1 (A2) directly participated in the actus reus as he was together with A1 and falls under section 21(1)(a) of the Penal Code as earlier quoted in count one.DW2 was an aider in the commission of the offence as he provided transport wherever there was need to do the same and falls under section 21(1) (c) of the Penal Code as noted in count one. Although DW4 was found with the others, the role she played in the commission of the offence was not clearly established by the prosecution.



From the foregoing, the only conclusion any reasonable tribunal can make is that DW1 and DW2 were also principal offenders and committed the offence.

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 in both count one and two against DW3 and henceforth ACQUIT her of the same. I am further satisfied that the prosecution has proved all the elements of the offence charged against DW1 and DW2 and a conviction would be safe. I, therefore, find you **CLEMENT BWALYA** and **JOSHUA MBEWE** guilty of:

COUNT ONE:

Theft contrary to section 272 of the Penal Code Chapter 87 of the Laws of Zambia and I convict you accordingly.

COUNT TWO:

Theft contrary to section 272 of the Penal Chapter 87 of the Laws of Zambia and I convict you accordingly.

DELIVERED IN OPEN COURT ON THE DAY OF 2017.

