

IN THE SUBORDINATE COURT OF
 THE FIRST CLASS FOR THE LUSAKA
 DISTRICT HOLDEN AT LUSAKA
 (CRIMINAL JURISDICTION)

CASE /2PA/016/2017

BEFORE HON.MR. BRIAN.M. SIMACHELA.



THE PEOPLE v MARTHA PHIRI

JUDGMENT

For the People : Mrs S.Tembo, Public Prosecutor.

For the Accused: In person.

LEGISLATION REFERRED TO: Sections 272 and 265(1)/ (2) of The Penal Code Cap 87 of The Laws of Zambia.

CASES REFERRED TO: David Zulu v The People (1977) Z.R. 151 (S.C.)

The accused person stands charged with one count of Theft contrary to section 272 of The Penal Code Cap 87 of the Laws of Zambia. The particulars allege that, on 24th December 2016, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with unknown persons did steal K3, 200.00 the property of Justine Chisanga.

The burden is upon the prosecution to prove the case beyond all reasonable doubt. There is no burden upon the accused to prove his innocence. If, after considering all of the evidence in this case there is any doubt in my mind as to the guilt of the accused, then the accused is entitled to the benefit of that doubt.

In order to establish the guilt of the accused, the prosecution must establish that the accused:

1. Fraudulently, and
2. Without claim of right,
3. Took,
4. Property,
5. Being the property of another.

The prosecution called four (3) witnesses. The accused elected to give evidence on oath and called no witness. I will now review the evidence on record.

PW1, Justine Chisanga a police officer stated that on the night of 24th December 2016, whilst with his two friends Justine Mwanza and Michael Sitali went out to drink atnight club. Whilst there, they met the accused and her friend joined them for a drink up. He testified that after some beers he felt tired and decided to go and sleep at Laguna guest house with the accused. When they reached the guest house, he counted the money which was K3, 200.00 and they slept. He stated that they slept around 04:00 hours and at 06:00 hours when he woke up, the accused had already left the room but forgot to carry her purse. He went to ask from the reception if they had seen the accused, but he was told that they saw her in a panic mode leaving the guest house. He called his friends and they reported the matter to Embassy police post. He testified that when he tried to check the accused's purse, he found a ZESCO card which revealed her house number. They located her house and found the accused but she ran away from them.

In-cross examination PW1 stated that he counted the money before he slept with the accused but he did not show her where he put it. He confessed that he did not owe the accused anything and that he asked the accused to pay back the money so that the matter was withdrawn from the police.



PW2 Michael Sitali a businessman stated that on 23rd December 2016, he went out with his two friends PW1 and Justine Mwanza to a drink up. At the club they met Martha and her friends and later on went to Laguna guest house where Martha and Justine Chisanga slept. He testified that it was after an hour when PW1 called to inform him that Martha had stolen K3, 200.00 and she left her hand bag. The matter was reported to Embassy police post, and from the hand bag that Martha left there was a ZESCO card that revealed her house number. He stated that on 31st December 2016, he went to CC night club and met Martha again. He grabbed and took her to the police, but before they could reach there she told him the money was somewhere but he insisted to take her to the police.

In-Cross examination PW2 told the court that the accused told him that the money was there.

PW3 constable Shiyanda Adam testified that on 2nd January 2017 he investigated a matter in which male Justine Chisanga reported a theft of K3, 200.00 by Martha Phiri. He interviewed the accused who was already in custody, and she gave him unsatisfactory answer. Under warn and caution she gave him a free and voluntary reply denying the charge. He stated that the stolen K3, 200.00 was not recovered and he identified the accused in court.

There was no cross-examination.

That marked the end of the prosecution case and the accused was found with a case to answer and put on his defence.

REVIEW OF DEFENCE

DW1 Martha Phiri (A1) stated that on 24th December 2016 she was drinking beer with PW1, PW2, PW3 and her friends at CC Night club. Justine Chisanga (PW1) got tired and they went to Laguna guest house to sleep. She stated her friends and PW1's friends decided to go and Martha and PW1 remained at the lodge. She testified that she charged PW1 K500.00



for sex but he refused saying he had bought her food and beers. The two finally slept for about one hour and they woke up together around 06:00 hours. Martha was given a K500.00 and they parted company.

During cross-examination she stated that she went to Laguna guest house with Justice Chisanga and when PW1 went to her house, she did not run away. She confessed that the police went to arrest her from her house.

In Re-examination she stated that PW2 took her to the police post.

From the above facts, what is the position as regards the law? Section 265 (1) and (2) of the Penal Code Cap 87 provides as follows:

- 1) 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.**
- 2) 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;**
 - b) an intent to use the thing as a pledge or security;**
 - (c) An intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;**
 - (d) An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;**



(e) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

FACT FINDING

The evidence on record shows that K3, 200.00 was allegedly stolen. PW1 stated that he went to sleep at a lodge with the accused and when he woke up in the morning, the accused was gone and K3, 200.00 was missing. PW2 stated that he found the accused at the night club and took her to the police, but along the way she confessed having stolen the money and promised to take him where the money was but he refused.

Is there direct evidence to prove the allegation against the accused person? The answer is in affirmative. The prosecution alleged the accused person is the one that committed the offence and have invited me to find her guilty, what evidence is there?

It is clear that there is no direct evidence to show that the accused committed the offence, however, there is circumstantial evidence pointing to the accused persons. In **DAVID ZULU v THE PEOPLE (1977) Z.R. 151 (S.C.)** it was held that:

1. *It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.*
2. *It is incumbent on a trial judge that he should guard against drawing; wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.*

In the present case, the question that begs for an answer, has the evidence on record taken the case out of the realm of conjecture that the only inference to be drawn could be that of guilty.



The accused confessed that she went to sleep with PW1 at the lodge where **K3, 200.00** got lost the same morning. The confession by the accused to PW2 that the money was somewhere and attempted to take him there, was proof enough to show that she stole the money. For the accused to have forgotten to carry her hand bag shows that she was in panic mode when she was leaving the guest house. The accused's failure to bring the witness (receptionist) from the lodge whom she claimed helped her to get the money from the complainant, is evident enough that she was not telling the truth.

VERDICT

I had an opportunity to observe the demeanour of the accused persons from the beginning of the trial to the end of ^{her} their defence. It is not in dispute that ~~building materials~~ ^{3200.00} worth ~~K4000.00~~ went missing at the lodge. It is not in dispute that the ~~two~~ accused persons confessed having stolen the ~~items~~ ^{money} and ~~shared the money~~ ^{to PW2.}

In these circumstances, I can only come to the conclusion that the accused is guilty as charged for the offence of Theft contrary to section 272 of the Penal Code Cap 87 of the Laws of Zambia and I will and hereby convict her accordingly.

DELIVERED IN OPEN COURT THIS 23rd MARCH 2017



HON. BRIAN. M. SIMACHELA (Mr)

MAGISTRATE CLASS III

