

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

CASE /2PA/137/2016

BEFORE HON.MR. BRIAN.M. SIMACHELA.



**THE PEOPLE v EVANCE NKANDU, ROBERT MUTALE AND ACKIM  
 NGULUBE**

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**JUDGMENT**

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For the People : Mrs Ngosa, Public Prosecutor.

For the Accused: In person.

**LEGISLATION REFERRED TO:** Sections 272,265(1)/ (2) and 278 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.)

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The three accused persons stand charged with one count of Theft by servant contrary to section 272 and 278 of The Penal Code Cap 87 of the Laws of Zambia. The particulars allege that, on unknown dates but between 1st and 2<sup>nd</sup> April 2016, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together being persons employed as General workers did steal 6 packets of Rhino light, 4 packets of cement and 1 x 5 litres of thinners altogether valued at k6, 258.00 the property of the said employer.

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 (4) witnesses. The accused elected to give evidence on oath and called one witness. I will now review the evidence on record.

**PW1, Julie Limpick** a lodge owner stated that on the 2<sup>nd</sup> July 2016, she went to her lodge and found that Robert and Evans were not there. When she asked Ackim he told her he did not know where they went. Her son told her that the two went outside carrying Rhino light on their bicycles. She testified that when the two came back she put them in the guard house and called the police. As they were in the guard house, her son asked them where they had gone but they told him they had gone to buy air time. She stated after a check-up they discovered that Rhino light was missing. When the police went there the two tried to run away but they were apprehended and led the police where they sold the items. Upon reaching there, the police discovered that the two stole and sold cement, Rhino light, Tile fix and other items. Ackim tried to jump on the wall fence, but her neighbour apprehended and handed him to the police. She valued the items at k4, 000.00 and identified the accused persons together with the items. The Rhino light and two packs of tile fix were marked as 'ID1' and 'ID2' respectively.

In-cross examination by A1, PW1 stated that A1 confessed to her son having stolen the items and she told the police that he stole the items. She



testified that A1 took the police to ng'ombe compound market where the items were recovered.

In Re-examination she stated that A1 confessed having stolen the items and he took the police where he sold them, and A3 helped him carry the items to the gate.

**PW2 Admire Ngoma** a businessman stated that on 2<sup>nd</sup> July 2016, two people sold him 2 pockets of Rhino light at k100.00. They carried the items on their bicycles when delivering the items. He stated that upon returning from the stadium on the same day, he was told that police had gone to his shop with the suspects and collected the Rhino light. On Monday he went to the police and explained what transpired. He identified A1 in court and could not identify A3.

**In-Cross examination** PW2 told the court that A1 and A2 sold him the items and collected k100.00. They carried the items on their two bicycles and told him that their supervisor sent them so that they could buy food.

**PW3 Gift Mashata** testified that on 2<sup>nd</sup> July 2016 he was fixing tiles at PW1's lodge when A1 asked for his bicycle to go and buy air time. As soon as A1 left PW1 went to ask him where A1 had gone. PW1 informed him that A1 should have left without getting permission because she discovered items were missing. He stated that when A1 came back, PW1 called the police and A1 attempted to escape but he was apprehended. He identified the accused in court.

There was no cross-examination.

**PW4 Detective Constable Leonard Chilufya** testified that on 2<sup>nd</sup> July 2016, he investigated a matter in which a female Lodge owner (PW1) in Kalundu reported a theft of various items. He and his colleagues rushed to the scene of crime and apprehended A1 and A2 who attempted to run away upon seeing them. The two suspects were taken to Ng'ombe police where they confessed having stolen the Rhino lights and tile fixers and sold them

in Ng'ombe market. He stated that A1 told him that A3 was also involved in the stealing, and he went back to the scene of crime to arrest him after he attempted to run away but he was apprehended by other employees. The three (3) suspects were charged for theft by servant, under warn and caution they gave a free and voluntary reply admitting to the charge. He identified three accused person in court and the items they stole. He tendered the items for evidence and they were marked as 'P1' and 'P2' respectively. The stolen items were valued at K6, 258.00.

During Cross-Examination he stated that the accused persons admitted to the charge and led him to recovery at Ng'ombe market. He testified that A2 mentioned A3, and that's why he was arrested.

In Re-examination he stated that A1 and A2 led him to the recovery of the items from Ng'ombe market.

That marked the end of the prosecution case and the two accused were found with a case to answer and put on their defence. Accused number one called one witness and A3 called none.

#### **REVIEW OF DEFENCE**

**DW1 Evance Nkandu (A1)** stated that on 2<sup>nd</sup> July 2016 he left his work to go and buy air time at the market. While he was there, he met Robert (convict) carrying two bags of Rhino light. He stated that Robert told him that their supervisor Peter had sent him to sell the items. When two went back to their work station, they found their boss who asked them where they were coming from. Evans told her that he were coming from the market to buy airtime, but Robert informed her that Peter had sent him to sell Rhino light. He testified that PW1 called the police from Ng'ombe compound and she was explaining to them on phone, Peter told him to run away but he was caught by the police officers. The three were taken to police and locked up.



During cross-examination he told the court that he and Robert took the police to recover the stolen items. He stated that he did not get permission from his boss before going out to buy airtime.

In Re-examination he stated he went with Robert when they took the police to recover the items.

**DW2 Ackim Ngulube** testified that on 2<sup>nd</sup> July 2016 while at work place his boss went to ask him where his colleagues went. She asked him if Robert and Evans had reported for work. He stated that he was told to look for them but could not find them. Around 12:00 hours the police officers went there asking for him, Peter, Isaac and Thomson and ordered them to stand on the other side. He testified that he left the place after Peter instructed him to do so. After he left, he went to the neighbour's house to explain what had transpired, but the neighbour took him to the police where he found his co-accused persons in custody.

There was no Cross-examination.

**DW3 Peter Kapolo testified** that he was not there when the all incidence happened, but he confirmed having known Evans Nkandu (A1).

During cross-examination he stated that on that particular day he went to operate from somewhere else, and when he went back he was just told that something had happened while he was away.

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 building materials worth K6,258.00 were allegedly stolen, but the Owner testified that K4000.00 worth of building materials were stolen. The accused persons are alleged to have stolen the items. A1 informed the court that he met A2 at the market while he was carrying two bags of Rhino light. PW4 confessed that the accused persons admitted having stolen the items at the police. Is there direct evidence to



prove the allegation against the two accused persons? The answer is affirmative, as A2 the now convict stated that he went to sell the items together with A1. The prosecution alleged the accused persons are the ones that committed the offence and have invited me to find them guilty, what evidence is there?

It is clear that there is no direct evidence to show that the accused A1 and A3 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.

A2 during his plea of guilty stated that after they sold the items, the money was shared between themselves. A1 and A2 guided the police officers to where the items were sold, and they were recovered. The confession by A1 and A2 that they sold the items and shared the money, amounts to direct evidence. As for A3, there no direct evidence attaching him as he was just implicated by A1.

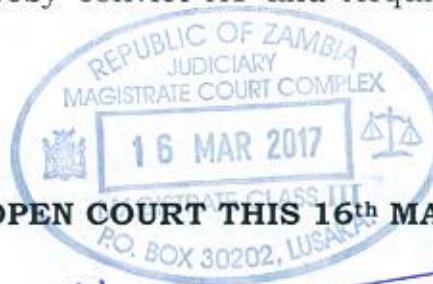
## VERDICT

I had an opportunity to observe the demeanour of the accused persons from the beginning of the trial to the end of their defence. It is not in dispute that




building materials worth K4000.00 went missing at the lodge. It is not in dispute that the two accused persons confessed having stolen the items and shared the money.

In these circumstances, I can only come to the conclusion that the accused persons A1 and A2 are guilty as charged for the offence of Theft by servant contrary to section 272 and 278 of the Penal Code Cap 87 of the Laws of Zambia and I will and hereby convict A1 and Acquit A3 and set him to liberty forthwith.



**DELIVERED IN OPEN COURT THIS 16<sup>th</sup> MARCH 2017**

  
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**HON. BRIAN. M. SIMACHELA (Mr)**

**MAGISTRATE CLASS III**