

IN THE SUBORDINATE COURT OF IPG/234/2016  
 THE FIRST CLASS FOR THE LUSAKA  
 DISTRICT HOLDEN AT LUSAKA  
 (Criminal Jurisdiction)

THE PEOPLE v KELLYS SIWALE

Before Hon N. C. Simaubi on the 14<sup>th</sup> day of March 2017

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**JUDGMENT**

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For the People : Mr. B. Simuusa, PP.

For the Accused: In Person

Legislation referred to

Section 272 and 278 of the Penal Code Cap 87

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The accused person stands charged with one count of theft by servant contrary to section 272 and 278 of the Penal Code Cap 87. The particulars allege that Kellys Siwale on 16<sup>th</sup> September 2016 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, being a person employed by Capital Fisheries Company Limited as a Depot Supervisor, did steal K8034.00 cash the property of the said employer. The accused person pleaded not guilty to the count.

The burden is upon the prosecution to prove the case beyond all reasonable doubt. There is no burden upon the accused person to prove his innocence.

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In order to establish the guilt of the accused, the prosecution must satisfy me upon each and every ingredient of the offence charged. **Section 278 of the Penal Code** provides as follows:

s. 278 If the offender is a clerk or servant and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.

**Section 272 of the Penal Code** provides:

272 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.

From the above the prosecution must show that:

1. The accused person being an employee of Capital Fisheries Limited;
2. Fraudulently; and
3. Without claim of right;
4. Took K8034.00 cash belonging to his employer;
5. By virtue of his employment.

I will now review the evidence on record. The prosecution called four witnesses. The accused person elected to give sworn evidence and called no witnesses.

**PW1, Elisha Zulu** is the Human Resources and Administration Manager at Capital Fisheries Ltd. His duties include staff recruitment, keeping of records for employees, disciplinary matters and representing the company in labour matters. He testified that on 16<sup>th</sup>

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September 2016 around 1800 hrs, he received a phone call from Kellys who is one of their employees. Kellys told him that at around 1200 hrs that day at Garden Depot, he lost company money when he left his office to go to the convenience. He testified that Kellys explained that on his return to his office, he found the window broken and K5000.00 and his phone were missing. Zulu told the Court that he asked Kellys why he was calling at that hour instead of the time the incident happened but that Kellys responded that he did not have his mobile number and transport. Kellys further told him that he did not report the matter to the matter as he was confused. Zulu then told Kellys to wait at the head office and he then phoned Emmasdale Police Station. A Sgt Zulu was dispatched to the scene while Zulu picked Kellys and took him to the police.

Zulu testified that Sgt Zulu later told him that Kellys was himself the thief and that he was coming with a witness. He told the Court that a check of the stock in the cold-room revealed that 10 boxes of Tilapia Fish worth K8034.00 were missing. Neither the stock nor the fish were recovered. A stock-audit report was completed and Zulu, Tifwenge Mvula, he assistant depot manager and Kellys signed it. Kellys was then taken to the police and detained. He told the Court that the accused indicated that he broke into the shop himself because he had no explanation apart from saying that he was robbed.

Zulu identified Kellys as the accused in Court. He further produced the Stock-audit Report-P1; the contract of employment for the accused-P2 and the September 2015 payslip-P3.

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In cross-examination by the accused, Zulu maintained that at the police, the accused admitted to breaking the window.

**PW2, Saviour Njovu** works for a car wash. He testified that on 16<sup>th</sup> September 2016 the accused got money belonging to Capital Fisheries Ltd and gave it to his friend, Phiri who in turn later fled to his village. Njovu told the Court that the car wash from where he operates is just next to the container for Capital Fisheries Ltd which is used as an office. He told the Court that after Phiri ran away, the accused began complaining that Phiri told him to go to Petroda Filling Station or that he would tell his employers. It was his testimony that at around 1520 hrs, the accused borrowed a K20.00 from them and then broke a window inside the office using a stone. The accused then told Njovu and his colleagues to say that thieves had broken into the container. He explained that he was by the container when the accused broke the window using a stone they put by the door.

Njovu testified that at around 1800 hrs, a Mr. Zulu, a police officer, came and took some notes before leaving for Emmasdale Police Station. Njovu identified the accused as Kellys Siwale.

In cross-examination, Njovu responded that the accused told them that he and Phiri had agreed to take the money and go to Malawi. He stated that the accused said this after Phiri left. He maintained that the accused came and told them that he gave Phiri the money and that they were supposed to meet at Petroda Filling Station. He stated that he was with his employer, one Mvula and others when the accused told them. He explained further that the accused initially told Mvula before telling the others and asking for a K20.00.

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**PW3, Tifwenge Mvula** is the deputy assistant manager at Capital Fisheries Ltd. He testified that on 16<sup>th</sup> September 2016, he received a call from Zulu that there was a problem at the Garden Depot involving the accused and asked him to accompany him there. He testified that they went to the police where they found the accused in custody. The accused was then removed from custody and they went together to the depot and conducted a stock-take. He testified that the container was opened and the stock was counted. They discovered that K8034.00 worth of stock was missing with cash. He told the Court that both the stock and the cash have not been recovered. He identified the Stock Audit Report-P1 as the document on which the audit was done and the accused as Kellys Siwale.

The accused had no questions for cross-examination.

**PW4, Sgt Peter Zulu** testified that at around 1900 to 2000 hrs on 16<sup>th</sup> September 2016, he received a phone call from Elisha Zulu, the HR Manager at Capital Fisheries Ltd. PW1 reported that unknown thieves had broken into the garden Depot. Sgt Zulu then rushed to the scene which was near and found Saviour Njovu who works at a car wash nearby. He testified that on interviewing him, Njovu told him that the accused and his workmate were in the office where they sell fish. The accused then left his colleague in the office and went to the convenience. Njovu told Sgt Zulu that when the accused returned, he found his friend had gone away. Njovu further told him that after a while, the accused began shouting that some people had stolen money from the shop but that he broke the window intentionally to purport that criminals had done so when he realized that it was his friend that had gotten



it. Sgt Zulu produced two A4 photographs of the broken window marked P4.

He then returned to the police and asked Zulu to present the accused at the police. When the accused was brought, Sgt Zulu interviewed him but that he gave him an unsatisfactory answer. He then detained him in custody pending further investigations. He later went with Zulu and an auditor to the depot where an audit of the stock revealed that K8034.00 was missing. He later proceeded to charge and arrest the accused for the offence who admitted taking K5000.00 cash. Under warn and caution, the accused admitted the charge. He identified the accuse in Court together with the Stock Audit Report-P1, the Contract of Employment-P2 and the September 2015 payslip-P3.

The accused had no questions for cross-examination.

This marked the close of the prosecution case. I then put the accused on his defence and he elected to give sworn evidence and called no witness.

**The accused person, Kellys Siwale** denied stealing any company moneys. He argued that he was found with company money everyday which he kept and that he would have stolen it a long time ago if he wished. He testified that the money was lost when he was about to go to the bank. He explained that he went out to the convenience and that on his return he found the window broken and the money and laptop missing. He then went outside to the car wash and asked his friends if they had seen what had happened but they responded that they did not see anyone. He testified that he noticed that one of the car wash employees was missing. His employer phoned him but that the phone was off. He testified that it was then concluded that the missing employee

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was the one that stole the money. Siwale told the Court that the conclusion arose from the fact that the missing employee used to come to the office and knew where the money was kept.

Siwale testified that he and the employer of the missing person went to talk to the person that introduced the employee to the firm. The man told them that he did not know where the employee now lived. They then returned to the depot where he asked for a K20.00 but the car wash owner had nothing to give. He then walked to the Capital Fisheries head office but found everyone had knocked off. He then spoke to the Caretaker who gave him the phone number for the Human Resources Officer. He phoned him and he came. Siwale explained what happened and the HR officer said they go to the shop. However, the HR officer took him to the police where he was detained.

He submitted that he used to be found with a lot of company money but never stole any. He further submitted that he used to keep a lot of company money during public holidays when banks were closed.

In cross-examination by the prosecutor, Siwale conceded that he was employed by Capital Fisheries Ltd in the light industrial area. He stated that he at times kept up to K150 000.00 during the four days holiday. He responded that on 16<sup>th</sup> September 2016 he had K5979.00 and that it went missing around 1500 hrs. He stated that he went to head office from Garden Township to report the theft at around 1600 hrs. He responded that there were four people at the car wash namely: Saviour, Phiri and two new employees. He responded that Phiri is the missing employee from the car wash whom he described as his friend. He denied leaving anyone in the locked office when he went to the convenience store.

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stated that he left the money in the drawer but that neither the drawer nor the door was broken save for the window. He maintained that he suspected Phiri because he knew where he keeps the money. He responded that he introduced Phiri to his office as he was a friend and he trusted him.

This marked the close of the defence. I will proceed to make my findings of fact.

The following facts are not in dispute:

1. That the accused person, Kellys Siwale was an employee of Capital Fisheries Ltd having been employed as a Depot Supervisor. This was confirmed by PW1 and the employment contract marked P2;
2. That the accused was the depot supervisor for Garden light industrial area as at 16<sup>th</sup> September 2016 as per his own testimony;
3. That the accused worked alone at the depot;
4. That on 16<sup>th</sup> September 2016, K8034.00 worth of stock and cash went missing from the depot which is a container. This is as per the stock audit report-P1 which shows that 2x boxes were missing, and the testimony of PW1 and PW3; and
5. That a window for the depot was broken as per the photographs taken by PW4 marked P4.

However, the following were in dispute:

1. Whether one Phiri took the money from the container; and
2. Whether it is the accused or Phiri that broke the window to the container.

PW2, Saviour Njovu testified that after Phiri ran away, the accused began complaining that Phiri told him to go to Petroda Filling Station or that he would tell his

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employers. It was his testimony that at around 1520 hrs, the accused borrowed a K20.00 from them and then broke a window inside the office using a stone. The accused then told Njovu and his colleagues to say that thieves had broken into the container. Njovu explained that he was by the container when the accused broke the window using a stone they put by the door.

I wish to note that Njovu initially testified as though he was only told of what happened thereby suggesting that his testimony was hearsay. However, it became apparent from his testimony that he was actually present when the episode transpired.

The accused denied breaking the window saying he found it broken on his return from the convenience with the money and laptop missing. He told the Court that on enquiry from those working at the neighbouring car wash, he discovered that one employee was missing. He told the Court that this missing car wash employee is the thief. However, this testimony flew in the teeth of Njovu's testimony who told the Court that the accused broke the window after disclosing that 'his friend Phiri' had gone with the money. The Court was told that the window was broken by the accused in an effort to suggest that there was break in.

I am inclined to believe the testimony of Njovu considering that he works at the car wash next to the depot. He was present when the accused announced that fugitive Phiri with whom he had arranged the theft had gone with the money. Njovu was also present when the accused broke the window and asked them to say it was a break in. Further, the accused neither raised this defence to PW4 during investigations nor in cross-examination. In fact, the accused never challenged the testimony of PW4 at all.

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In these circumstances, I find that it is the accused that took the money from the depot and broke the window in an attempt to suggest a theft. I find that the accused either gave the money to fugitive Phiri or allowed him to take it. The accused had no lawful excuse to take or give out the money. He got the money by virtue of his employment as a depot supervisor. Consequently, the defence that he has dealt with huge sums of money for his employers and never stole cannot help him for the evidence shows that he cannot account for K8034.00 on 16<sup>th</sup> September 2016.

### VERDICT

In these circumstances, I find that the case has been proved beyond all reasonable doubt. The accused, Kellys Siwale is guilty of the offence of theft by servant contrary to section 272 and 278 of the Penal Code cap 87 and I convict him accordingly.

DELIVERED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF MARCH 2017

  
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 HON. N. C. SIMAUBI

MAGISTRATE CLASS 1

