

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

THE PEOPLE

VS

SYDNEY SHAKEMBA

For defence: In person

For the state: Mukombwe, N and Kakoma

Coram: Hon Mwansa R.

JUDGEMENT

CASE LAW

Andine Ali Tembo .v. The People

Mukwakwa v The People (1978) ZR 347

Mutale and another v The People (1995-97) ZR 227

Mwewa Murono v The People (2004) ZR 206

Woolmington V the DPP (1935) AC 462

STATUTES

CRIMINAL PROCEDURES CODE, CHAPTER 88 OF THE LAWS OF ZAMBIA

PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA

The accused stands charged with one count of Breaking into a building and committing a felony, Contrary to Section 303 A of the Penal Code Cap 87 of the laws of Zambia, Volume 7. Particulars of the offence allege that on the 5th February, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, with intent to steal he did break and enter a ~~shop~~ Evelyn Hone College Main hall and stole from therein 8 Mattresses valued at K3,480.

When called upon to take plea, he pleaded not guilty.

It is trite law that it is incumbent upon the prosecution to prove a case beyond reasonable doubt against the accused and there is no onus on the accused to prove his innocence. If after considering all of the evidence adduced for and against the charge, I remain in reasonable doubt as to the guilt of the accused, then I shall be left with no option but to acquit him.

In order to establish the guilt of the accused the prosecution must satisfy me upon each and every element of the offence charged.

Turning to the count at hand, the accused is charged with the offence of breaking into a building and committing a felony contrary section 303 (a) of Cap 87 which provides that;

“That any person who breaks and enters into any building other than a dwelling house and commits a felony in it... Is guilty of a felony and is liable to imprisonment for seven years.”

To prove the above offence the following elements must be met.

- i. That the accused broke and entered into a building other than a dwelling house without authority

- ii. That in so acting he committed a felony there in
- iii. That in so acting he stole something capable of been stolen
- iv. That in so acting deceitfully converted that thing to the use of any other person other than the general or special owner thereof.
- v. That he had no lawful justification for his action or claim of right to the stolen property.

I will now consider the evidence in this case. In support of their case, the state called a total of ~~4~~⁵ witnesses.

PW1 was Richard Mfwila Banda who testified on oath that he is the procurement officer at Evelyn Hone College and that on the 5th February 2017 he recalled receiving a phone call from his supervisor that 8 mattresses ³/₄ were stolen from the school hall of Evelyn Hone College, the said mattresses were bought at K435 each and the total amounted to K3480.00 and that the people who stole accessed the hall through the window which didn't have burglar bars, the said windows was found to have been tempered with and that the windows were few meters from the floor just like the windows in Court 2 of the subordinate court of Lusaka.

PW1 identified the mattresses but said he didn't get to know the accused.

There was nil cross-examination.

PW2 was Chishala Steven who recalled that on the 5th February 2017, he woke up around 04:00hrs on Sunday and left for prayers to the Evelyn Hone football pitch, when he reached and started praying, he opened his eyes and saw a shadow of a man 100 metres away carrying mattresses and throwing them over the wall fence and the said person passed again with some more mattresses.

PW2 later decided to go and report to the college security, on his way he meant the sports chairman by the name of "Samuel" who escorted him to the main gate to get help and they reported to the college guard, who joined them to look for the suspect in the pitch but they couldn't find him hence Samuel decided to jump over the fence to see whether the suspect was there and PW2 and the guard jumped too and they all saw the mattresses with the guard who works at a car wash outside Evelyn Hone college premises between Evelyn Hone College and ZICAS. The said suspect now the accused had the mattresses in his shelter, 3 were packed nicely whilst 5 were still outside his shelter.

PW2 identified the mattresses as being 8 in number and single mattresses and he also identified the accused as being the one who stole the mattresses.

There is nil in Cross Examination

PW3 was Samuel Munalula who testified on oath that on 5th February 2017 he was coming from a social outing around 04:00hrs when he meant PW1 who told him that he has saw someone stealing the mattresses and they were both scared and they decided to report the matter to the security Guards and the three run to the football pitch but they found the person gone and there were no mattresses, they then decided to jump over the wall fence and they found the mattresses, 3 of which were packed nicely in the guard shelter and the accused was there but he pretended like he didn't know anything and they took him to the Police Station together with the mattresses.

There was nil in cross examination.

PW4 was Namakondo Mubita who testified on oath that he was a security guard at Evelyn Hone and that on the 4th February 2017 he reported for work at 17:00hrs, then the following morning around 03-04 hours, two students approached him that is PW1 and PW2 and said that they were people stealing

mattresses acting on the report PW4 run with PW1 and PW2 so as to catch the person but they didn't find him, so PW2 climbed over the wall fence and they saw the mattresses in guard's shelter, three of them were packed nicely in the guard shelter and 5 were outside, they then found the guard (now accused) at the same place in the said shelter and when he saw them he tried to go and fetch water with a bottle and PW4 asked him about the mattresses then he responded that he didn't know who left them there.

The matter was reported to the police and the accused was arrested and the mattresses were kept as exhibits.

PW4 identified the 8 mattresses and the accused in the dock.

PW5 was Mwangala Victor who testified that he was a police officer based at Lusaka Central Police and he recalled that he was allocated the docket of theft where the complainant Evelyn Hone College reported that a person broke into the school hall and stole 8 mattresses, acting on the report PW5 interviewed the suspect concerning the property but he didn't give satisfactory answer hence, PW5 charged him for the subject offence and under warn and caution statement administered in Nyanja the accused denied the charge and he was detained pending court process.

PW5 produced the 8 mattresses which were in his custody and it was admitted as part of evidence.

There was nil in Cross Examination.

This marked the close of the state's case and the accused was put on his defence and he elected sworn evidence and called PW4 as his witness.

DW1 was Sydney Shakamba who testified on oath that he didn't know anything about the mattresses, there were some people who threw the said

mattresses and kept them in the place where they cook nshima. He had nothing to do with the mattresses even when the Evelyn Hone College guard came, DW1 was going to draw some water from the people who packed the truck across. The mattresses were only found in his location but he didn't know about them and he didn't know where the said mattresses come from.

In cross-examination, he told the court that he looks after property and that he works at the small car wash, that he left the place briefly and went to the truck driver to get water.

DW1 refused that he said people jumped over the wall with the mattresses he agreed to have patrolled the premises and that the night was not so dark for him not to see and that the truck driver was packed in front at 22:00hrs.

DW1 further denied to have informed the court that students stole the mattresses but he agreed to have said that it was some people who threw the mattresses in the shelter.

In Re-examination in chief DW4 said he had nothing to say

This marked the close of the defence case.

This was the gist of the evidence before me, considering the whole evidence, I find the following facts are not in dispute; That the main hall of Evelyn Hone College was broken into, That the 8 mattresses worth K3480 belong to Evelyn Hone College, That the mattresses were found outside the Evelyn Hone College in a guard shelter at the car wash were the accused works as a guard. The 3 mattresses were packed in the shelter and 5 of them were unpacked outside the shelter. That the accused was found at the same point where the mattresses were found

I also find that the following facts are in dispute; that accused was the person who actually stole the mattresses, that someone else other than the accused stole the 8 mattresses, that the accused was seen breaking into the main hall and stealing the 8 mattresses, that accused person had an intention to deprive the owner permanently.

Having established the facts, I now apply the said facts to the law. I ask myself a question that did the accused person committed the alleged offence? The evidence in this matter is tending to implicate the accused person, that he is the one who broke into the main hall for Evelyn Hone and stole 8 mattresses from there in. What evidence is there? PW1 testified that he was informed that 8 mattresses were stolen from the main hall and that the accused assessed the building through the window which is metres from the floor and has no burglar bars are installed and they found the windows tempered with. PW2 further testified that whilst conducting his prayers around 04:00hrs in the Evelyn Hone college football pitch, he saw a shadow of someone 100 meters away carrying 8 mattresses belonging to Evelyn Hone college and throwing them over the fence where there is a car wash situated between Evelyn Hone College and ZICAS, he got scared and decided to call for help and in turn he meant the Sports Chairman PW3 and the two went to report to PW4 the security guard at Evelyn Hone College main gate and they all searched for the said person now the accused stealing the mattresses but to no avail until they jumped over to the wall fence and they found the 8 mattresses (3 mattresses in the accused shelter and 5 unpacked besides the shelter.

On the hand the accused is on record that it is not him who stole the mattresses he only saw people throwing the mattresses in the shelter where they cook nshima and that he didn't know anything about the mattresses but only saw people in the truck and wanted to get water.

From the above, the elements of breaking into a building other than a dwelling house is satisfied as the main hall of Evelyn Hone College is not a dwelling house and it was secured hence assessed through the windows illegally. A felony was committed therein as 8 mattresses were stolen and are valued at K3480 which entails that there were something capable of being stolen, the said mattresses belonged to Evelyn Hone College hence Evelyn Hone College was the special owner, the mattresses were taken out of the Evelyn Hone College main hall to the guard shelter occupied by the accused hence the element of converting to own use other than the special owner is satisfied.

At this point however am faced with the question as to whether the identity of the accused by PW2 is strong enough to warrant a conviction? The evidence has shown that the said 8 mattresses were found with the accused in his guards shelter where 3 were nicely packed and the 5 were laying around near the said shelter, the accused claims some other people threw them over, but I ask myself why the alleged people decided to leave the mattresses with him, it is however not known if he indeed broke into the building in that the key witness PW2 only saw a person carrying mattresses 100 metres away and according to him he first saw the shadow of the person carrying the mattresses but he didn't see whether it is the accused face the accused is only connected to the offence through recent possession of the stolen items and according to him it's not him who brought the mattresses to the shelter.

It is trite law that while evidence of identification of an accused takes various forms the main problematic area in practice is where the suspect's evidence relates to identification. The danger to be guarded against such evidence is that of an honest mistake. In such a case the court is mandated to look for a connecting link to support the accused evidence of identification thus where the connecting link is provided by possession of stolen property, the possession of stolen property supports the weak evidence of identification. The possession

of various stolen items strengthens the weak evidence of identification as fortified in **Mukwakwa v The People (1978) ZR 347** where the court held that ***"where there is ample and adequate evidence of identification connecting the accused to the offence charged, the court is competent to convict but where there is weak evidence of identification, the evidence of recent possession supports weak evidence of identification."***

Invoking the above principle I find that the accused being in possession of the stolen 8 mattresses confirms that he is the one who broke into the main hall of Evelyn and committed the felony therein.

On the element of no claim of right the court is alive to the position of **Andine Ali Tembo .v. The People** That ***"The defence of bon fide claim of right is not confined to those cases where an accused person believes the property in question was his or has become his; it is applicable also in those cases where the accused has a bona fide belief that he has the right to keep, or deal with somebody's property."***

In this case where the accused wasn't owed anything by Evelyn Hone College, it is not proper for him to get the 8 mattresses as there is nothing to recover hence there is no legal justification or claim of right to the charged property.

Subsequently, the state has fulfilled the requirement as per **Woolmington V the DPP (1935) AC 462**, where it was fortified that ***"Throughout the web of criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the accused guilt If at the end if and on the whole case, there is a reasonable doubt, created by the evidence given by either the prosecution or the accused. If the prosecution has not made out the case the accused is entitled to an acquittal."***

In these circumstances, I find that the state has proved the case beyond reasonable doubt and there is no slight doubt or lingering doubt as per *Mutale and another v The People (1995-97) ZR 227*, Consequently I find him GUILTY as charged for the offence of breaking into a building and committing a felony there in contrary to Section 303 (a), Penal Code, Chapter 87 of the Laws of Zambia and **I CONVICT HIM ACCORDINGLY.**

