

**IN THE SUBORDINATE COURT OF
THE FIRST CLASS FOR THE LUSAKA
DISTRICT HOLDEN AT LUSAKA**

IPG/180/2015

(Criminal Jurisdiction)

THE PEOPLE v DAVY SIAME

Before Hon N. C. Simaubi this ⁰³ day of March 2017

JUDGMENT

For The People : Mr T. Chikonde, PP.

For the Accused: In person

The accused person stands charged with one count of corrupt practices contrary to section 19 (1) of the Anti-Corruption Act No 3 of 2012 of the Laws of Zambia. The particulars allege that Davy Siame between dates unknown but between 1st August 2014 and 30th September 2015 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, being a public officer, namely Legal Assistant in the Prosecutions Section of the Legal Department at Lusaka City Council, corruptly solicited and actually received ZMW 3000.00 cash gratification from Brian Mwiinga as an inducement or reward in order for you to assist the said Brian Mwiinga secure the release of motor vehicle registration number ALK 4012 which was impounded by the Road Transport and Safety Agency (RTSA), a public body.

The accused pleaded not guilty to the count. The burden lies on the prosecution to prove the case beyond all reasonable doubt.

Section 19 (1) of the Anti-Corruption Act No 3 of 2012 is in the following terms:

19 (1) A public officer who, by oneself, or by or in conjunction with, any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for oneself or for another



other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, commits an offence.

The punishment for corrupt practices by a public officer is provided under **section 41 of Act No 3 of 2012** which provides as follows:

41. A person who is convicted of an offence under this Part,

for which no penalty is provided, is liable —

(a) upon first conviction, to imprisonment for a period not exceeding fourteen years;

(b) upon a second or subsequent conviction, to imprisonment for a term of not less than five years but not exceeding fourteen year; and

Section 3 of Act No 3 of 2012 defines corrupt, gratification, public body and public officer in the following terms:

“corrupt” means the soliciting, accepting, obtaining, giving, promising or offering of a gratification by way of a bribe or other personal temptation or inducement, or the misuse or abuse of a public office for advantage or benefit for oneself or another person, and “corruption” shall be construed accordingly;

“gratification” includes—

(a) money, any gift, loan, fee, reward, commission, valuable security, property, or interest in property of any description, whether movable or immovable;

“public body ” means the Government, any Ministry or department of the Government, the National Assembly, the Judicature, a local authority, parastatal, board, council, authority, commission or other body appointed by the Government, or established by, or under, any written law;

“public officer” means any person who is a member of, holds office in, is employed in the service of, or performs a function for or provides a public service for, a public body, whether such membership, office, service, function or employment is permanent or temporary.



appointed or elected, full-time or part time, or paid or unpaid, and “public office” shall be construed accordingly;

Therefore, the prosecution must establish that;

1. The accused person being a public officer;
2. Corruptly solicited, and;
3. Actually received cash money from one Brian Mwiinga;
4. Being gratification as an inducement or reward to assist the said person secure the release of an impounded motor vehicle;
5. From a public body.

The prosecution called eleven witnesses in support of the charge. The accused elected to testify on oath and called no witnesses.

REVIEW OF THE PROSECUTION EVIDENCE

PW1, Kelvin Banda is the Senior Human Resources Officer at the Lusaka City Council herein after “the LCC”. He told the Court that his duties include employment of staff, supervising registry staff and maintenance of job descriptions. Banda testified that on 29th January 2016, he was summoned by the Anti-Corruption Commission to verify the employment status of Davy Siame. He told the Court that Siame is an employee of the LCC and that his Man No. is 5465. He explained that Siame holds the position of Legal Assistant and that he prosecutes cases. He testified that the LCC has a memorandum of understanding with the Road Transport and Safety Agency (herein after “the RTSA”) in which the later prosecutes road traffic offences on behalf of the former. He told the Court that Siame, being a prosecutor, was assigned to be prosecuting these offences. Banda further testified that at the moment, Siame is on suspension for alleged corrupt practices. He identified Davy Siame as the accused person.

In cross-examination by the accused, Banda responded that he does not know anything about the charge against the accused. He stated that he did not come with a copy of the memorandum of understanding.



PW2, Mutale Chibesakunda testified that on 2nd September 2014, he accompanied a friend, Mkandawire to the Civic Centre Fast Track Court who had a matter there. He told the Court that when the case for Mwale was called, the person who stood as accused was Brian Mwiinga. He told the Court that the offence was driving under the influence of alcohol and was said to have occurred on 23rd August 2014. Mwiinga admitted the charge and was fined K2500.00. Chibesakunda thereafter left for his work place until at 1435 hrs when he received a call from Mkandawire that they had refused to give his driver the vehicle. He then went to the Government Complex where he met Mkandawire who gave him a paper for the case with a cell phone number and a deposit slip of K3000.00 in the names of Davy Siame, a council court clerk.

Chibesakunda testified that he phoned Siame after Mkandawire told him that Siame wanted K1000.00 in addition to the K3000.00. He told the Court that he pretended as though he was the owner of the bus and asked Siame to come and get the money. He told the Court that Mkandawire saved the account number on Brian Mwiinga's cell phone for him to deposit the money. He testified that when Siame came, he asked him if the account number was his and why he wanted some more money when Mwiinga had been fined K2500.00. Siame responded that it was because there were three persons that were assisting in the case. Chibesakunda then produced his identity card and told Siame that he was arresting him for corrupt practices as the money was deposited into his personal account and not a government account.

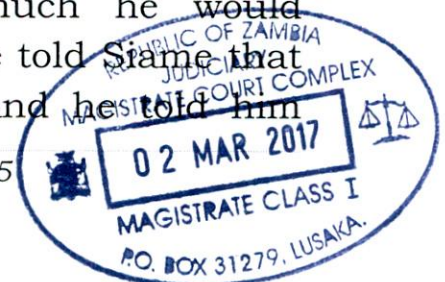
Chibesakunda then took Siame to the RTSA and phoned the CEO Mr Soko who directed him to the deputy director, Mr Banda. Banda called one Lesa who took them to the Kamwala RTSA offices where Lesa phoned the ACC. ACC officers came and arrested Siame. Chibesakunda identified the ZANACO deposit slip in the names of Davy Siame for K3000.00 dated 29th August 2014 marked P1 and the accused in Court.



In cross-examination by the accused, Chibesakunda maintained that he arrested the accused and that they met at Premium House. He maintained that K3000.00 was deposited into the account of the accused by Mkandawire. He insisted that the accused met Mkandawire at 1445 hrs on 2nd September 2014 and knew him. He insisted that Mkandawire is the one that sent the money. He maintained that the accused had Brian Mwiinga convicted. He stated that the accused called Mwiinga four times to send the money into his account. He maintained that he heard the accused on the phone ask for K1000.00. When shown P1, Chibesakunda responded that the signature on it was for Mkandawire. He stated the accused was the one calling Brian Mwiinga and that he heard the voice. He maintained that Brian Mwiinga appeared in Court, took plea and was convicted.

PW3, Brian Mwiinga testified that he worked for Alfred Mkandawire as a bus driver. He told the Court that on 23rd August 2014 he was unwell and asked Sambani Mwale to drive his bus to Kafue for people that had hired it. At around 2300 hrs, Mwale phoned to inform him that the bus had been impounded by the RTSA. Mwiinga told the Court that on 24th August 2014, he waited for Mwale who did not come and so he went to his home where he was told that Mwale had travelled to Chipata. On a Monday, Mwiinga went to the RTSA offices where he was advised to go to the Fast Track Court for Traffic Offences at the Civic Centre. It was his testimony that at the Court, neither his name nor that of Sambani Mwale was called. He then entered one of the offices to enquire and was told to wait for Davy Siame. After sometime, the officers used his phone to call Siame who came and took Mwiinga to his office.

Mwiinga testified that he explained that he told Siame that Mwale was not available and that he (Mwiinga) had never appeared in Court. Mwiinga then asked Siame how he could assist him seeing Mwale was in Chipata. He testified that Siame told him that the fine was K2500.00 and asked him how much he would contribute since he was not the one charged. He told Siame that he should tell him how much to contribute and he told him



K3000.00. Mwiinga then asked for time to raise the money and Siame gave him a phone number. Mwiinga told the Court that he then went back to the RTSA offices. He also phoned a Mr Kunda from the Office of the President and told him about the K3000.00 required at court. Kunda referred him to one Mutale of the RTSA who advised him to pay the money and see how the bus would be released without a receipt.

Mwiinga testified that after two days on 29th August 2014 he phoned Siame that the money was ready. When Siame asked where they should meet, Mwiinga said he was busy and asked that Siame gives him an account number to deposit the money in. It was his testimony that Siame sent him a text message with the number but that at the bank they discovered that it was incomplete. He then phoned Siame who again sent an SMS with the complete account number and his NRC No. He told the Court that on the same day at around 1200 hrs, he and Mkandawire deposited the money into Siame's ZANACO account. He told the Court that at 1500 hrs, Siame phoned and told him to go to court on Monday as it was a Friday.

Mwiinga testified that on Monday, he went to Court but that nothing happened and so he went to see Siame. Siame told him to go the RTSA offices as he had phoned the people with the keys. He told the Court that Siame directed him to a lady who attended to him. At the RTSA offices, Mwiinga was asked to produce a copy of his NRC and the motor vehicle registration certificate. As he had no copy of the certificate, he phoned Mkandawire to come with a copy. Mkandawire came with his driver's licence but that one Chinyimba of RTSA came and asked why they wanted to release the vehicle without a receipt from court and if Mwiinga was from court. Mwiinga told the Court that he then went outside and phoned a Mutale of RTSA and explained what had happened and that it was becoming difficult to get the vehicle.

Mwiinga testified that Mutale took him to the RTSA CEO, Zindaba Soko who asked him to phone Siame to explain the challenges he had encountered. Mwiinga phoned Siame and put



his phone on loud. Same told him to go to court on Tuesday and explained that the challenge was that he was not the one who committed the offence. Siame told him that he should pretend to be Sambani Mwale in court and also explained to him how to respond in Court. He testified that he was convicted and fined K2500.00 but that he had no money to pay as he had given Siame. Siame told him that he only had K1500.00 and asked him to look for K1000.00 before 1400 hrs.

Mwiinga then went back to Mutale at the RTSA offices who in turn phoned Mkandawire to come. They then went to Soko's office who directed Mutale to avail Siame. When Siame was brought, Soko asked him if he knew Mwiinga to which he responded that he owed Mwiinga K1500.00. When asked to explain the circumstances giving rise to the debt, Siame had no answer. The Anti-Corruption Commission office was called and officers came and took them to their offices for interviews regarding the circumstances surrounding the vehicle ALK 4012.

Mwiinga identified the ZANACO deposit slip for K3000.00 marked P1 and the accused in Court.

In cross-examination by the accused, Mwiinga responded that in Court he was not asked to produce any identification. He stated that Mkandawire and the accused met at the RTSA offices. He stated that he was with Mkandawire when he deposited the money. He maintained that he appeared in court and was fined K2500.00 and that the accused gave him his phoned number. He maintained that he did go to the office of the accused and that the officers at court used his phone to call the accused. He maintained receiving a text message from the accused with the account number. Mwiinga responded that the ACC got his phone containing the text messages. He stated that he was supposed to pay the fine immediately but that he did not do so because he was with the accused. He responded that there are no names on both the original and carbon copy of P1. He stated that he did sign on the copy but that his name is not there.



In re-examination, Mwiinga maintained that his names do not appear on the deposit slip except for his signature. He maintained that the phone number on the slip is for Siame. He stated that two text messages were sent to him containing the account number. He stated that he was with Alfred Mkandawire when depositing the money.

PW4, Alfred Mkandawire testified that on 3rd September 2014 he was summoned by the ACC on a matter involving Brian Mwiinga and Davy Siame a prosecutor at the Fast Track Court. He testified that Mwiinga was a driver of a 16-seater Toyota Hiace minibus registration number ALK 4012 Fleet No 11842. He told the Court that he had arranged with Mwiinga to be cashing every Sunday but that on Sunday 24th August 2014, Mwiinga did not come. On 25th August 2014, he called Mwiinga to find out what had happened but was told that he was going to the RTSA offices as the bus had been impounded the previous evening. In the evening, Mwiinga informed him that he had been referred to the fast track court. On a Thursday evening, Mwiinga told him that he was going to court the next day. Later, Mwiinga informed Mkandawire that he met Siame a public prosecutor at the Civic Centre who told him that K3000.00 was required because his case was complicated. It was his testimony that Mwiinga told him that Siame needed the money so he can instruct people at the RTSA offices to release the bus. Mwiinga also told him that he had phoned Chibesakunda and Mutale that work for RTSA that told him to give Siame while they investigate the matter.

Mkandawire testified that he made enquiries at the Civic Centre and confirmed that Davy Siame works there as a prosecutor. He testified that he made a further follow up at RTSA to confirm if Edwin Mutale and Chibesakunda worked at RTSA and that he met them and that they told him that they were aware of the case. Mutale further asked him to pay the money to see if Siame would have the vehicle released. He testified that he arranged for the K3000.00 and asked Mwiinga to meet him at the ZANACO Bank Kamwala branch on 29th August 2014. He told the Court that Mwiinga phoned Siame and asked him for his account



number to deposit the money. He testified that a short while later, Siame sent a text message containing his account details and that they deposited K3000.00 into it. He stated that later, Siame sent a text message confirming the debit of the money into his account. Mkandawire testified that he retained the original deposit slip and took the carbon copy to RTSA.

Mkandawire testified that sometime around 1st September 2014, Mwiinga informed him that RTSA had refused to release the vehicle as he did not have the motor vehicle registration certificate. He then went there as he had his driving licence and photocopied the certificate. It was his testimony that as his licence and certificate were being examined, a Chinyimba of RTSA came in and asked the two ladies what they were doing with the vehicle and told them that the case was in court. When Mkandawire told Chinyimba that they had already paid, he demanded for a receipt which they did not have. It was his testimony that he avoided saying much to avoid compromising the case. He then stepped out and asked Mwiinga to call Siame. Siame told Mwiinga to go to court back on 2nd September 2014.

Mkandawire testified that Mwiinga later told him that he went to court and was fined K2500.00. Mwiinga further told him that Siame only released K1500.00 and told him to find the other K1000.00 to pay the fine. He testified that Mwiinga went back to RTSA and phoned him to go there. At RTSA he met Mutale and Chibesakunda and told Mwiinga to tell Siame that he had the K1000.00 and to ask him to go and collect it. He testified that Siame came to RTSA and was apprehended and handed to the ACC.

Mkandawire identified and produced the ZANACO Bank deposit receipt marked P1 and the blue carbon copy ZANACO Bank deposit slip marked P2. He told the Court that he has never met Davy Siame.

In cross-examination by the accused, Mkandawire responded that he has never met or communicated with the accused. He



stated that Mwiinga made the deposit. He explained that Mwiinga has challenges in writing. He stated that the cell phone number appearing on P2 is for Mwiinga. He explained that the deposit was done at the Kamwala Zanaco branch. He argued that Government Complex is in Kamwala.

In re-examination he explained that after withdrawing the money, he helped Mwiinga to write the slip and that he thereafter endorsed on it.

PW5, Mwanida Tembiwe Sakala is a Road Traffic Inspector with RTSA. She testified that some of her duties include releasing motor vehicles that have been seized. Sakala testified that on 1st September 2014, Siame came to the enforcement office to hand over cases from court that were concluded and pending. She testified that Siame handed her two cases, one involving Sambani Mwale and gave an instruction that the case was completed and that the convict was serving a custodial sentence. He further told her that the vehicle should be released when the owner came. Sakala testified that about 10 minutes later a man whose names she could not recall came in and enquired as to when the vehicle released by the court was released from. She then directed him to her colleague, Choonga Chipambala. She told the Court that about 5 minutes later, she walked to Chipambala's desk and that it was then that she realised that the man had come for the vehicle that Siame had given her instructions.

Sakala testified that she advised Chipambala that the vehicle be released and that they then asked for identification from the man in form of an NRC or motor vehicle registration certificate. The man left the office and 10 minutes later returned with another man whose names she did not know. She told the Court that the man spoke loudly and demanded to know why the vehicle had not been released when the convict had been sent into custody and that they had made payments for the offence. They then showed him a copy of a receipt from court required to be produced as proof of payment and asked him to produce his. She testified that at this point, their colleague, Chinyimba came in



and enquired why there was so much noise. They then all left the office.

Sakala explained that when a person commits a traffic offence and their vehicle is impounded, the officer fills in an offence report and issues the offender a Warning of Intended Prosecution and Notice of Intended Prosecution and a Seizure Form. The offender is then advised when to appear at the Fast Track Court. The documentation is then handed to the prosecution department who prepare the case for court. When the offender returns from court, they are required to produce an original receipt of payment from court. She told the Court that the offender is then cleared when he produces the licence or a disc for the vehicle. She stated that where there is a conviction, documents must still be produced as such convicts cannot produce a receipt. Sakala produced the file for the Sambani Mwale case marked P3.

In cross-examination by the accused, Sakala stated that more than 10 cases were brought. She responded that he said he took the convict. She stated that she did not know of any irregularity on P3.

PW6, Chuungu Chipambala is the Senior Inspector of Government Transport. Chipambala testified that she was seconded to the RTSA between 2013 and 2015 where she served as a road traffic inspector. She testified that on 1st September 2014, she was on duty in the enforcement office when a man walked in from court and asked her to give him the keys to his vehicle saying the driver had been sentenced. She explained that she did not give him the keys as he had no receipt. The man then asked her if Siame, the prosecutor, had communicated with her over the vehicle but she said no. Chipambala told the Court that Siame was on duty that day. She then communicated with Siame who said that he had given Mwanida Sakala instructions. When she asked Sakala, she confirmed receiving instructions from Siame that vehicle registration number ALK 4012 must be



released. She then asked the man for the motor vehicle registration book and NRC but that he was unable to do so.

Chipambala testified that the man went away and returned with another man who said he was the owner of the vehicle. This man wandered why they were refusing to release the vehicle saying the driver had been sent to prison and he had paid. Chipambala told the Court that this was a contradiction because the system worked in such a way that if one was sent to prison, then they don't pay anything. She told the Court that at this point, one of their colleagues, Chinyimba walked in and intervened. He asked the owner of the vehicle to produce his motor vehicle registration certificate. She then knocked off. She identified Siame in Court.

In cross-examination by the accused, Chipambala responded that she does not know the two people that approached her over the vehicle. She stated that they alleged that the accused had told them to come to the enforcement office. She maintained that she recalled calling the accused who confirmed that they should release the vehicle. She responded that she was not aware that people pay for people in prison.

PW7, Georgina Mushota Mweetwa is a Clerk of Court. Mweetwa told the Court that her duties include ensuring that court is prepared, collecting government revenue and supervising staff. She testified that on 16th September 2014 she gave an interview to the ACC. In the interview she explained that the case involving one Sambani Mwale came up for hearing on 2nd September 2014 and not on the 1st. Mweetwa, who at the time of testifying was working from the Fast Track Court at the Civic Centre, testified that the procedure followed was that once RTSA staff brought case records, they were first taken to the magistrate for signing of the complaints and summons. Thereafter, the signed documents would be separated so as to have two files: one for the court and the other for the prosecutor. The prosecutor would then serve the accused and court would start. She explained that at that time, the Fast Track Court was managed by the Hon. Mrs Hamaunda



and two prosecutors from the Council, namely Mr Chabala and Davy Siame under a Memorandum of Understanding with RTSA.

Mweetwa testified that on 2nd September 2014, the Sambani Mwale case was heard by a different magistrate because Hon Hamaundu and Mr. Chabala were attending a seminar in Chisamba. She told the Court that the case record was received on 25th August 2014 and was signed by Hon Hamaundu. The said accused was fined K2000.00 on 2nd September 2014 which money he did not pay. She explained that she is the one who receives such fines and that she never collected any money from Sambani Mwale on 1st and 2nd September 2014.

Mweetwa further told the Court that on 2nd September 2014, she did not receive the case record for Sambani Mwale until Hon Hamaundu phoned her from the seminar asking her if she was aware about what was happening concerning the same matter. On pulling the record, she discovered that it was not paid for contrary to the order that the fine be paid forthwith. She told the Court that the fines are receipted using government receipt books used by all government departments. She told the Court that to confirm if the payment was made she used Receipt Book No 1133 which she produced marked P4. She also produced the case file record for "The People v Sambani Mwale IPV/TRO/3676 of 2014" marked P5.

Mweetwa testified that P4 shows that receipt Nos. 2229255 to 2229264 were issued on 2nd September 2014 but that none was issued to Mwale. She also identified the accused in Court.

In cross-examination by the accused, Mweetwa stated that on the day in question, the case record was not given to her. She stated that all files for RTSA cases at that time were green. She responded that if an accused person does not come to court, the matter does not proceed even if the magistrate has signed. She responded that she does not sit in Court to know if the accused was seated. Mweetwa stated that she wouldn't know if the accused was the only prosecutor that day. She conceded that



there have been instances when accused persons left without paying the fines. She stated that the fine of K2500.00 was at the discretion of the magistrate and that it was the standard fine at the time. She responded that on 2nd September 2014, she received K18200.00 in fines.

PW8, Priscilla Moonga is the Assistant Manager-Customer Services with the Zambia National Commercial Bank herein after ZANACO. Moonga testified that on 24th September 2014 she received an officer from the ACC regarding an account for Davy Siame held at the Civic Centre Branch. She explained that on being presented with the details, the mandate file is located which confirms the account holder details. Thereafter, an account statement is obtained using their computers. She testified that using her password, she generated a customer statement which confirmed that a transaction of K3000.00 was deposited on 29th August 2014 at the Government Complex branch. She told the Court that she then printed the account statement for Davy Siame which she produced marked P6. Moonga further produced a photocopy of the mandate file marked P7.

In cross-examination by the accused, Moonga stated that the deposit was made at the Government Complex Branch while she works at Civic Centre branch. She denied being Mutale J. L., the teller that carried out the transaction. She conceded that the part for depositor's name and purpose are blank but that K3000.00 was deposited. She stated that there was an order to search the account.

In re-examination, Moonga explained that she printed the statement though she is not the teller because Civic Centre Branch is the host branch.

PW9, Edwin Mutale is the Customer Care Officer at RTSA. Mutale testified that on a date he could not recall in August 2014, he received a call from Brian Mwiinga who complained that his motor vehicle had been impounded by RTSA and that he



could not locate the person who was driving it. He told the Court that he referred Mwiinga to the Enforcement Dept. Mwiinga told him that he had been there and was given court summons. Mutale testified that he then advised him to go to court. He testified that Mwiinga returned later and informed him that at the Fast Track Court he met Davy Siame who told him that he could help him. Mutale told the Court that Mwiinga told him that he could help him since the summons were in the names of Sambani Mwale but that he would have to pay him K3000.00.

Mutale testified that he did not know Siame because the prosecutor at that time at the court was Chabala. He then phoned Chabala who acknowledged that Siame was also a prosecutor at the court. When he queried Mwiinga further, Mwiinga told him that Siame said he would issue him a receipt to present to RTSA officers to have the vehicle released. He told the Court that as GRZ receipts are used he wondered and became suspicious. It was his testimony that he advised Mwiinga to cooperate with Siame since he said he would issue a receipt. Later, Mwiinga told him that he had been in touch with Siame and that he had raised the K3000.00. Mutale testified that Mwiinga told him that Siame had given him details of his personal account in which to deposit the money and that he later deposited it into the account. Mwiinga later showed Mutale a copy of the deposit slip and the receipt. He told the Court that at that point, he referred Mwiinga to his superiors who referred the matter to the ACC. Mutale identified the receipt and deposit slip marked P1 and P2, and the accused as Davy Siame.

In cross-examination by the accused, Mutale maintained that Mwiinga deposited K3000.00. He conceded that he was not party to the communication between Mwiinga and the accused but that Mwiinga told him everything.

PW10, Isaac Musadabwe Banda is a Subscriber Information Analyst with Airtel (Z) Ltd whose core duties include receiving search warrants and executing them including extraction of



subscriber data such as call records, serial numbers of handsets and details of subscriber names and addresses.

Banda testified that on 15th September 2014, he was served with a search warrant by ACC officers for call records and subscriber details for two numbers. He told the court that on 17th September 2014 he entered the two numbers into their system which generated two reports and the subscriber details as well. He then printed the reports and authenticated them by stamping and signing them. He identified and produced the two reports marked P8A and P8B covering the period 1st August 2014 to 1st September 2014. He stated that the reports entail that any activities on the numbers on the warrants show the transactions at any particular time for the period in question. He explained that the two reports confirm transactions of either voice call or message and the names of the respective numbers.

In cross-examination by the accused, Banda responded that P8A is for 0977495786 for Davy Siame of Chilenje South while P8B is for 073576654 for Brian Mutale of Avondale. He responded that the system neither records conversations nor actual content of messages. When shown P1 and P2, he read the cell number as 0973276654 and said that it was different from what is on the call records. He responded that 0973576654 is not for Sambani Mwale, Alfred Mkandawire or Brian Mwiinga. Banda responded that P1 shows NRC # 104986/56/1 which he said differs from that for Brian Mutale.

PW11, Patricia Mukuka Mulenga is an Investigations Officer with the ACC. Mulenga whose duties include receiving and investigating complaints of corruption, testified that on 3rd September 2014, the Commission received a complaint alleging corruption against Davy Siame. She told the Court that Siame is a prosecutor at the Fast Track Court at the Civic Centre. The allegation was that Siame asked for and actually received K3000.00 from Brian Mwiinga, a bus driver, so as to facilitate the release of a minibus registration number ALK 4012 which was impounded by RTSA. She told the Court that the Director-



General authorised investigations into the matter and it was allocated to her by her supervisor. Mulenga testified that on 3rd September 2014, she proceeded to the RTSA offices with her colleague where they found Siame, Brian Mwiinga and some other individuals. Siame and Mwiinga were taken to the ACC offices and interviewed.

Mulenga testified that she also interviewed several other persons in connection with the matter. Upon concluding the investigations, she realised that there was an attempt to have the bus released on 1st September 2014 with false documents as the matter of *The People v Sambani Mwale* was only heard on 2nd September 2014 in which Siame caused Mwiinga to appear falsely as Sambani Mwale before the court. She further told the Court that the K3000.00 was deposited into the personal account of Davy Siame. She told the Court that in view of the totality of the evidence before her, she made up her mind to charge and arrest Davy Siame for the offence of corrupt practices by a public officer contrary to section 19 (1) of the Anti-Corruption Act No 3 of 2012. Under warn and caution statement, Siame denied the charge.

Mulenga identified the deposit receipt-P1; the deposit slip-P2; the file-P3; the case record-P5; and the Airtel print-outs P8A and P8B. Mulenga told the Court that when shown P8B at Airtel, she observed that Mwiinga communicated with Siame on 26th August 2014. She further observed that there were sms sent on 28th and 29th August 2014 from Siame's number to Mwiinga's number. She stated that the last communication between the two was on 2nd September 2014. She identified Davy Siame in Court as the accused.

In cross-examination by the accused, Mulenga responded that when Mwiinga went to court the second time, he met two ladies who advised him to see the prosecutor. However, she conceded that she did not interview them. She stated that Mwiinga told her that the accused advised him to sit in court as Sambani Mwale. She responded that Madalitso Mwanza was the arresting officer.



in the Mwale case but that he was not in court when the case was heard on 2nd September 2014. She conceded confiscating cell phones for the accused and Mwiinga but that they were not produced in Court. When shown P1 and P2 she responded that the cell # appearing is 0973276654 but that she does not know the owner of the number. She responded that it was not necessary for her to interview Brian Mutale. She maintained that there was communication between Mwiinga and the accused. Mulenga responded that the accused denied knowing Mwiinga during the interview. She stated that Mwiinga was using his friend's cell number but that she did not produce this number to the Court.

At this point, the prosecution closed its case and the accused was placed on his defence. He elected to testify under oath and called no witnesses.

REVIEW OF THE DEFENCE

DW1, Davy Siame the accused, testified that on 25th August 2014 he reported for duties at the LCC offices and proceeded to the Fast Track Court. He told the Court that he discovered that among the files he received from RTSA was that of *The People v Sambani Mwale*. The files were then sent to the magistrate for signing and date stamping before serving the people present. He told the Court that he realised that Sambani Mwale was absent. After a week on 1st September 2014, he took back the RTSA files for concluded cases and those for accused persons that were not coming. It was his testimony that at the Enforcement Office, he advised the officer he found to contact those that were not attending court including Sambani Mwale.

The accused testified that on 2nd September 2014, they again received some new cases including some that had been returned the previous day. Among these was that of *The People v Sambani Mwale*. He testified that during orientation he realised that an accused person responding to the names of Sambani Mwale was present. Mwale was charged with driving under the influence of alcohol.



September 2014 he was prosecuting cases at the Fast Track Court for RTSA. He conceded that on 29th August 2014, K3000.00 was deposited into his account at the Government Complex Branch. He responded that P1 is the deposit receipt that he was referring to. He conceded that he prosecuted the Sambani Mwale case and that P3 is the file he took to RTSA. He responded that he could not recall the officer he left it with at the RTSA offices. He responded that he could not recall what PW5, Mwanida Sakala testified. He however conceded that she testified that two men came to her office over the file. He denied telling her that the vehicle should be released. He stated that he could not recall PW6's testimony that he said the vehicle should be released. He denied receiving any call from PW6. Siame maintained that Billy Mbewe was selling phones for him and that he deposited the money upon making some sales though he did not give him the deposit slip. He responded that this was the first deposit in August 2014. He stated that Mbewe did not give him the deposit slip and that Mbewe does not have it. He maintained that the mobile No appearing on the deposit slip is for Mathews Musonda who is a friend to Billy Mbewe. He responded that he does not know why Mbewe used Musonda's number.

SUBMISSIONS BY THE PROSECUTION

The State lodged final submissions on the matter. It was submitted that it is not in dispute that the accused is a public officer as at the material time he was employed as a Legal Assistant in the Legal Dept. at Lusaka City Council and that he prosecuted matters for RTSA at the Fast Track Court.

Secondly, it was submitted that the accused corruptly solicited, accepted or received or attempted to receive K3000.00 from Mwiinga as gratification. For this, the State relied on the testimony of PW3 that he filled in and signed the deposit slip while the receipt was signed by PW4 after he noticed that Mwiinga had difficulties filling the deposit slip. It was submitted that the NRC No appearing on the receipt belongs to PW4 and that the accused didn't dispute this fact. It was submitted that



PW8 confirmed that there was a deposit of K3000.00 into the Zanaco account of the accused on 29th August 2016 as per P6. The prosecution observed that PW7 testified that at no point do prosecutors collect fines.

With reference to section 66 (3) and (4) of the Anti-Corruption Act, 2012, it was submitted that the fact that the accused had not adduced evidence in support of his defence with regard to Billy Mwanza depositing K3000.00 into his account or any evidence to the contrary, must lead to the presumption that the payment made into the account of the accused by PW3 was solicited and/or received corruptly.

The State submitted that the said gratification was an inducement or reward for the accused to assist in releasing the impounded motor vehicle. It was argued that the accused was seized with conduct of the case of ***The People v Sambani Mwale*** and that prior to this he had no contact with PW3. It was submitted that this must lead to the conclusion that the said gratification was an inducement or reward for the accused to assist to release the motor vehicle as it is the only transaction connecting the two.

With reference to Section 66 (1) of Act No 3 of 2012, it was submitted that the accused accepted to receive gratification of K3000.00 which was deposited into his account and that there is no evidence to the contrary by the accused. The Prosecutor submitted that it follows that the gratification shall be presumed to have been accepted or received as an inducement or reward to assist in the release of the vehicle impounded by RTSA, without dispute, a public body.

The State further submitted that the attempt by the accused to have the vehicle released is independent evidence supporting the allegation in the charge. This was the testimony of PW5 and PW6.

With regard to the defence led by the accused, the State submitted that ***the case of Sambani Mwale*** was only heard on 02/09/16 and not on 01/09/16. It was submitted that it could be



safely concluded that at the time the accused took the files to the RTSA offices the case was not yet concluded but that the accused fraudulently told PW5 that it was. This, it was submitted, shows that the accused was determined to fulfil his promise that once paid the K3000.00 he would ensure that the vehicle was released.

With regard to the failure of the accused to call Billy Mbewe to testify with regard to the deposit, it was submitted that this defence was not supported by evidence. The State submitted that it was clear that the deposit was made by PW3 and not the said Mbewe as there was no evidence to show that Mbewe was dead. The Prosecutor submitted that while the rule in criminal matters is that the legal burden of proving every element of the case lies from beginning to end on the prosecution, the accused bears the burden of adducing evidence in support of any defence that he raises after being placed on his defence as per the case of **Mwewa Murono v The People (2004) ZR 207**. Consequently, it was submitted that the accused has not adduced any evidence in support of this defence. In this regard, it was submitted that as there is no evidence to the contrary that the accused solicited and actually received K3000.00 gratification to assist in releasing the impounded vehicle, section 66 of Act No 3 of 2012 gives mandatory guidance that the Court is under an obligation to presume that the gratification was an inducement or reward for the accused to assist in releasing the impounded motor vehicle.

SUBMISSIONS BY THE DEFENCE

The prosecution was expected to have filed submissions prior to the defence. However, these submissions never reached me and I thus proceeded without them. The accused filed final submissions urging me to acquit the accused.

The accused submitted that it was not in dispute:

1. That at the material time he was working for the LCC as a Legal Assistant in the Legal Department under the Prosecution Section;



an impounded vehicle. He thus submitted that it was misplaced for anyone to claim that he attempted to or facilitated the release of the vehicle in question in view of the well-laid down procedure for the release of such vehicles.

He submitted that Mwiinga left without paying the fine imposed without permission from anyone and that he only came to know him when he was taken to the RTSA offices by officials from the organisation. He stated that this was common at the Fast Track Court.

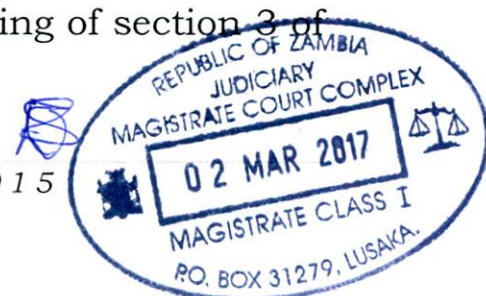
It was submitted that P8A and P8B do not show the actual content of the messages between the accused and Mwiinga. It was argued that it would be wrong to conclude that his number sent text messages to another number giving bank details.

The accused further argued that the State submitted that he failed to prove that Billy Mbewe deposited the money into his account by not producing any document. He submitted that there is no burden on an accused person to prove his innocence as the legal burden lies on the State. He thus submitted that the State has failed to prove the case against him beyond all reasonable doubt and that he ought to be acquitted.

FINDINGS OF FACT

I have considered the submissions herein and the evidence before me. I am satisfied that the following facts are not in dispute:

1. That the accused is employed as a Legal Assistant under the Prosecutions Section in the Legal Department of the Lusaka City Council;
2. That the said accused is also a Prosecutor at the Fast Track Court for Traffic Offences situated at the Civic Centre;
3. That the Lusaka City Council is a public body within the meaning of section 3 of Act No 3 of 2012;
4. That the accused being an employee of the Lusaka City Council is a public officer within the meaning of section 3 of Act No 3 of 2012;



5. That on 28th August 2014, the RTSA impounded a public service vehicle registration No ALK 4012 driven by one Sambani Mwale for driving under the influence as per the green case file marked P3;
6. That on 2nd September 2014, the case of *The People v Sambani Mwale IPV/TRO/3676* of 2014 was heard at the fast Track Court and that the accused was fined K2500.00 or in default six months simple imprisonment as per the case record marked P5;
7. That the person that appeared in Court as Sambani Mwale was in fact PW3, Brian Mwiinga as per his own testimony;
8. That the said fine of K2500.00 was never paid as per the testimony of PW3 and PW6 and as evidenced by the general receipt book entries for 2nd September 2014 marked P4; and
9. That on 29th August 2014, K3000.00 was deposited into the ZANACO bank account for Davy Siame as per the deposit slip, receipt and Statement of Account marked P1, P2 and P6 respectively.

However, the issues in dispute are;

1. Whether or not the accused and PW3 interacted physically and through their mobile phones with regard to the release of the motor vehicle;
2. Whether or not the accused solicited for the K3000.00 to be deposited into his account;
3. Whether or not this deposit was gratification for the accused to facilitate the release of the vehicle;
4. Whether or not the accused was aware that PW3 was not in fact Sambani Mwale; and
5. Whether or not the accused instructed PW5 and PW6 to release the said motor vehicle.

PW3, Mwiinga testified that he met the accused when he first went to the Fast Track Court to make a follow up on the case of Sambani Mwale on 25th September 2014. He told the Court that Fast Track Court staff used his mobile phone to call the accused and that he came and took Mwiinga to his office. It was his



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testimony that it was during this encounter that the accused asked him for K3000.00 to facilitate the release of the vehicle from RTSA. He told the Court that there was further communication by phone on 29th August 2014 leading to the accused texting details of his bank account. Mwiinga also testified that after having difficulties in getting the vehicle released, he communicated with the accused and that this culminated in him appearing at the Fast Track Court as Sambani Mwale.

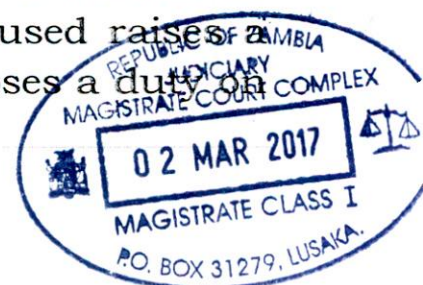
Mwiinga never disclosed what his mobile No is but the deposit slip-P2 shows 0973276654. However, the Airtel call-record P8A shows that Brian Mwiinga's mobile No is in fact 0973576654 while P8B shows that the accused' mobile No is 0977495786. P8B shows that there was communication between Mwiinga and the accused on the following dates and times:

1. 26/08/2014 at 12:17 hrs;
2. 27/08/2014 at 11:36 hrs;
3. 27/08/2014 at 14:52 hrs and
4. 27/08/2014 at 15:40 hrs.

These voice communications cannot be mere coincidence. They show a pattern of regular communication between the two during the period in question.

The accused led evidence that the mobile No on the deposit slip belongs to one Mathews Musonda who sells cell phones on his behalf. He further argued that the prosecution, having custody of his mobile phone and that of Mwiinga, ought to have produced them in evidence to show if indeed there was communication between the two. There was no other evidence to support the assertion that the mobile No is for Musonda other than that of the accused himself.

Our jurisprudence does not impose a burden on an accused person to prove his innocence. It instead imposes a burden on the prosecution to do so. However, where the accused raises a defence during his defence, our jurisprudence imposes a duty on



him to lead evidence to support it. This was the position in the case of **Mwewa Murono v The People (2004) Z.R. 207 (S.C.)** where it was held that:

In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution.

.....

The accused bears the burden of adducing evidence in support of any defence after he has been found with a case to answer.

Therefore, there is a burden on the accused to lead evidence to show that the money was deposited into his account by Billy Mbewe, his business associate and that the mobile No is for Mathews Musonda. Indeed, this Musonda was never called to give evidence. Therefore, it would have been in the best interests of the accused if he led evidence to show this rather than making mere assertions.

It follows that the duty of this Court in evaluating the evidence of the accused is to weigh it against the totality of the prosecution evidence and to consider whether the defence tendered by the accused is supported by evidence to leave the Court in doubt as to his guilt.

I have to consider if this explanation tendered by the accused (that he has never communicated with the accused, that the deposit of K3000.00 was made into the account of the accused by Billy Mbewe his business associate who used Mathews Musonda's mobile No on the slip) leaves me in reasonable doubt as to the guilt or innocence of the accused.

The evidence before me of the testimony of Mwiinga and Mkandawire supported by the Airtel print-out, P8B shows communication between the accused and Mwiinga. The accused denied ever communicating with Mwiinga and yet the print-out shows the opposite. I therefore cannot believe or accept his testimony that the mobile No on P2 is for Mathews Musonda. I take the view that Mwiinga fell into human error when stating this.



mobile No on P2 by putting the digit '2' where there ought to have been '5'. Consequently I find that Mwiinga's mobile No is in fact 0973576654 and not 0973276654. I further find that the accused and Mwiinga did in fact communicate.

In this regard, I reject the submissions and evidence of the accused that he never had any communication with Mwiinga or that he dealt with him other than at the time he appeared in Court as the fugitive Sambani Mwale. The accused and Mwiinga dealt with and know each other, and I find accordingly.

Having found that there was communication between the accused and Mwiinga, I accept the evidence of Mwiinga that the accused demanded K3000.00 to have the vehicle released. I accept and believe the testimony of Mwiinga and Mkandawire that they deposited the K3000.00 into the account of the accused. I accept the testimony of PW5 and PW6 that the accused did in fact instruct them to release the said motor vehicle contrary to the laid down procedures. This was confirmed by Mwiinga and Mkandawire who testified that they met resistance from the two ladies at the Enforcement Office when they sought to collect the vehicle. I am satisfied that Mwiinga did in fact appear in court as Sambani Mwale and that the accused was aware that Mwiinga is not Sambani Mwale. This is confirmed by their testimony and the communication between Mwiinga and the accused via phone.

Section 66 (1) of the Anti-Corruption Act No 3 of 2012 provides:

66 (1) Where, in any proceedings for an offence under this Act, it is proved that the accused person offered or accepted gratification, the gratification shall, unless the contrary is proved, be presumed to have been offered or accepted as an inducement or reward, as is alleged in the particulars of the offence.

I have found that the accused accepted a deposit of K3000.00 into his Zanaco bank account from Mwiinga. Consequently, I find that this deposit was accepted as an inducement or reward to have the impounded vehicle released. This solicitation and



acceptance of the money was corrupt in that it was a reward to have the vehicle released. Whether the deposit was made by Mkandawire or Mwiinga is of no consequence for the money came from Mkandawire who is Mwiinga's employer and it was for the purpose of releasing the vehicle from RTSA.

VERDICT

In these circumstances, I find that the prosecution has proved the case beyond all reasonable doubt. The accused person, Davy Siame is guilty of the offence of corrupt practices by a public officer contrary to section 19 (1) of the Anti-Corruption Act No 3 of 2012 and I convict him accordingly.

DELIVERED IN OPEN COURT THIS DAY OF MARCH 2017

HON. N. C. SIMAUBI

MAGISTRATE CLASS 1

