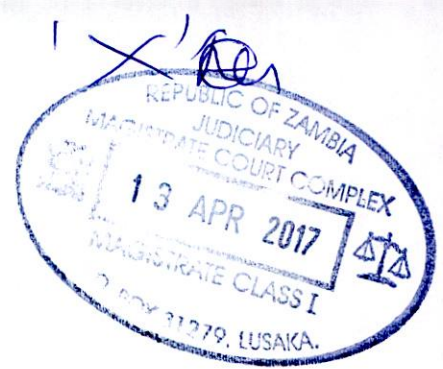


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IN THE SUBORDINATE COURT
OF THE 1ST CLASS FOR THE
LUSAKA DISTRICT, HOLDEN
AT LUSAKA

CASE NO.1P/A/034/2017

[Criminal Jurisdiction]

BEFORE MRS A.N WALUSIKU

THE PEOPLE

VS

EMMANUEL BANDA

J U D G M E N T

In this case the accused stands charged with Theft Contrary to section 272 of the penal Code Chapter 87 of the Laws of Zambia. The particulars of the offence allege that the accused on 23/12/16 at Lusaka in the Lusaka province of the Republic of Zambia, did steal k15, 000 the property of Mzamose Sakala.

The accused pleaded **NOT GUILTY** to the charge.

I warn myself at the outset that the onus to prove the case beyond reasonable doubt lies on the prosecution and there is no onus on the accused to prove his innocence. The accused is entitled to give and call evidence or say nothing at all and if he elects to say nothing this does not affect the burden on the

Prosecution. 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 must be given the benefit of that doubt.

In order to establish the guilt of the accused the prosecution must satisfy me upon each and every ingredient of the offence charged. Turning to the count, section 272 of cap 87 states that **' any person who steals anything capable of being stolen is guilty of the felony termed 'theft', and, unless owing to the circumstances or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years' ' .**

The prosecution therefore must establish:

1. That the accused took the said cash;
2. That he was not allowed to take the said cash;
3. That his intention was to deprive the owner permanently;
4. That accused had no claim of right to the said cash.

The prosecution has alleged that the accused did steal the K15,000 the property of the complainant.

Thus the prosecution has to prove that it was the accused that took the cash. That he was not allowed to take the said cash. That his intention was to deprive the owner permanently and that they had no claim of right to the said cash.

I will now consider the evidence in this case. The prosecutions called five witnesses while the accused elected to give sworn evidence and called no witnesses.

PW1 was **MZAMOSE SAKALA** a Business lady. On 21/12/16 her mother died and left a house in Mtendere East. Herself, JULIANA and Hellen decided to sell the house. They looked for an Agent. The Agent was Samuel Banda and the house was sold at K120, 000. The buyer was the now accused who told her that he was buying the house for his mother. Accused told her that he was also selling a house in Kalingalinga and was only going to be back after he found money. On 21/12/16 accused went to her with his mother and another. Her Agent Samuel was also present. Samuel the Agent wanted K10, 000 as Commission. The mother to accused gave accused K90, 000 and accused gave her the money and said that the balance would come on 23/12/16. She gave K10, 000 to Samuel. On 23/12/16 accused and his mother and another went back and paid the K30, 000 balance. Accused. Accused then asked his mother to go out of the house and PW1 was told to take her round to see the tenants. When they went back in the house, accused asked her to give him K15, 000. She asked what the money was for because she had already given her Agent PW5 the money. Accused started making noise. He told her to wait and accused went outside and got his mother and took her away. Later accused went back and demanded for the money and inquired as to where they would keep the money from. PW1 and others got scared and she got K15, 000 and gave it to accused. Accused left. On 30.12.16 the buyer of the house a lady came and demanded for the letter of sale. They refused to give her because a K15, 000 was not there. The following day she was picked by the police that she did not give her the document and she explained to the

police that it was because accused got the K15, 000. Accused was asked over the K15, 000 and he said that he gave it to his friends. Accused was asked as to how many agents were there and he promised to pay back. Accused did not pay back. She identified accused.

In XXN she told the Court that accused got K15, 000. Accused told her that he wanted to give the money to his friends. PW5 agreed to be given K10, 000. PW5 her Agent did not say that the house would be sold at K105, 000. She did not sign anywhere at the office of the sum of K15, 000. She denied to have called accused back. PW5 was not given K15, 000. She was the one that gave accused K15, 000. PW5 was her agent and she gave him K10, 000.

PW2 was JULIANA SAKALA. On 21/12/16 herself, PW1 and Hellen sold the house for their late mother. She was called by PW5 the Agent that the buyer was ready. She then called PW1 and Hellen to receive the money. She was not around and so she learnt from PW1 that K90, 000 was paid. The agent PW5 called her and informed her that he had received his K10, 000 as his commission. Later she was called by PW5 that the buyer was ready to pay the balance. PW5 and accused confirmed to have paid the balance. Accused then called her and said that he wanted to get K15, 000. She asked accused what the money was for. She told accused not to get the money. Later PW1 called her and told her that there was noise at home and that accused had insisted to be given K15, 000 and that they had given him under duress. On 25/12/16 she came to Lusaka. On 25/12/16 the one who bought the house called her for her to sign an agreement form, they met at Kalikiliki police and she refused to sign because a K15, 000 was missing. The buyer asked as to where the

money went to and she was told that it was taken by accused. Accused was asked to go to the Police but he called her on phone and started shouting at her and ordered her to sign the agreement but she refused. She left the police. On her way accused called her and told her to get back which she did but accused did not go there. Later accused reported her to Mtendere Police Post. She went to the police where accused was told to pay back the money and he accepted to pay. On the promised date accused did not pay and eluded the police. Accused was apprehended and taken to the police. She identified accused.

In XXN she told the court that the house was agreed to be sold at K120, 000. Accused never called her to say the agent needed K15, 000. She knew nothing about the brother that told her to give accused a K15, 000. They never agreed on the K15, 000. She did not allow her brother to give accused K15, 000. She never told accused to deal with her brother over the K15, 000. Accused got the money under duress. She spoke to accused on phone for him not to get the K15, 000. There was no document that accused signed to have taken the K15, 000 because it was under duress.

PW3 was **CHARLES SAKALA** a Businessman. He knew the accused person in the case. Accused was the one that bought the family house. On unknown date in December, 2016 he was told by PW1 that there was a buyer for the house and was coming. He went there and found accused and a group seated and were ready with money. Accused removed the money and counted. He was given the money and in turn he gave to PW1. Instead of K120, 000 he was given K90, 000. He asked where the balance was and accused said it was going to be paid on Friday. On Friday accused and group went back and took a K30+, 000-00. Later accused started

demanding for K15, 000. He asked what the money was for but accused asked him if he did not know. He asked PW1 over the money and she said that she was not aware. Accused started making noise and asked them as to where they were going to keep the money from. Accused told him that he would be back in 10 minutes time and within a short time accused came back furious. There was pressure and he asked his sister PW1 to give accused K15, 000. They then went to the Police to report. Accused left. What he knew was that it was accused who bought the house. Their agent was PW5 and was given K10, 000 immediately the K90, 000 was paid.

In XXN he told the Court that on the first payment there were 9 people present. The agent he knew was Samuel. Samuel was given his money. He was present when Samuel was paid. On the last payment accused did not mention that they sort out the agent. The K15, 000 was given to accused and not to Samuel and Francis. Samuel, Henry Sakala were present when accused was given the money. It was PW1 that gave accused the money. Accused told him that he did not know ~~what~~ accused and PW1 had agreed on.

PW4 was TACKSON KAPUTULA the arresting officer based at Woodlands Police Station. On 11/01/17 he was on duty when he was allocated a docket of case of Theft in which PW1 reported that her money amounting to K13, 000 was stolen. She further stated that accused was the one that stole the money. On 20/01/17 accused was apprehended by the complainant and taken to the Police. He interviewed Accused who failed to give him a satisfactory reply and so he made up his mind to charge and arrest ~~them~~ ^{him} for theft. Under warn and caution statement in English the language that accused appeared to understand better ~~they~~ ^{he} gave a free and voluntary reply denying to the charge. He

identified ~~the~~ The case emanated from the sale of a house by PW1 to Regina. Regina was now deceased. There was a Notice of death to that effect which he identified marked P1. He also identified the letter of sale marked P2.

In XXN he told the Court that he recalled that accused, Francis and Sam agreed to pay back the money. He was not aware that the complainant got K3, 200 from the tenants. The report that he received was for K13, 000 and not K15, 000. He did not question SAM and Francis because it was accused that got the money. Sam and Francis did not admit to say the money was theirs. He did not recall that accused paid K3, 200 to the complainants. Investigations showed that accused got the K15, 000 without a reason. Accused was not given the K15, 000. Accused stole because he did not explain why he got the money.

PW5 was SAMUEL CHITANDULA a Businessman. In November, 2016 PW1 went to his office and told him that she had a house for sale. He started looking for buyers. One of his friends Kafwaya of Kalingalinga told him that there was a lady who wanted to buy a house. Kafwaya went to him with accused. Accused and MARY BANDA decided to negotiate. They were three sisters and agreed to sell at K120, 000. In November, 2016 accused called him and told him that the money was ready. Later accused called that the buyer had K90, 000 and that would pay the balance by Friday. He reported that to PW1 who agreed. He was communicating to the three sisters of whom one was in Chipata. Later PW3 joined them and the K90, 000 was paid. PW3 got a K10, 000 and gave it to him as an agent. On Friday, accused called him and said that the balance was ready. There were two sisters and PW3 and the buyer came with three others. The K30, 000 was paid. Accused told him that he agreed with PW1 that he would be given K15, 000

out of the whole amount. PW3 asked what the money was all about and he told him that he did not know because he was already given the K10, 000. PW3 refused to pay. Accused warned that he wanted the money and should find it and went outside. The two sisters told PW3 to give accused the money and accused was given. Later he was summoned to the Police where he told the Police that he was given his share of K10, 000 and knew nothing on the K15, 000. Accused promised to pay. To him accused was the buyer of the house. He identified accused. He did not get a share of the K15, 000.

In XXN he told the Court that the last price ~~in~~ cash was K105, 000. PW2 said cash money for the house was K105, 000. The sister in Chapata refused to release the K15, 000 to accused. He gave K5, 000 from the K10, 000 to give to Francis Kafwaya. He denied to have gotten a K5, 000 from the K15, 000 to give to Kafwaya. He denied to have held the K15, 000. Before accused left, accused came back to demand for the K15, 000 from PW3. Accused warned to get the whole amount so that he can look for another buyer. He denied to have agreed to pay back at the police. Accused was the one that agreed to pay back.

PW6 was MWANGALA WANYAMBE. The late Regina Mudaala was her grandmother. She died on 20/02/17. There was a Notice of death to that effect which she identified marked P1. Accused was a known person to her. Her late grandmother sold her house in Kalingalinga and told her agent to look for a house for her to buy. The agent found a house and they went to see it. And were told that it was sold at K120, 000. ON 21/12/16 THEY PAID k90, 000 AND ON 23/12/16 they paid K30, 000. After paying accused told the owner of the house to take them round to see the tenants. They stood at the vehicle which they booked and

accused was the one driving it. After accused came out she asked him as to why there was noise in the house but accused told her that there were problems with the agents. There was noise ~~in~~ on the house. Accused took them back and told ~~him~~ that he was going to Chelstone Police to see his friends. After three days PW2 was called and she told them to meet at Kalikilki police for her to sign. PW2 however refused to sign because accused who said was the son to the buyer got a K15, 000. The amount was not K120, 000 which was on the paper.

In XXN she told the court that there was noise in the house. Accused told her that there was noise because of the agents. The agents for the sellers were Sam and another. It was Kafwaya and Maurice who looked for the house. The agents were given K2, 500 by the grandmother. She did not know about the percentage. The K2, 500 was for buying the house. She was ~~not~~ there when accused was agreeing with ^{Kafwaya} ~~Kabwata~~ and Maurice.

The accused was put on his defence. He elected to give sworn evidence and called no witnesses.

According to DW1 on 14/11/16, Regina called him and said that she was selling a house. Regina was his mother in law. She told him to look for agents. He found Kafwaya and Mole. The house was sold. Regina decided to buy a house after the ~~sake~~ of her house. A house for PW1 was found and he was told that it was going at K140, 000. He said he needed something for K100, 000. They said they needed K140, 000 because they had an agent Sam. They agreed at K105, 000. He told them that he would pay after a week. Before a week passed PW2 called to say he could pay K100, 000. He told her that the money was not yet ready.

He took Regina and PW6 to go and see the house which they saw and liked. Later Mole and Francis followed him and asked where the commission would come from. He told them that together with Sam they were to go and see Juliana. He went to see PW2 as a buyer because he was buying a house for Regina. At the time of meeting was MOLE, FRANCIS and Sam. The three told him that the house would be sold 7 k120, 000. They told him that they go to PW2. THEY agreed that as agents they would sell at K120, 000 while the owner sold at K105, 000. PW2 said there was no problem as she needed K105, 000. On 21/12/16 Regina gave him K90, 000 and he went with PW6 to pay. They paid to PW1 as PW2 had gone to Chipata. They paid and PW5 produced documents which they signed. On Friday he took the balance. They signed for K120, 000. Only PW2 did not sign. Later he heard noise in the house that ~~that~~ they were refusing to release the money. He left with the family. Later PW1 and PW5 called him back and said that the issue of money had become a problem. He called PW2 and told her that the business had become difficult as the agent was not given money and that they reverse the transaction. In his presence he saw PW3 release K15, 000 and gave it to PW5. PW5 gave K5, 000 to his cousin, K3, 000 to Francis and K2, 000 to Mole. He left the house. A week later PW2 called him and told him that the money given was too much because she paid PW5 k10, 000. Later he was apprehended for Theft. He came to Court.

In XXN he told the Court that he recalled the witnesses that testified before Court. The two sisters said that they gave him money to give to the agents. He heard them say that they had one agent. He heard that they gave PW5 a k10, 000. After the transaction there was noise from the house. It was PW5 who made noise with the sisters. He heard PW1 say that accused was the one demanding for K15, 000. Amongst their group was PW6. PW6

came to testify before Court. He heard her say that accused came from the noise and drove them away. He did not know who an agent was. He agreed to have received the K15, 000. He did not recall if PW1 said accused was furious and she released the money for her to have peace. He heard from PW6 that the agents hired by Regina were paid. He was not aware that the Sakala's had no obligation to pay the agent he took. Accused paid K90, 000 and K30, 000. IT was K120, 000 in total. He wanted the court to believe that the house was sold at K105, 000 when he paid K120, 000. The agreement was not to sell it at K120, 000.

This is the evidence that I received. I now state my findings of fact. I find that the K15, 000 was taken. I find that it was taken by accused. I find that accused was not allowed to take the said K15, 000. I find that his intention was to deprive the owner of the said K15, 000 permanently. I find that he had no claim of right to the said K15, 000.

Having found the facts I must now apply the law to these facts. I ask myself if on these facts the accused has in law committed the offence charged. Turning to the count, if the accused acted in the way alleged then certainly he would be guilty of Theft. But has the prosecution established beyond reasonable doubt that it was accused who took the said K15, 000

What evidence is there that accused took the said K15, 000? There is evidence to this and in particular that the said house

was sold at K120, 000 and K120, 000 was paid by the buyer. However, accused demanded for the K15, 000 and it is not known in what capacity he received that money in. There was an agent for PW1 who is PW5 who was paid his K10, 000. Accused was neither an agent nor anyone in the transaction but demanded with threats the K15, 000 which was given to him under duress. P2 shows that K120, 000 was to be paid upon signing of the contract. The said money was paid but accused demanded from a K15, 000. Accused looking at the evidence was neither here nor there in the picture but ended up using threats to get a K15, 000. The defence by accused that the house was sold at K105, 000 when records show K120, 000 is an afterthought aimed at misleading the Court. The fact and truth of the matter which does not need debate is that accused wanted to enrich himself out of a transaction which he did not spend anything. Accused told court that as agents they agreed to sale at K120, 000 while the seller agreed to sell at K105, 000. This just shows that accused was there to steal the K15, 000 which he demanded and was given after threats. Accused was not given that money freely and voluntarily the reason why the complainant complained to the Police. To say that he got the money so as to give the agents is not true. He intended to take away the K15, 000 with an intention of depriving the owner permanently. Accused had no claim of right to the said K15, 000.

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I do not see any reason as to why only the accused and not the agents would be implicated in the theft of the K15, 000. There was no difference between the accused and PW1 for PW1 to just think of accusing the now accused.

I have no difficulties to connect accused to the offence.

In light of the above I find the case of Theft C/s 272 OF Cap 87 proved beyond reasonable doubt. I find accused GUILTY and I **CONVICT** him accordingly.

DELIVERED IN OPEN COURT THIS.....^{13TH}.....DAY ON.....^{APRIL}.....2017.



DESIGN