

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

1PG/010/2017

THE PEOPLE v PAUL PHIRI

Before the Hon N. C. Simaubi on the 24th April 2017

JUDGMENT

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

For the Accused : In Person

Legislation referred to:

Section 300, 303 (a), of The Penal Code Cap 87 of The Laws of Zambia.

Cases referred to:

Mbinga Phiri v The People (2011) Vol. 3 ZR

The accused person stands charged with one count of Breaking into a building and committing a felony therein contrary to sections 303 (a) of the Penal Code Cap 87 of the Laws of Zambia. The particulars of the count allege that Paul Phiri on 16th February 2017, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, did break and enter into a building, namely Patrick Hamukoma's store-room and did steal from therein one generator valued at K3400.00 the property of Patrick Hamukoma. The accused pleaded not guilty to the count.

The burden is upon the prosecution to prove the case beyond reasonable doubt. There is no burden upon the accused to prove his innocence. If, after considering all of the evidence in this case

AS



there is any doubt in my mind as to the guilt of the accused, then he is entitled to 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 offences charged. s. 303 (a) of the Penal Code is in the following terms:

Any person who-

(a) breaks and enters into any building other than a dwelling house and commits a felony in it; or

Is guilty of a felony and is liable to imprisonment for seven years.

s. 300 of the Penal Code defines breaking and entering. The provision shows that a person is deemed to have broken into a building once he opens a building by unlocking, pulling, or pushing any door, window or object meant to cover or close an opening. Entry thereof occurs once any part of his body or instrument used by him is within the building. The criminal intent to commit a felony therein can be ascertained from the circumstances of the case. In this regard, the prosecution must establish:

1. That the accused broke,
2. And entered,
3. Into a building other than a dwelling house,
4. With intent to steal therein, and
5. Did steal from therein.

I will now consider the evidence on record. The prosecution called two witnesses in support of the charge. The accused elected to remain silent and to call no witnesses.

PW1, Patrick Hamukoma is the complainant in this matter. He testified that on 16th February 2017 he came home only to discover that the locking system to his store-room was broken. On checking inside, he discovered that his Ryobi 2700A generator had been



stolen. He also noticed that there were some foot prints in the groundnut field showing where the thieves passed and rested with the generator. However, a follow-up yielded no results. Hamukoma then reported the matter at Rosedale Police Post and that two officers came home with him to visit the scene of crime.

Hamukoma testified that on his way back to the farm, he found that his wife had picked two of the three workers that were working on the farm that day. He identified the missing worker as Paul Phiri and told the Court that he paid them each time they completed the work they were assigned for the day. He testified that upon looking at the foot prints, it was discovered that they belonged to Paul Phiri. He then gave the two workers his phone to call him as they lived with Phiri. However, by 2000 hrs, the worker had not called him. At around 2100 hrs, he went to where the workers lived and with the help of the community, apprehended Phiri and took him to the police.

Hamukoma testified that a day later, police phoned him to say that Phiri had told them where the generator was. He then went to the police from where Phiri led them to Garden-Chilulu at a bar belonging to Phiri's friend. The generator was recovered and taken to the police. As Hamukoma needed to use it, it was taken to the Subordinate Court where it was disposed back to him by a magistrate on a disposal form he identified marked P1. He identified the accused in the dock as Paul Phiri.

The accused had no questions for cross-examination.

PW2, Det Sgt Titus Phiri testified that on 16th February 2017, Hamukoma brought a suspect named Paul Phiri to the police post. The suspect was alleged to have broken into a store-room and stolen a generator valued at K3400.00. Sgt Phiri then interviewed the suspect who was already in custody who admitted stealing the generator and taking it to Garden Compound. He testified that the suspect later led him to the place and that the generator was recovered. He then made up his mind to charge and arrest the suspect for the subject offence. The suspect, whom he identified as



Paul Phiri, admitted the charge under warn and caution. He told the Court that the generator was disposed back to Hamukoma by the courts on a disposal form that he produced marked P1.

The accused had no questions for cross-examination.

This marked the close of the prosecution case. The accused was placed on his defence but he elected to remain silent and to call no witnesses. He is perfectly entitled to do so as there is no onus on an accused to speak in his defence or to call witnesses. It follows that I have to decide this case on the evidence adduced by the prosecution. However, this does not absolve me from testing that evidence to satisfy myself as to its truth or falsity nor does it affect the onus on the prosecution to satisfy me beyond all reasonable doubt as to the guilt of the accused person.

The accused did not cross-examine any of the prosecution witnesses. As such, he has raised no defence both in direct and indirect evidence. I am thus left with only the evidence of the prosecution to consider.

Hamukoma testified that he found his store-room locking system damaged upon his return home. He further discovered that his generator was missing from the same store-room. Therefore, I find that someone did in fact break and enter the store-room and take the generator. Neither of the witnesses saw the accused break, enter and take the generator from the store-room. However, Sgt Phiri testified that when he interviewed the accused, he admitted taking the generator from the store-room and selling it to someone in Garden Compound. Sgt Phiri later recovered the same generator from Garden Compound. PW1 also confirmed accompanying police to Garden Compound and recovering the generator.

Therefore, the only evidence available that suggests that the accused is the person that took the generator is circumstantial. It is not in dispute that the accused is one of three persons that worked for Hamukoma at his farm. It is also not in dispute that the accused was the only worker that was missing from the farm on the



material day. As told by Sgt Phiri, it is also the accused that led him to the recovery of the generator from Garden Compound.

In **Mbinga Phiri v The People (2011) Vol. 3 ZR**, it was held that:

Circumstantial evidence or indirect evidence is evidence from which the judge may, infer the existence of the fact directly.

It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue, but rather is proof of facts not in issue. But relevant to the facts in issue and from which an inference of the fact in issue may, be drawn.

A trial judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture, so that it attains such a degree of cogency which can permit only an inference of guilt.

Where a conclusion is based purely on inference, that inference may, be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may, be said to be reasonably possible cannot be condemned as speculation.

In this regard, I am satisfied that the inference that the accused is the person that took the generator, is the only reasonable inference that can be drawn from the facts before me. These facts being that the accused was a farm hand who went missing on the day the generator was stolen. He is also the same person that led police to its recovery. These facts take this case out of the realm of conjecture and I find accordingly.

Consequently, I find that it is the accused person, Paul Phiri that broke into the store-room and took the ~~store-room~~ ^{GENERATOR} and sold it in Garden Compound. I find that the generator that was stolen and recovered is the same one that was handed back to Hamukoma as per the disposal of exhibits form-P1.



The accused had no lawful excuse to take the generator from Hamukoma.

VERDICT

Consequently, I find that the prosecution has proved the case beyond all reasonable doubt. The accused person, Paul Phiri is guilty of the offence of breaking into a building and committing a felony therein contrary to section 30~~B~~ (a) of the Penal Code Cap 87 and I convict him accordingly.

DELIVERED IN OPEN COURT THIS 24TH DAY OF APRIL 2017


HON. N. C. SIMAUBI (Mr.)

MAGISTRATE CLASS 1

