

**IN THE SUBORDINATE COURT OF THE FIRST CLASS**

**HOLDEN AT LUSAKA**

*(CRIMINAL JURISDICTION)*

**THE PEOPLE**

**COMPLAINANT**

**AND**

**DORA SILIYA**

**THE ACCUSED**

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**RULING**

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**AUTHORITIES CITED.**

**STATUTES**

**Criminal Procedure Code, Cap 88**

**Penal Code, Cap 87**

**CASES**

**The People v The Principal Resident Magistrate, Ex Parte  
Faustin Kabwe and Aaron Chungu (2009) ZR 170**

The accused in this matter was charged and arrested in two counts in relation to the offence of Abuse of Authority of Office contrary to section 99(1) of the Penal Act, Cap 87 of the Laws of Zambia.



In the **FIRST COUNT** the allegation is that; **MS. DORA SILIYA**, between 22<sup>nd</sup> February, 2008 and 20<sup>th</sup> April, 2009 in Lusaka being a person employed in the Public Service as a Minister then in the Ministry of Communications and Transport, in Abuse of the Authority of her office directed the cancellation of a duly awarded tender for the supply, delivery, installation and commissioning of the Zambia Air Traffic Management Surveillance Radar System to Thales Air System SA whose implementation was frustrated, an act prejudicial to the rights or interest of the Government of the Republic of Zambia.

In the **SECOND COUNT**, it is alleged that **MS DORA SILIYA**, between 20<sup>th</sup> February, 2008 and 20<sup>th</sup> April, 2009 in Lusaka employed in the Public Service as Minister of Communications and Transport, in Abuse of the Authority of her office and in breach of laid down procedures accepted a purportedly free offer from Selex Sistemi Integrati S.P.A. for the repair of a Radar Head at Lusaka International Airport as a result of which Government actually paid



**K1,943,932.36** an act prejudicial to the rights or interest of the Government of the Republic of Zambia.

The offence the Accused was charged with was found in Section 99(1) of the Penal Act, Cap 87 of the Laws of Zambia. That provision has since been repealed and replaced.

Section 99(1), of Cap 87 itself provided that;

***Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights or interests of the Government or any other person, is guilty of a misdemeanour. If the act is done or directed to be done for purposes of gain, he is guilty of a felony and is liable to imprisonment for three years.***



The offence the accused is charged with occurs when a person commits, or directs the commission of, an arbitrary act in their capacity as a public servant; that is in abuse of their authority in that capacity and that the arbitrary act in question being consequently prejudicial to the rights of another person(s).

The elements constituting the offence of Abuse of Authority of Office which the prosecution ought to prove include the following;

- that the accused acted arbitrarily,
- while being employed in the Public Service,
- the action in question stemming directly from an illegitimate agenda which is improper in motive (with either personal gain or gain for another party in mind) and thus
- causing prejudice to a specific party in the process.

I must hasten to say here that everyone accused of a criminal misdeed is deemed innocent until the prosecution has been able to submit sufficient evidence to the Court which will persuade the Court to place them on their defence. Concomitant to this principle





is another equally sacrosanct principle which is that the burden of proving the guilt of an accused rests squarely on the prosecution. It is not up to the accused persons to prove their innocence; it is up to the prosecution to prove their guilt. This evidential burden of proving specific facts rests on the Prosecution and does not shift throughout the trial.

At this stage of the case and in terms of the statutory provisions, the court is called upon to make a ruling on whether or not the accused has a case to answer.

In this regard, at the close of the prosecution's case, the Accused person may submit to the Judge or Magistrate that there is no case for them to answer. If the court agrees, then the matter is dismissed and the accused is acquitted without having to present any evidence in their defence.

The criminal procedure Act, Cap 88 is well instructive on this rule;

***Section 206 provides that;***



*"If, at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case, and shall forthwith acquit him."*

*Section 207 provides that;*

*"At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has the right to give evidence on his own behalf and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask*



***him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence, if any."***

Both the prosecution and the defence have cited some cases decided on by our superior courts that have interpreted and pronounced on the two cited provisions;

I will not belabor at this point to recite those authorities.

Suffice to say that a submission of 'no case to answer' in a criminal court or trial is a submission on point of law. It is a legal submission. All the accused is saying at this stage of the trial is that: Accept all that the prosecution has said through its witnesses, yet it (the prosecution) cannot secure a conviction either of the offence charged or of any other alternative offence of which the accused may possibly be convicted, upon the evidence.



The principle behind the submission of no case to answer is that an accused should be relieved of the responsibility of defending himself or herself when there is no evidence upon which the court may convict. The submission might also be made that whatever evidence there was, which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing the guilt of the accused.

Such evidence must meet ALL, and not some of the essential elements of that offence.

The prosecution called 17 witnesses and submitted a number of documents to support their case;

In relation to both counts, the thrust of the state's case is that the accused canceled the duly awarded tender to Thales Air System SA for the supply, delivery, installation of new air traffic management surveillance Radar system at the Kenneth Kaunda International Airport. And that consequent to her cancelling the contract in question she went ahead and arbitrarily accepted the free offer by a company called Selex Sistemi Integrati S.P.A. She is being accused





of meddling in the procurement processes and by so doing she was flouting guidelines under the cabinet handbook. And further that by accepting the free offer from Selex Sistemi Integrati government was made to pay about K1.9 million. The state believes that the so called free offer had hidden costs and so was not free at all.

I have reviewed the information presented by the prosecution through its 17 witnesses and I have looked at the very many documents that were tendered as evidence.

First of all let me give a factual position based on the facts presented in court through the witnesses that appeared as well as the many documents presented.

There was a debate in the Zambian Parliament in early 2008 and at that discussion, the state of the Zambia Air Traffic Management Surveillance Radar System at our two international airports was of great concern to the Parliamentarians. The said Radar system was said to be in a bad state urgently needing government intervention; either to procure a new system altogether or to do something about



the old one. That is how the Ministry of Communications and Transport through the Permanent Secretary then Ms. Mukuka Zimba, who is PW16 in this case, in consultation with the then Minister Hon Prof. Godfrey Lungwangwa at the time invited Selex who apparently were the suppliers of the Radar at Kenneth Kaunda International Airport very many years ago, to carry out an assessment; Selex came and did as asked and generated a report, recommending among other things that a new one be purchased. Subsequently the tender process in accordance with the tender rules and regulations under the Zambia National Tender Board was commenced. Dr Mambwe, who had succeeded Ms. Mukuka Zimba as Permanent Secretary, actively pursued the procurement of the Radar. I must say that during that time Ms Dora Siliya, the accused person, had just been moved to the Ministry as Minister in charge replacing Prof Lungwangwa who was transferred to another Ministry. Noticing and believing that something undesirable was going on in the procurement process, the accused person instructed the Permanent Secretary to advise and urge the Zambia Public Procurement Agency to halt that deal, whose contract had not been signed yet.



In the memo dated 5<sup>th</sup> January, 2009 Ms Siliya wrote to the Permanent Secretary that;

***“....I wish to re state my earlier instruction that the bid be redone and only manufactures of radars be invited to bid.....in this way no middle men will be entertained and the government will be assured of money well spent and reliable follow up service.”***

Subsequent to the above Ministers memo, Dr Mabmwe, wrote to ZPPA that;

***“....I have obliged to carry out the Minister's directive to advise ZPPA to cancel the tender and re advertise....”***





There was a lot of communication between ZPPA and the Ministry on the issues raised by the accused person. It is a fact that the Zambia Public Procurement Authority's central tender committee stuck to their guns and refused to cancel the tender insisting all was done above board. In this regard the Director General at the time, Mr. David Kapitolo wrote and said;

***“.....ZPPA has not found any compelling reason to justify the cancellation of the tender.....ZPPA is satisfied that the tender was conducted in a fair and transparent manner in compliance with the Zambia tender board Act as it existed then.....”***

I must say that even when this debate was going on (whether to re-do the tender or not) the court learnt that the Ministry had no budget line for the purchase of a new radar system.

It is a fact also that along the way, around the same time when the discussions were on over the acquisition of the Radar system,





SELEX who had earlier done an assessment on the equipment at KKIA offered to do repairs to the system for free. Following that gesture by SELEX, Ms Siliya wrote to the Minister of Finance who at the time was Dr Situmbeko Musokotwane seeking for guidance over the free offer. The Minister of Finance replied and in effect permitted the accused's request; He said in his letter dated 8<sup>th</sup> January, 2009 that;

***“.....You are at liberty as a Ministry  
to proceed on that matter as long it is  
within the financial regulations.  
Certainly on the face of it, it makes  
sense to accept an offer if free  
repairs especially if it is from the  
manufactures of the equipment.....”***

The purchase of the new radar system had halted because of concerns and the raging debate whether to re do it or not. In the meantime, having been invited by the Ministry to undertake repairs at the Kenneth Kaunda International Airport, SELEX moved on site



and carried out some works. With regard to the free works done by SELEX, some witnesses testified that even though the radar was not brought to fully functional state some components were repaired and what was called the secondary channels began to work. In fact Mr. Misitala the Managing Director of the National Airports Corporation put it this way;

**“.....The Radar system had never fully functioned; yet SELEX brought it to a functional state.”**

What transpired later is that SELEX proposed additional works and activities that included training of the intended users of the Radar. These additional programs were at a cost. As a matter of fact the Ministry following all procedures approved the extra works that largely included trainings, and a payment of K1, 943, 932.36 was processed. It is this issue of the cost factor that gave an impression to the law enforcement agencies that the whole story of a free offer by SELEX was tainted with criminality. However the evidence on record shows that when this was happening the accused person had left the Ministry of Communications and Transport and was



serving in another Ministry altogether. Ms Siliya certainly had nothing to do with the payment of the K1, 943, 932.36.

The facts are as plain as narrated in summary above;

Having considered the evidence on record, I really did not see any criminality that the accused person should be accused of here. Her strong desire to regularize the tender of the procurement of the Radar equipment could not have been said to be cancellation of the tender. In any case the accused did not even possess such authority. The authority to award or not to award a tender of that magnitude was solely the responsibility of the central tender committee as it existed under the Zambia National Tender Board. Similarly the cancellation of a contract was exclusively the responsibility of that committee. That is why the Minister's advice to re do the tender was rightfully turned down by the committee. nder.

Whatever the motivation, all that Ms. Siliya did was to try and persuade the body clothed with authority to award or not to award contracts to reconsider the tender that had already closed. And





indeed this fact was well appreciated by ZPPA hence Mr. Kapitolo technically turned down the advice of the Minister when he emphatically said the tender was above board.

Therefore in terms of the ingredients of the offence, it is not correct to allege that the accused directed that the tender be cancelled [or indeed cancelled the tender] because she did not cancel anything, neither did she have the authority to cancel the tender. These witnesses namely; Mr. David Kapitolo, Mr. Isaac Mukupa, Dr. Eastern Mambwe, Mr. Sam Kunda told the court that the tender was not cancelled. The purported cancellation was invalid as that power only lay with the central tender committee.

Tied to this is the suspicion that her cancelling the tender was meant to pave way for SELEX to come on board and that is why she accepted the free offer and the state argue this was prejudicial to the interest of the Government. As I have demonstrated above Ms Siliya did not cancel the Radar contract. She advised and hoped the tender could be re visited, however she was ignored by those with authority to cancel such awards. It must be pointed out that as can





be noticed from the information on record, the bringing in of SELEX to assess and possibly work on the Radar was started by another Minister and Permanent Secretary altogether. The accused person brought to Government's attention that SELEX had offered free repairs to the Radar. Her role ended at that. As we heard from the state witnesses some repairs were done in that free offer. The issue of costs sprung up when SELEX claimed that additional works outside the scope of the free offer were needed such as a training of technical staff. Almost at the expense of sounding repetitive, this was happening when the accused had been divorced from the Ministry of Communications and Transport. Mr. Kenneth Sunga, Mr. Silavwe and Mr. Harrison Banda all confirmed this fact.

The ingredients of the offence of abuse of authority of office are;

- a. That the accused was employed in a public body or a company in which the government has shares.**
- b. That the accused did or directed to be done an arbitrary act.**
- c. That the act was done in abuse of authority of his office.**



***d. That the arbitrary act was prejudicial to the interests of his or her employer or any other person.***

From the foregoing there is no sufficient evidence to support elements; b, c and d. Maybe that is why the Tribunal set up by the Chief Justice some few years ago to probe the accused of these very allegations cleared Ms Siliya of the same.

In the relatively recent case of **The People v The Principal Resident Magistrate, Ex Parte Faustin Kabwe and Aaron Chungu (2009) ZR 170**

The Supreme Court had this to say concerning no case to answer submissions;

***“.....there is no requirement under section 206 of the Criminal Procedure Code for the court to give reasons for acquitting the accused; it must merely appear to the court that there is no case to answer.....a finding of no case to answer is based on the courts***

***feelings or impressions and appearance of  
the evidence.....”***

My impression when I looked at the evidence in its entirety is that it is greatly insufficient, and it was discredited during cross examination to warrant the accused to be asked to defend herself.

This is a typical case where the accused person should be relieved of the responsibility of defending herself because there is no evidence upon which the court may convict.

In accordance with Section 206 of the Criminal Procedure Act, I therefore dismiss the charge and its allegations. Consequently Ms. Dora Siliya is acquitted forthwith.

**IN OPEN COURT THIS 23<sup>RD</sup> JUNE 2017.**



**JOSHUA BANDA  
CHIEF RESIDENT MAGISTRATE**