

IN THE SUBORDINATE COURT OF THE FIRST CASE NO: 2PD/067/17
CLASS FOR THE LUSAKA DISTRICT
HELD AT LUSAKA

(Criminal jurisdiction)

BETWEEN:

THE PEOPLE

VERSUS

WILSON MWEENE AND RODGERS KANTUMOYA

BEFORE MAGISTRATE: ALBERT K. MWABA

APPEARANCES

For the Accused : In person

For the State : Public prosecutor

JUDGMENT

Cases referred to:

1. *Andine Ali Tembo v The People HJA/12/2011*
2. *Dorothy Mutale and Richard Phiri v the People (1997) S.J. 51 (S.C.)*
3. *David Zulu v The People (1977) Z.R. 151 (S.C)*
4. *Mbinga Nyambe v The People (S.C.Z. Judgment No. 5 of 2011)*
5. *Woolmington v The DPP (1935) All E.R*

Legislation referred to:

1. Penal Code Chapter 87 of the Laws of Zambia.
2. Criminal Procedure Code Chapter 88 of the Laws of Zambia.

In this case, the two accused stands charged with one count of theft from a motor vehicle contrary to section 272 and 276 © of the Penal Code Chapter 87 of the Laws of Zambia.

It is alleged that on 18th February, 2017, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together stole 2 laptops from a motor vehicle namely Mitsubishi registration no. ALZ 4272 valued at K10,00.00 the Property of Stanley Mwanza.

The accused denied the charge and consequently trial commenced.

I must state from the onset that it is incumbent upon the prosecution to prove the case beyond all reasonable doubts, and not otherwise. The accused may give and call evidence, or remain mute, and this does not affect the burden on the prosecution, neither does it absorb me from considering the weight of the evidence on record. However, if there is any doubt in my mind as to the guilty of the accused, the doubt shall be resolved in accused's favour and shall stand acquitted.

In order to establish the guilty of the accused the prosecution must satisfy me with each and every ingredient of the offence charged.

Section of the Penal Code 272 Chapter 87 of the laws of Zambia defines theft as:

stealing anything capable of being stolen and any person who steals anything capable of being stolen is guilty of the felony termed "theft", and, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years.

Section 276© of the Penal Code Chapter 87 of the laws of Zambia provides that:

If a theft is committed and if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;

The prosecution, therefore, must establish the following that the accused:

1. on 18th February, 2017, the two accused whilst acting together broke into the motor vehicle namely, Mitsubishi registration no: ALZ 4272;
2. the accused stole 2 laptops which were property of another person in this case property of Stanley Mwanza or that he was a special owner;
3. the two accused persons had no authority to take away the said items;
4. the two accuse persons intended to deprive the owner permanently; and
5. the two accuse persons had no claim of right over the said things.

In order to prove the offence charged, the prosecution called 4 witnesses, and at the close of its case, the accused were put on his defence; and A1 gave sworn evidence and called no witnesses. A2 gave unsworn evidence and called no witnesses.

PW1 was Stanley Mwanza, 41, an inspector at Zambia Bureau of Standard (ZABS) who averred that on 18th February, 2017, around 18:30 hours he parked a Mitsubishi Tryon registration number ALZ 4272, white and blue in colour in Kabwata at his brother's house along the road and stepped out to pick his family and money leaving the car locked. Barely 40 minutes after, one of the people that attended his nephew's birthday told him and the brother that the small window of his Mitsubishi Tryon registration number ALZ 4272 was broken into and when he checked, he found that the motor vehicle had been broken into and two of his laptops HPs, MTN Modems, office documents and the reflectors which were property of Zambia Bureau of Standard and his personal documents missing from the front passenger seat, and reported the matter to Kabwata police station, and also informed his supervisor, Inspector manager, and Assistant Director Inspections, and flew out to South Africa. And when he returned on 22nd February, 2017, he was told by Mulenga a driver

from his place of work that someone was found wearing the Zambia Bureau of Standard reflector and was apprehended, and that he was required to accompany the heard of security to Kabwata police where they went on the day that followed.

When cross examined by A1, he reiterated that there were two laptops in the car and only one was stolen.

When cross examined by A2, he said he did not see A2 where the things were stolen from.

There was no re-examination.

PW2 was Ellison Mutenge, the Chief Security Officer at the Zambia Bureau of Standard, who recollected that on 22nd February, 2017, around 10:00 hours, his boss David Silungwe called and asked to meet him along Chachacha Road apposite ACC building at Kulima Tower, he rushed there and met David Silungwe who handed A1 over to him who wore the Zambia Bureau of Standard reflector for inspectors and took him to Kulima Tower police post as an impersonator. Later he was told by David Silungwe that a Zambia Bureau of Standard motor vehicle for Choma branch was broken into and a laptop, Dongo, and reflectors all valued at K5, 600.00 were stolen. He said A1 who he came to know as Wilson Mweene when interviewed in his presence, A1 revealed that he was with his friend Rodgers Katumoya, and he and the police officers drove into town along Nkwazi Road and apprehended A2. He identified the reflector, and also identified the two accused in the dock as Wilson Mweene and Rodgers Katumoya.

Both A1 and 2 never cross examined this witness, consequently there was no re-examination.

PW3 was Davide Silungwe the Senior Administrative Officer at Zambia Bureau of Standard who averred that on 18th February, 2017, a Zambia Bureau of Standard Inspector Stanley Mwanza (PW1) reported to him that when he visited

Kabwata, his Zambia Bureau of Standard motor vehicle namely Mitsubishi Tryon registration no. ALZ 4272 was broken into and the Zambia Bureau of Standard laptop, reflector jacket and internet Dongo were stolen, and that the matter was reported at Kabwata Police post. He avowed that on 22nd February, 2017, around 09:00 hours while he was driving along Nkwazi Road and he was just about to join Chachacha Road, he saw A1 wearing a Zambia Bureau of Standard reflector, he told the driver to pull over and asked A1 to jump onto the motor vehicle and drove Zambia Bureau of Standard offices along Nkwazi Road where he asked Inspectors if they could recognise A1, and when he could not be recognised him, he asked him where he got the reflector from and he answered that he just bought it from someone, and at that point he was taken to the police by Mr Mulenga who he met at ACC building at Kulima Tower building. He valued the stolen items K10550.00. He identified the reflector P1 and also identified A1 in the dock as the person that he apprehended.

When cross examined by A1, he restated that A1 told him that he bought the reflector from someone.

There was no cross examined by A2, and there was no re-examination.

PW4 was Detective Sergeant Mutondo Elias of Kabwata police station who stated that on 27th February, 2017, around 17:00 hours, he was allocated a docket of theft from motor vehicle, and called and interviewed Stanley Mwanza (PW1) who told him that he parked the Mitsubishi Tryon registration no. ALZ 4272 white and blue in colour and went to pick his family from his brother's house, and that when he returned to the motor vehicle, he found that it had been broken into and a laptop, reflector and MTN internet Dongo the property of the Zambia Bureau of Standard were missing. He interviewed Mr Mwanza who was in the company of the Chief Security Officer on how he apprehended A1; he also interviewed A1 who was already in police custody, and A1 told him that he was a wheelbarrow pusher and that he just bought the reflector from Rodgers Katumoya and immediately wore it but unfortunately collided with

officers from the Zambia Bureau of Standard who apprehended him and took him to the police. He vowed that A1 led him and officers from Zambia Bureau of Standard to the apprehension of A2 within town, and when interviewed, A2 denied having had sold the reflector to A1 and that never at any given time did he have the same and that he did not know A1. But when asked where he was on 18th February, 2017 around 19:00 hours, he admitted that he was in Kabwata area though denied having broken into the motor vehicle in question. Upon being unsatisfied with the explanations given, he charged and arrested the two accused for the subject offence, and that when warned and cautioned, both accused denied the charge. He went on to identify the reflector which he tendered in evidence as P1. He also identified A1 and A2 in the dock.

The two accused never cross examined this witness and consequently there was no re-examination.

This was the close of the prosecution case and after a very careful consideration of the prosecution case the accused was placed on his defence, and section 207 of the criminal procedure code was complied with. A1 gave sworn evidence and A2 gave unsworn evidence and both called no witness.

DW1 was Wilson Mweene A1 who stated that on the date he could not remember, but around 09:00hours on his way from Shoprite, along Cairo Road he bought a reflector from Rodgers Katumoya (A2) and when he finished his day business he knocked off and went home. The following day in the morning he received a call from Mr Mumba the owner of the premises where he parked his wheelbarrow who asked him to buy him some food after delivering the goods for the client, and that on his way to City market he met people who duped him that they wanted him to help them load some goods but when they reached their offices they took pictures of him and took him to Kulima Tower police post where he was deposited in cells. He was later taken to Kawata police station where he was asked about the reflector and his response was

that he just bought it from Rodgers Katumoya(A2) in Town and led the police to his apprehension.

When cross examined by A2, he said he and A2 were the two of them when he bought the reflector from A2 at K10 after bargaining, and the time was between 09:00 hours and 10:00 hours.

When cross examined by the Public prosecutor, he said he was illiterate but reiterated that he bought the reflector from and that he saw that it had some writing but he could not read. He averred that he did not know what was going on his heard that he did not ask other people what was written on the reflector. He said he had known A2 barely two weeks before the incident as A2 had gone to a restaurant behind Shoprite to see a certain lady who was A1's boss and that he had just been in Lusaka for a week when the incident happened, though that he had earlier stayed in Lusaka about a year ago, before going back to the farm. He stated that the man that called him was Mr Mumba who he had also known just for a year, and that the same Mumba could confirm that he had just been in Lusaka for a year. He deposed that he bought the reflector at K10.00 where he got the reflector and he and A2 were just the two of them when they transacted, but he used to find the accused washing cars and never saw him selling reflectors. He denied knowing anything about the reflector, and opined that A2 denied the charged because that was how his friends coached him.

There was no-examination.

DW2 was Rodgers Katumoya A2 herein who stated in his unsworn statement that on the day in question, at about 16:00 hours whilst along Nkwazi Road washing motor vehicles, he was apprehended and put onto the motor vehicle where A1 was, and that the two of them were taken to Kabwata police station where he was told that he and A1 had stolen a reflector from a motor vehicle. He added that A1 told the police that he was with his friend and another person when he committed the offence and led the police to the apprehension

of his friend who was also brought to the police, though that A1's friend and his (A2) friend were released after 20 days.

This was the entire evidence in this case, and after a very careful consideration and to the core, I find that it is undisputed that PW1 parked his Mitsubishi Tryon registration no. ALZ 4272 blue and white in colour in Kabwata area along the road, and having had locked the doors, he went to pick his family at his brother's house, and that when he checked upon being tipped by someone that his motor vehicle had been broken into, he found that it had been broken into and the laptop, reflector and MTN Dongo were stolen the property of The Zambia Bureau of Standards. It is common cause that A1 was found wearing the Zambia Bureau of Standards reflector for inspectors P1. The accused were arraigned for the subject offence adding that the two were the one that broke into the motor vehicle in question and stole the item in issue but both accused denied the allegation.

Therefore, the question that falls to be considered is who then broke into PW1's Mitsubishi Tryon registration no. ALZ 4272 blue and white in colour and stole there in the items in question, was it the accused or somebody else, and did that person steal the said thing or not, what evidence is there to buttress the prosecution's evidence.

Section 264. (1) of the Penal Code chapter 87 of the laws of Zambia provides that:

Every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen.

- (2) *Every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.*

In this case the laptop, reflector and MTN Dongo all were inanimate things and were capable of being stolen as soon as they were taken from the Mitsubishi Tryon registration no. ALZ 4272 blue and white in colour.

Section 265. (1) of the Penal Code chapter 87 of the Laws of Zambia provides that:

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with an intent permanently to deprive the general or special owner of the thing of it;

The sum of the prosecution's evidence is that the items in question were the property of Zambia Bureau of Standards and at the material time, PW1 was the special owner, and it is clear that whosoever took the items in issue from the motor vehicle named above, did so fraudulently knowing very well that the same was not his, still more so that he was not allowed to break into the motor vehicle Mitsubishi Tryon Registration no, ALZ 4272 blue and white in colour and take the item in issue. Above all, the said items were never given back to the owner, clearly the person who took them intended to deprive PW1 as special owner or indeed the Zambia Bureau of Standards the lawful owner permanently, as the same property was in fact not recovered.

The question therefore, who then broke into PW1's motor vehicle and stole the said items stated on the indictment, was it the accused or some other people?

PW1 avowed that on 18th February, 2017, when he went back where he had parked his motor vehicle mentioned above upon being told by someone that came to attend his nephew's birthday, he found that it had been broken into and the items mentioned above were missing. Clearly, he did not see who

broke into his motor vehicle and stole there in the items in question. Whereas PW2 averred that he found A1 wearing the ZABS reflector and apprehended him and later handed him over to PW3. Therefore, would A1 be said to be the one that broke into PW1's motor vehicle and stole the items in question or not, what evidence is there?

A1 said he just bought the reflector from A2 along Cairo Road in Town but A2 denied the assertion, and denied knowing A1 and that he never even saw the reflector in issue but that he was apprehended by the police because A1 led them to him.

From the evidence above it is palpable that there is no direct evidence to show that either of the two accused persons broke into PW1's motor vehicle in Kabwata area and stole the things mentioned above, but what is there is circumstantial evidence. What gives rise in the circumstances, has the evidence taken the case out of the realm of conjecture so that it has attained such a degree of cogency which can permit only an inference of guilty that the accused committed the alleged offence charged or not. In the case of **David Zulu v The People** (1977) Z.R. 151 (S.C.) it was held that:

- (i) *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 fact in issue and from which an inference of the fact in issue may be drawn.*
- (ii) *It is incumbent on a trial judge that he should guard against drawing; wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The 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.*



In the present case, PW2 said when interviewed in his presence, A1 revealed that he was with his friend Rodgers Katumoya, and he and the police officers drove into town along Nkwazi Road and apprehended A2. PW4 stated that A1 told him that he was a wheelbarrow pusher and that he just bought the reflector from Rodgers Katumoya; and PW3 stated that he asked A1 where he got the reflector and he answered him that he just bought it from someone.

On the other hand, A1 did not discredit PW3's evidence that he said he was with A2 when he broke in the motor vehicle in question, that notwithstanding, there is a discrepancy between PW3 and 4 with regards A1's confession, but what looms large is that A1 led the police to the apprehension of A2. PW4's evidence is exactly what A1 stated that he just bought the reflector from Katumoya and led the police to the apprehension of A2; and though A2 denied having sold the reflector to A1, he is on record that on 18th February, 2017, around 19:00, he was also in Kabwata, and this was the day, time and place where, and when PW1's Mitsubishi Tryon was broken into. Evidently, the only inference that can be drawn from these fact is that A2 was the one that broke into PW1's Mitsubishi Tryon and stole the items in question as this is an odd coincidence that A2 could find himself in Kabwata area around the same time and place when the Mitsubishi Tryon was broken into and later to be point at as the person who sold the reflector that was one of the things that went missing from PW1's Mitsubishi Tryon. A2 denied that he did not know A1, but A1 stated that he knew A2 as he used to see him at the shop and that he used to wash motor vehicles in town, and, A2 is on record that he used to wash cars in town, apparently the two knew each even before the incidence.

However, what remains to be resolved is whether A1 was involved or not, in the case **George Nswana v the People (1988 - 1989) Z.R. 174 (S.C.)** it was held that

The inference of guilt based on recent possession, particularly where no explanation is offered which might reasonably be true, rests on the absence of any reasonable likelihood that the goods might have



changed hands in the meantime and the consequent high degree of probability that the person in recent possession himself obtained them and committed the offence. Where suspicious features surround the case that indicate that the applicant cannot reasonably claim to have been in innocent possession, the question remains whether the applicant, not being in innocent possession, was the thief or a guilty receiver or retainer.

- (ii) The distinction is that a receiver receives with guilty knowledge at the time of receipt while the offence of retaining involves guilty knowledge of theft but acquired after the receipt of the property.

A1 is on record that he knew A2 as car washer and never had seen him selling the reflector in question more so that it was written ZABS but still more failed to ask him where he got it from, and that was the story he told the arresting; and that is what PW3 also stated. And PW2 said when A1 was interviewed in his presence, A1 revealed that he was with his friend Rodgers Katumoya, clearly there is a patent disparity between PW2' testimony and that of PW3, 4 and that of A1 as PW3, stated that A1 told him that he bought it from someone and PW4 stated that A1 told them that he just bought it from A2, and in his defence A1 stated that he told the police that he bought it from A2 and led the police to the apprehension of A2. In **Dorothy Mutale and Richard Phiri v the People (1997) S.J. 51 (S.C.)** it was held that

- (i) *Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference;*
- (ii) *There was nothing in this case to exclude an inference favourable to the accused*

In this case, obviously, the disparity between the A1, PW3 and PW4 and that of PW2 has created a doubt in my mind on whether A1 committed the alleged offence or not.

The question that remains is did the accused have a claim of right over the said items. In the case **Andine Ali Tembo v the People HJA/12/2011**, it was held inter alia that:

1. *The defence of bona fide claim of right is not confined to those cases where an accused person believes the property in question was his or has become his; it is applicable also in those cases where the accused has a bona fide belief that he has the right to keep, or deal with somebody's property.*
2. *The defence of bona fide claim of right is predicated on honesty of purpose in dealing with property of others.*

It is however lucid from the facts that A1 had bonafide claim of right over the reflector as he dealt with it believing the same to be his, or that he had a right to deal with it. When all is said done there is a doubt in my mind that A1 committed the offence as he was consistent throughout from the time he was arrested to the time he testified that he bought the reflector from A2 and led the police to his apprehension. In the case of **Phiri and Others v The People (1973) Z.R. 47 (C.A.)** it was stated that,

The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction the courts have no alternate but to acquit the accused, and when such an acquittal takes place because evidence which could and should have been presented to the court was not in fact presented, a guilty man has been allowed to go free not by the courts but by the investigating officer.

In the present case, it is clear that A1 gave a reasonable explanation as to how he got to be found with the reflector, and I cannot make assumption that he took part in the commission of the crime. In **Mbinga Nyambe v The People (S.C.Z. Judgment No. 5 of 2011)** the Court held inter alia that:

1. *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.

2. *When a Court purports to draw an inference of guilt in a case of recent possession of stolen property, it is necessary to consider what other inferences may, be drawn.*

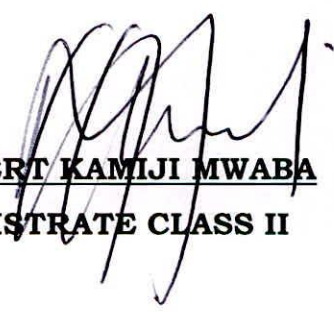
In this case, albeit A1 was found in recent possession of stolen property, in this regard, it is farfetched to infer that the only inference that can be drawn with respect to A1 is that of guilty, as there are more than one inferences that can be drawn as A1 ably stated that he just bought the reflector from A2, and he was consistent from the start of the interrogation.

However, with regards A2, A1 pointed at him as the person that sold him the reflector in question and that he is on record that he was at the same place and time when the offence allegedly happened, thus, he had the opportunity to commit the offence. His defence that he knew nothing about the reflector does not hold water as he could not demonstrate this in evidence as his testimony was not tested through cross examination as he gave unworn testimony and he never discredited the prosecution's evidence and that of A1.

For the aforesaid reasons, I find that the prosecution has not proved the offence of theft from motor vehicle contrary to section 272 and 276© of the Penal Code Chapter 87 of the Laws of Zambia, against A1 beyond reasonable doubt, thus I find him not guilty and accordingly acquit him. On the other hand, I find that the prosecution has proved the offence of theft from motor vehicle contrary to section 272 and 276© of the Penal Code Chapter 87 of the Laws of Zambia, against A2 beyond reasonable doubt, thus I find A2 **GUILTY** as charged and **CONVICT** him accordingly pursuant to section 214 of the Criminal Procedure Code Chapter 87 of the Laws of Zambia.

Delivered in open Court at Lusaka this **29th** day of **May**, 2017




ALBERT KAMIJI MWABA
MAGISTRATE CLASS II