

**IN THE SUBORDINATE COURT OF THE FIRST CLASS 2SPG/165/2016
FOR THE LUSAKA DISTRICT**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

THE PEOPLE

VS.

LIYA ONDYA



FOR THE PEOPLE:

MR. R. MALAMA PUBLIC PROSECUTOR

FOR THE ACCUSED:

**MS. JEAN LUMAMBA MAKIZI OF MESSRS-
LEGAL AID BOARD.**

BEFORE:

**MAGISTRATE G. MALUMANI SENIOR -
RESIDENT MAGISTRATE**

JUDGMENT

CASE LAW REFERRED TO:

1. Kezzy Ngulube V. the People (2009) ZR.

LEGISLATION REFERRED TO:

1. Sections 264, 265, 272 and 278 of the Penal Code Cap 87 of the Laws of Zambia.

In this case the accused stands charged with one count of Theft by Servant contrary to section 272 and 278 of the Penal Code Cap 87 of the Laws of Zambia. The particulars of offence allege that Liya Ondya on 24th October, 2016 at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, being a person employed by Hungry Lion as Controller did steal K19,708.40 cash the property of his employer. The accused denied the charge.

I warn myself at the outset that the burden lies with the prosecution to prove the guilt of accused beyond all reasonable doubt. The accused has no onus to prove his innocence. Any doubt cast in my mind upon considering all of the evidence may be treated for her benefit.

In terms of evidence, the prosecution called evidence from 6 witnesses. The accused also testified and called no other evidence. The details are on record.

In brief the evidence is this: PW1 was Portipher Mwiinga an Assistant Manager with Hungry Lion a food outlet in freedom way Lusaka. He testified on oath that on 24/10/2016 he found Liya the now accused waiting outside the shop. He had the shop keys while Liya had the safe keys. This was around 06:45 hours in the morning. When they opened he found the alarm off. He wondered what could have happened. He remembered what the Manager told him that when a certain breaker is down the alarm goes off. He went to the centre and found it down. He lifted it. When he checked he now found the alarm on. He unarmed it in the presence of Liya the accused. He then went to draw water to clean. Liya was inside.

He recalled that after some time she told him that the money she cashed the cashier was missing from the safe. She called him to the safe. He called the Manager Namakau who handled it from thereon.

He recalled that the day before on 23/10/2016 he handed K10,000.20 to the accused being the only money in the safe before she received other money from cashiers. He said when they counted with the Regional manager, Namakau, himself and the

accused, they found K1,100 missing from the main safe. He clarified that when handing over the day before, he wrote the break down of the notes in the safe. This was in the float handover book. He signed and she signed. The amount handed over was K10,000.20. and that he also handed over the only key to the safe.

PW1 identified the accused in court and the float handover book.

Under cross examination by the defence counsel, PW1 told the court that they have 2 safes, being lower and upper. In the lower safe they put money cashed from cashiers while in the upper safe they put money; petty cash which was K10,000. And that when handing over you do not know how much you expect from cashiers, as such money is still with cashiers at that time. In the morning that's when they send daily reports to the Regional Offices which are written in the morning.

The witness explained that at the point of handing over, what is handed over is petty cash for the upper safe only. The money from cashiers is handed over directly to the Manager now on duty by cashiers. This is why when one Manager hands over, it is not known how much will come from cashiers. This is the money which is put in the lower safe.

He said cashiers are given forms to sign for the amount cashed in to the recipient manager. The cashier sign and the Manager sign. And that the Manager does reconciliation in the morning of the following day.

He maintained that daily reports are sent the following day.

He said when the incident took place he was 3 days old at the branch. He clarified that the shop was not broken into. He said the signing in the book was for the money handed over to the accused on 24/10/2016. He admitted that she did not go outside after the shop was opened and that she was not inspected to know if she had money on her.

He disputed the insinuation that keys at the freedom way outlet once got lost.

PW2 was Taonga Vwalika a General Assistant, a cashier. He testified on oath that on 24/10/2016 around 15 hours they closed the shop. He had made about K2,974.70 which he handed over to Liya the Manager and both signed on the cash up slip. He identified the up slip form in court and the reconciliation form which the accused did not sign. On ID2 the reconciliation form which the accused did not sign, he said he did not know why.

PW3 was Matani Kawele also a cashier at hungry lion freedom way outlet. He testified on oath that on 24/10/2016 he reported on duty. Around 15 hours he handed over K5,165.20 to Liya the now accused. He signed in the cash up form and the accused did not sign which he identified in court. He also identified the cash drop reconciliation. Like PW2 he stated that the following day on 25/10/2016 he discovered the money went missing.

Under cross examination by the defence counsel PW2 stated that he does not know why she did not sign both documents. He said the person who was keeping keys from 24/10/2016 to 25/10/2016 was the accused Liya. He said she was the one they cashed to. He did not know who left last on 24/10/2016 because according to him he left many people. He said it's the accused who had the keys on 25/10/2016.

PW4 was Alex Sakala a cashier also. He testified on oath that on 24/10/2016 he cashed in K7,900 plus to Liya the accused. They signed on the cash up slip which he identified in court. He also identified the other document called cash drop reconciliation form.

PW5 was Kenneth Munji the Regional Manager Hungry Lion Central Region. He testified on oath that on 25/10/2016 the store Manager called him around 8 hours. She told him money was missing from the safe. At the branch he found 3 Managers namely Namakau, Potpher (referring to PW1) and controller Liya (accused).

He enquired and was told the sales for 24/10/2016 including part of the main float cash was missing. He was told there was no sign of tempering to the store. The Manager said the keys for the main float safe were with her (referring to the accused).

He then requested the accused Liya to open the 2 safes small and big. They verified that all the money for 24/10/2016 was missing. And that part of the main float K1,100 was also missing. The total sales missing was K18,607.40, total value lost was K19,608.40.

He reported the matter to police. He said Liya worked for about 3 years. He identified the accused in court.

He further stated that of K10,000 which is supposed to be found in the main float, they found K8,900. On petty cash what missed is K1,100.

He clarified that the company did not owe the accused. PW5 identified the store float sheet.

Under cross examination by the accused, PW5 told the court that he was aware the alarm was off on 25/10/2016 but it was because of power outage, not force alarm. He denied that in the 1st week of October, 2016 there was a report of missing keys.

He said she is the one who had the store keys. And that she also had both safe keys. He denied that he faced problems with her before.

PW6 was Nicholas Walaya a detective sergeant of city market police post. He testified on oath that on 25/10/2016 he was on duty when he was assigned to investigate a case of theft by servant. He said Kenneth Munji on behalf of hungry lion complained that between 24/10/2016 and 25/10/2016 the controller at freedom way hungry lion Liya Ondya had stolen K19,708.40.

He said he was availed with cash float reconciliation forms and cash up slips for 3 cashiers, cash handover book where they indicated K10,020.00 cash handover and the store float sheet indicating the amount found in the safe on the morning of 25/10/2016 being K8900 instead of K10,020 PW1 had handed over.

He said K1,100 was stolen, while sales were K18,608.40 making a total of K19,708.40 stolen from the safe.

He recalled that he interviewed the accused. Upon not giving him a satisfactory reply he made up his mind to charge and arrest her for the offence of theft by servant. Under warn and caution statement in English language she understood well she made a free and voluntary reply denying the charge. The arresting officer identified all the exhibits cash up slips, cash drop reconciliation forms, the cash handover book and the store float sheet. They were produced and marked exhibits P1 to 6 on record.

Under cross examination by the defence counsel, PW6 told the court that the theft took place between 24/10/2016 and 25/10/2016. He said the accused was in possession of safe keys though she did not work alone.

He denied that Potpher (PW1 was found with extra keys to the shop. He acknowledged though that it is him who handed over to the accused.

He recalled that he apprehended the accused on 25/10/2016 but found with nothing.

On why he charged the accused, he said she is the person who was receiving cash from the cashiers. She had the responsibility to secure the cash in the safe and the only person with the key to the safe. He did not agree that another person had a set of keys that day.

At the close of the prosecution case, the accused was found with a prima facie case and placed on her defence. She elected to testify on oath. She deposed that on 25/10/2016 she reported on duty. She was working at hungry lion freedom way as controller. She said the manager on duty reported missing keys to administration. Later those keys were replaced. That it is safe keys that had missed.

On 24/10/2016 she reported for work in the morning. After Portpher the senior controller opened the shop she entered. He handed over the safe key to her around 10 hours. At 15 hours she started collecting money from cashiers.

She wanted to do the banking but was unable to count all the money. He told her he was going to send the report the following day. She left the cash up and reconciliation unfinished.

Adding that after taking about 15 minutes at the changing room she got back. She asked him to give her the shop keys but he refused. She allegedly asked why he handed over the safe to her. She agreed that there was money in the sum of K10,000 when he handed over to her. But that she did not count how much was in the lower safe.

He then went to put a code for the alarm. The next day on 25/10/2016 she reported for work in the morning. Potpher opened the shop. She joined him. The alarm was off. She explained that if there was no power the alarm is off. When it comes it continues off. Adding that there was power in the morning but continued off. She could not explain the meaning of that. She stated that the alarm doesn't go off on its own. If there was power cut it comes on when power comes.

She said someone could have tempered with the alarm.

She said she discovered the money was missing on 25/10/2016. But checked everything was okay.

She recalled that when she checked in the safe she found no money. That Potpher was there when she opened. She stated that she did not verify how much was made the previous day and the work did not finish.

That in the top safe petty cash of up to K1,100 was found. She said she reported to him (Potpher PW1) that she did not find the money. And that he went to check. I note that she earlier said Potpher was present when she opened the safe yet she now said she report to him and went to check.

She alleged that there were other keys he was putting on the floor. And that the Manager was called to check (referring to the Regional Manager PW5). And that he

came and verified that the money missed. She said Mr. Munji verified that the top safe had K8,900 in coins. He verified K1,100 used for petty cash. She wondered why he said K1,100 was missing. I must pause here and state that this is not the correct assertion by PW5 Munji. What he said is that of the K10,000 petty cash what was found is K8,900. That what missed is K1,100.

Under cross examination by the learned public prosecutor, the accused admitted that she was on duty on 24/10/2016. That she collected money from cashiers at close of business. And that she had the safe keys up to the following day 25/10/2016 when she reported. That she did not do the banking. She said she did not know the amount.

She recalled that she is the one who opened the safe the following day. She admitted that when PW1 handed over to her there was a K10,000 infact in the safe.

She clarified that she had both keys, for the lower safe and upper safe.

She however denied stealing the money in issue.

At the closed of the defence case, the defence indicated that they would file final submissions. I directed the same to be filed on or before 19/5/2016. None were filed.

This is the evidence as a whole in brief.

Form the evidence in sum total, I find no dispute and therefore a fact that by 24th and 25th October, 2016 when this matter arose, the accused was working at hungry lion freedom way outlet in Lusaka. She was serving as a controller. She was on duty on 24th and 25th October, 2016. It is a fact not in dispute that on 24th October, 2016 she took over from PW1 Potpher. She got both safe keys, that is for the lower and upper safe.

It is not in dispute that at the time of handover, there was K10,000 petty cash in the safe which she acknowledged in the cash handover book. It is not in dispute that as controller on duty, she received cash sales from all the cashiers on 24/10/2016. This

money was not in the safe the following day on 25/10/2016. This was in addition to K1,100 from the petty cash of K10,000 which was found missing from the safes.

It is not in dispute that the 2 cashiers namely PW2 Taonga, Matani and PW4 Alex were on duty on 24/10/2016 and handed over their cash sales to the accused. They identified the cash up slips on which they handed over their cashing to the amounts of K2,974.00, K5,165.20 and K7,900 respectively.

It is also not in dispute that it was the administrative procedure of hungry lion outlet that the controller on duty is in possession of the safe keys and receive the day's cash sales at close of business.

And lastly it is not in dispute and therefore a fact that when the shop was opened on 25/10/16, the accused is the one who opened the two safes since she is the one who had the keys. And the safes were not tampered.

The dispute is on whether or not the accused stole her employer's money between 24th and 25th October, 2016.

From the evidence and arguments which arose, I note that the accused raises a defence that her fellow controller Potpher (PW1) could be responsible for the theft. She has raised the following:

1. That on 24/10/2016 he persistently demanded to handover to her and asked why.
2. That he is the one who put the alarm code the day before. The following day it was off. She made aspersions suggesting that he may have tampered with the alarm system.
3. She alleged that a Manager on duty reported missing keys to the administration before. And that PW1 had some other keys which he put on the floor at the time she called him to check the missing money in the safe on 25/10/2016.

I took time to examine these arguments and will state that as the trial court I had the privilege to observe the demeanour of all the witnesses when they testified.

On the first argument that the accused persistently demanded to handover to her, the evidence on record tend to show that it was a routine requirement that the controllers take over from each other from time to time. It was not shown that PW1 decided from without that he hands over to the accused. In any event she could have declined or reported to other senior officials such as PW5 Munji the Regional Manager.

On the alarm system, firstly the evidence on record show that PW1 was only 3 days at the outlet. I wonder how he could have manipulated the alarm system within these few days. In addition, he made a very convincing explanation, that from what he was told by the manager, the alarm could go off when a certain breaker was down. And when he went to check he found it down. He lifted it and the alarm was on. PW5 the Regional Manager supported this explanation. He said it was due to power outage not force alarm or tempering.

On the issue of missing keys and PW1 having other keys at the time, what I note is that this was a mere claim by the accused. It is my view that if he had suspicious keys with him other than those for the shop she could have reported it to administration. I took time to observe PW1 and 5 when they testified. I did not see any dishonest on their part. I found them to be creditworthy witnesses.

In the light of the foregoing I will dismiss the accused's defence. I find it to be hollow and an afterthought.

Of course I note the discrepancy on the amount allegedly stolen. From the evidence there was K1,100 from the petty cash of K10,000 and K7,900, K5,165.20 and K2,975.70 from the 3 cashiers. This gives to a total of K16,039.90, not K19,708.40 stated on the particulars of offence and reported.

Further I bear in mind that there is no direct evidence in strict sense that it is the accused who took away the stolen money. What is there is circumstantial evidence in my view. This is because she is the only one who had the safe keys where the K10,000 was at the time of handover on 24/10/2016. The same day she received cash of different amounts from cashiers though she claims that she did not count it. The assertion that she was prevented to count it has no basis. There is no proper reason shown as to how she could receive money in an official capacity but not count. That is not being serious.

So having received the money around 15 hours on 24/10/2016, the question is who got it by the following day in the morning when she had both safe keys and the safes were not tampered. In addition, there is no evidence that anybody observed her when she purportedly put the money in the safe on 24/10/2016 at close of business. I will therefore draw an inference that she is the one who got the money.

In the case of *Kezzy Ngulube V. The People (1)*, the principle established is that it is safe to convict where the circumstantial evidence is so clear as to take the case out of the realm of conjecture, leading to the only irresistible conclusion that it is the accused who committed the offence.

All the essential elements of the offence of Theft by servant have been satisfied in this matter. As earlier stated, the accused was an employee of the complainant company at the time serving as a controller. She was therefore a servant. And having taken away the employer's money without excuse which came into her possession by virtue of her duties as controller the elements of theft under sections 264 and 265 of the penal code have been proved. The money qualifies to be a thing capable of being stolen, she had no right to take it from the owners being the employers, she was not owed anything as such had no bonafide claim of right and by that act she permanently deprived the owners.

There is thus no doubt that can be treated in her favour. I hold that the prosecution have proved the guilt of the accused beyond all reasonable doubt.

I find her guilty of Theft by Servant contrary 272 and 278 of the Penal Code Cap 87 of the laws of Zambia. I convict her accordingly

DELIVERED IN OPEN COURT AT LUSAKA THIS 31ST DAY OF MAY, 2017.



G. MALUMANI ESQ

SENIOR RESIDENT MAGISTRATE

