

IN THE SUBORDINATE COURT OF THE FIRST CLASS 2PG/094/17

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE

VS

AKAKAMBAMA SHOWA

CORAM: HON. R. MWANSA

FOR THE STATE: MUKOMBWE N AND KALABA S

FOR THE ACCUSED: IN PERSON

JUDGMENT

STATUTES

Penal Code, Cap 87

Criminal Procedures Code, Cap 88

CASE LAW

David Zulu v The People (1977) ZR 151

Mwewa Murono v the People (2004) ZR 207

Ngati and 2 others v the People (2003)

The accused in this matter stands charged with one count of Theft by Servant Contrary to Section 272 and 278 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars are that the accused between the 26th and 27th March, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia being a person employed by Musa Company did steal 2 x 18 inches metal bar valued at K300 the property of the said employer.

The accused denied the charge and the prosecution called 4 witnesses in support of the allegation against him. At the close of the case for the prosecution, the accused was found with a case to answer and was accordingly put on his defence.

It is trite law in criminal proceedings that the burden of proof lies on the prosecution to prove its case against the accused beyond all reasonable doubt and that there is no onus on the accused to prove his innocence. The accused is entitled to give evidence, either sworn or unsworn or may indeed choose to remain silent.

The accused is also entitled to call witnesses suffice to state that whichever option the accused chooses to launch his defence, the prosecution must still prove the case against him beyond all reasonable doubt.

Therefore, in order to establish the guilt of the accused, the prosecution in this case must prove each and every element of the offence charged. It must be proved that:

- *That the accused fraudulently and without a claim of right*
- *That in so acting took something capable of being stolen or*
- *That in so acting fraudulently converted that thing to the use of any other person other than the general or special owner thereof.*
- *That the property stolen was the property of their employer and it came into his possession by virtue of his employment*

As earlier mentioned, the prosecution called 4 witnesses whereas the accused gave sworn evidence and no witnesses were called; however, I shall not belabor to reproduce verbatim testimonies of each and every witness that came to court serve to state that I shall only dwell on the evidence which in my considered view, is relevant to the determination of this matter.

This was the evidence at hand. **PW1** was Dauti Mkandawire who told the court on oath that he was an employee of Musa Farms and that on 26th March 2017 he went out of the farm to go and buy some relish at around 14:00hrs when on his way he was called back by his boss Mohamed to go and load the empty sacks of flour.

PW1 went back and whilst 50 meters away from the farm he meant the accused who exchanged greetings with him and informed him that he was from the farm seeing a friend at a place where workers were packing maize later on PW1 reached his destination and loaded the sacks as instructed and later went back to buy the relish and took it home when unfortunately he was told by his wife that he forgot to buy some salt and the wife offered to go with him and so they proceeded

to go and buy the salt using the orchard route within the farm where they noticed that the ground was scratched and two iron bars measuring 12 meters were laying on the ground this prompted PW1 to tell his wife to go back and inform Clement the security guard to come to the scene and PW1 left alone to go buy the salt.

When PW1 came back with buying the salt he found Clement and everyone else shouting thief and the said Clement said that he knew the alleged thief now the accused.

The group decided to trail the footprints and managed to apprehend the accused at his house and took him to the Police Station.

The iron bars belonged to Musa Farm and they were worth K404, had lines, rust and measured 12 metres in length.

In cross-examination PW1 told the court that the accused was not with the iron bars when he met him, PW1 was not there when the accused was apprehended at 03:00hrs and that he was not there when the accused was identified by Clement.

The accused at the point of apprehension was half naked and didn't attempt to run away.

There was no re-examination.

PW2 was Clement Siyambango who gave evidence on oath that he was a Security Guard at Musa Farms and that on the 26th March, 2017, at around 15:00hrs whilst in the company of his sister-in-law

saw the accused one of the general worker at the said Musa Farm and that upon meeting the accused PW2 and the accused exchanged greetings and chatted about beer and the accused left.

Far along PW2 was called by PW1's wife after she and PW1 had passed through the orchard that there were some iron bars found on the ground in the orchard.

PW2 decided to go the orchard where indeed he found 12 metres of iron bars laying besides some converse sneakers foot prints upon that discovery PW2 immediately suspected the accused as he saw him wearing some converses earlier that day.

PW2 together with the two others including PW1 returned to the orchard around 19:00hrs as they had thought that the person who dragged the iron bars to the orchard was likely to go back to collect them.

PW2 and the team waited from around 23 hrs - 01 hrs the next day whilst hiding in the trees and had put some touches to have enough light so as to be able to see the suspect when he comes to get the items.

Around 01:00 hrs they saw the accused came to the orchard whilst pretending to be drunk moving back and forth about 10 meters away, he then drew near and got one of iron bar and put it under the tree and got the other and put on his shoulder but immediately he saw PW2 the accused started to run away.

PW2 dismounted from the tree tried to chase the accused but he dropped the iron bar on his foot and PW2 screamed at him to stop as it was pointless to run when they will still follow him nonetheless the accused still managed to run away after strangling with PW2.

PW2 identified the two iron bars as been 12 metres in length, brown in colour and worth the total same of K404.

In cross Examination PW2 told the court that he meant the accused first around 15:00hrs and at that time the guard at the gate was Mwape.

That it was during the night around 01:00hrs when the accused went back to get the iron bars but PW2 couldn't catch him as he was overpowered when the accused dropped one iron bar on his foot and eventually escaped.

The matter was then reported to West Hood Police Post where they were told to go and apprehend the accused themselves from his house and that it was Mr. Nyemo the night guard who caught the accused.

PW2 was with Mr Nyemo, Boyd Simukoko and PW1 when the accused was apprehended from his home whilst he was half naked and that the accused took his gum boots and trousers with him.

PW2 told the court further that the accused was wearing converse sneakers in the day and gum boots in the night which were left at the

police post hence it was the police on duty to bring the boots not PW2. The said boots were yellow and black in colour.

There was nil in REXN

PW3 was Archlord Nyemu who testified on oath that he worked as a security guard at Musa Farm along Mumbwa Road and that on the 26th March 2017 around 17:00hrs he was on his way to buy talk time when PW2 informed him that something happened concerning iron bars in the orchard near the oranges.

PW3 proposed to PW2 that they needed to go there later so that they catch the person who got the items and he called his colleague Boyd Simukoko, PW2 and Dauti Mwandimina. They all four teamed up and hid in the orchard trees until the night, however around 01:00hrs PW3 left the orchard and decided to patrol the area when he was told by PW2 that the thief now the accused came back and was seen with the torch light coming to the orchard to pick the iron bars and that they managed to trail him using foot prints for his gum boots which he wore until the gate however he jumped over the farm gate and escaped.

PW3 advised PW2 that the matter be reported at West Hood Police Post and so did they nonetheless they were told by the officers on duty to go and apprehend the accused from his home themselves.

PW3 and the team did the needful by proceeding to the accused's home as led by PW2 who knew the accused home and they managed to apprehend the accused whilst he left the door for his house slightly

open but was not answering the door after they knocked for five times this moved the team to push the door and force themselves inside and apprehended the accused, took him to the Police Post and also carried the boots.

PW3 identified the iron bars as been 12 metres in length, Y20 and valued at K440 and the accused in the dock positively.

In cross-examination PW3 told the court that he knew the accused only facially and that they worked at the same farm and that the accused worked from 3th March 2017 to 26th March 2017.

The accused was apprehended by the team on 27th March 2017 and they didn't find him with iron bars.

PW3 was not in the milling and that he was there when the accused was apprehended and that the accused boots were trailed and that he was found bending towards the door at his house after 01:00hrs and that he was taken to the police half naked because he was resisting arrest.

PW3 could identify the gum boots because of the wet mud underneath which was as red as the one in the farm, the prints were trailed up-to the accused home.

In REXN PW3 told the court that the footprints for the accused were trailed

The last state witness (**PW4**) was Charles Nyirenda who told the court that he was a police officer at West hood police station and that on the 27th March 2017 he was allocated the docket of theft by servant of Y20 iron bars the property of Musa Farm by a Musa Farm Employee now the accused.

That upon receipt of docket PW4 interviewed the suspect already in custody over the alleged offence but he couldn't give satisfactory answers this prompted PW4 to charge him with the subject offence under warn and caution statement the accused gave a free and voluntary reply denying the charge and was later detained pending court process and later released the accused on bond.

PW4 produced ID1 as part of evidence and this was admitted as P1.

PW4 further brought the APB book and showed the court that at the time the accused was brought to the police he was with the gum boots and that the said boots were given back to the accused.

He recognized the said APB book and lend the court to the necessary page as having the accused name, the item of prisoner and the officer in charge's name and this was admitted as P2

There was nothing in Cross Examination.

As earlier mentioned, at the close of the case for the prosecution the accused gave *viva voce* submissions that he couldn't be found with the case to answer because the evidence was strictly based on the fact relevant to the issue i.e that he was found with gum boots which

had the same red soil as that of Musa Farm when it was not possible that Musa Farm was the only place with red soil.

In contradiction the state through Mr Mukombwe responded that they didn't only rely on the circumstantial evidence but also on direct evidence that the accused was seen by PW2 a known person to the accused coming to the Orchard to pick the stolen items and that there was enough light for him to be properly identified therefore the identity of the accused is not a disputed fact as in fact the accused person is well-known to all three witnesses.

That marked the close of the case and the accused was found with a case to answer and was accordingly put on his defence and he gave evidence on oath as mentioned in the preamble.

DW1 was Akakambama Showa who acknowledged having been working at Musa Farms and that on the 26th March 2017 he went to the farm at around 14:00hrs and that he went to collect his salary from his boss when he was told that the boss was not around on that day.

That he proceeded to his home but to his amusement his friends came in the night to his house and took him by force to the police station without letting him even dress up, he was taken half naked to the police station and that they also beat him.

The said friends worked with him at Musa Farm and that they were alleging that he stole the iron bars but he knew nothing about them.

DW1 was later detained at the police post and he was happy that the matter came to court so that the witnesses can tell him why they decided to implicate him.

That in fact the people who testified are not even the people who caught him, PW1 was not even there it was only PW2 who apprehended him and started circulating the story to his friends.

In cross examination DW1 told the court that he indeed went to Musa farms on the momentous day and that he worked there for the period of three months one week and that it was possible to get paid on Sunday or any other day. DW1 didn't however challenge PW3 that no one worked on Sunday in that he was allowed to enter the premises on Sunday when he found Mr. Mpatso and that there were other people working in the farm such as Chris and Mubita.

DW1 denied wearing converse sneakers on that day and told the court that he wore play boy smart shoes neither did he wear the alleged gum boots but the gum boots found at his house were carried and taken to the police when he was apprehended but said gum boots didn't have wet mud on them.

DW1 also acknowledged having signed the APB book surrendering the boots.

In Re-examination DW1 told the court that the gum boots were not even his he just forgot to tell the police.

This was the evidence before court. I have very carefully considered the evidence on record and I find that the accused was an employee of Musa Farm and that he went there on the 26th March 2017 in the Musa Farms. My findings are based on the evidence of **PW1** that the accused was one of the workers at Musa farm and that on the day of events he was seen on Sunday afternoon in the Musa Farms by PW1 who was going to buy relish and that upon PW1's return he went back to buy salt when he found that the iron bars were laying on the ground in the Orchard this was confirmed by **PW2** who further said that he also saw the accused who he knew personally in Musa Farms wearing converse sneakers at 15:00 hrs on Sunday afternoon and that the accused chatted with PW2 over beers and left but later on PW2 was called by PW1's wife that there were some iron Bars hidden in the Orchard and PW2 saw the converse foot prints on the ground and concluded that they could have been for the accused who was seen wearing converses earlier and that later PW2, PW1, PW3 and Boyd Simukoko arranged trap the accused by hiding in the trees as they had a belief that there was a likelihood of him coming back, they set the trap at 19:00hrs, waited up-to 23:00 hrs. and at around 01:00 hrs. indeed the accused went back to pick the iron bars in the orchard whilst pretending to be drunk, that he first put one iron bar down and put another on his shoulder and was quickly recognized by PW2 with enough light coming from the torch. The accused then tried to run away and strangled with PW2 who warned him that it was pointless to run away in that even if he did they were still going to follow him

nevertheless the accused still managed to escape after hitting PW2 with one of the iron bars.

PW2 and the team later trailed the accused foot prints from his gum boots he wore in the night and the matter was reported to West Hood Police Post where the team was told to go and apprehend the accused themselves which they did and found the gum boots which were taken together with the half-naked accused to West hood Police Post, the evidence supported by PW3 who added that the red mud found on the accused boots was the one found in the Musa Farm and that on the day of events the soil was wet in the farm hence the foot prints engraved in the orchard ground.

Further PW4 brought the APB book to prove that the accused indeed wore boots on the day of apprehension.

In defence the accused submitted that he wasn't seen that night as the evidence tending to implicate him was based on the gum boot's red soil which could have been from anywhere else other than Musa Farm and added that the only person who apprehended him PW2 and that because of that he has lost his job and he further protested the manner in which the apprehension was done.

Applying the law to the facts section 272 and 278 of Penal Code, Chapter 87 of the Laws of Zambia provides interalia;

“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."

"If the offender is a clerk or servant and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years."

On the other hand I am alive to the requirement of the law as regards to circumstantial evidence raised in defense as per **DAVID ZULU v THE PEOPLE (1977) Z.R. 151** that *"It is therefore 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 in our view must, in order to feel safe to convict, 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 of an inference of guilt."*

As to the current case as regards to the gum boots foot prints allegedly from the accused's gum boots, I must stress out it is not enough to warrant a conviction in that there were several other people on the farm who could have worn gum boots in particular more than four people are known to the court to have been on the farm on that day therefore it is not known whether it was only the accused who wore gum boots and stepped on the ground on that day.

On the other limb it also not known whether Musa Farm was the only farm which had red wet soil on that day, it is therefore not conclusive that based on the above piece of evidence the case has been taken out of the realm of conjecture neither has it attained the notch of intensity that the only inference will be that of the accused guilt nonetheless it is worth noting that the court shall not solely place its reliance on the facts relevant to the issue as there is direct evidence from PW2 that he knows the accused and that the two conversed about beers in the afternoon around 15:00hrs on the day of events thus I am meant to believe that the two are familiar to each other especially considering the fact they worked for the same farm and PW2 was even able to lead the team to the accused's house at this point therefore the identification is not a disputed fact hence there is no doubt that the accused was the one who was seen by PW2 in the night at the crime scene.

The question which arises though is whether PW2 falsely implicated the accused, from the facts above it appears that the two gentlemen were friendly during the day accordingly there is nothing known to the court for PW2 to falsely implicate the accused.

At this juncture It is must be overly emphasized that where the element of false implication arises but is eliminated as regards to identification the court in the case of **Ngati and 2 others v the People (2003)** upheld the high court decision that the "*court is competent to convict on the testimony of a single witness*"

As such the court is sound to hold that PW2 saw the accused committing the alleged offence therefore the elements that the accused being an employee of Musa Company did get the two iron bars valued at K300 the property of his employer, the said was something capable of been stolen, he frauduantly converted it to his own use other than the special owner, the said came into his possession by virtue of his employment and that he had no claim of right to the charged property are satisfied.

From the forgoing I therefore hold further that the state has proved their case beyond reasonable doubt by successfully executing the requirement as per **Mwewa Muroso (2004) 206** that "***the standard of proof in criminal matters are beyond reasonable doubt.***"

I consequently find the accused **GUILTY** as charged for the offence of Theft by Servant Contrary to Section 272 and 278 of the Penal Code, Chapter 87 of the Laws of Zambia and I CONVICT him accordingly.

DELIVERED IN OPEN COURT ON ^{18th} DAY OF ^{July} 2017

IRA WITHIN 14 DAYS



HON. MWANSA R