

**IN THE SUBORDINATE COURT OF THE
FIRST CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA**

(Criminal Jurisdiction)

2SPD/049/2017



BETWEEN:

THE PEOPLE VERSUS MARTIN LUKURANGA

**Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu, at 09 00 hours
this 8th day of August, 2017.**

For the People: Munenga (Public Prosecutor)

For the Accused: In Person

JUDGMENT

STATUTES REFERRED TO:

- 1. Constitution of Zambia, Cap 1, Art 18**
- 2. Penal Code, Cap 87, ss, 8, 265, 276**

CASES REFERRED TO:

- 1. *Woolmington v. DPP* (1935) ALL E.R 1**
- 2. *Mwewa Murono v. The People* SCZ judgment No. 23 of 2004**
- 3. *Kalebu Banda v The People* (1977) ZR 169 SC**
- 4. *Phiri and Others v The People* (1973) ZR 47 CA**

The accused, Martin Lukaranga stand charged with the offence of theft of goods in transit contrary to section 276 (c) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence are that on the 25th day of March, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, the accused did steal 600 x 50 Kg bags of fertilizer valued at K153, 000.00 the property of Jay Pandoliker which were in transit from Mozambique to Lusaka, Zambia.

The accused pleaded not guilty.

I warn myself at the onset that the onus is upon the prosecution to prove their case beyond all reasonable doubt and there is no onus on the accused to prove his innocence. The landmark decision in the case of **Woolmington v. DPP** (1935) ALL E.R 1 held that:

“In criminal cases it is the duty of the prosecution to prove the accused’s guilt beyond all reasonable doubt.”

This doctrine is lucidly entrenched in our **Zambian Republican Constitution, Chapter 1 of the Laws of Zambia** which states in **Article 18(2)(a)**:

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.”

In this regard the Supreme Court made its pronouncement in the case of **Mwewa Murono v. The People SCZ judgment No. 23 of 2004** when it held:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from the beginning to the end on the prosecution. The standard of proof must be beyond all reasonable doubt.”

The accused is entitled to call and give evidence or say nothing at all. If he elects to remain silent this does not affect the burden on the prosecution to prove the guilt of the accused to the required standard. If, after considering all

the evidence, there is any doubt in my mind as to the guilt of the accused then the accused must be given a benefit of that doubt.

Theft is defined under **section 265 of the Penal Code, Chapter 87 of the Laws of Zambia**. It appears six facts must be proved beyond reasonable doubt in order for the accused to be convicted of the offence of theft of goods in transit namely:-

1. the taking;
2. of property (goods);
3. in transit;
4. belonging to another;
5. the fraudulent; and
6. intention permanently to deprive the other of the (goods) property

Bona fide claim of right is a defence on the charge of theft and is defined under **section 8 of the Penal Code, Chapter 87 of the Laws of Zambia** and is couched in the following terms thus:

“A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.”

According to **OXFORD ADVANCED LEARNER’S DICTIONARY, Oxford University Press 7th edition at page 1572** the word “**transit**” is defined as:

“The process of being moved or carried from one place to another.”

Having laid down the legal foundation upon which the offence of theft of goods in transit can be examined, I now consider the evidence in this case. The prosecution called three witnesses. The first prosecution witness PW1, was Jay Pandoliker, the special owner of the alleged stolen goods in transit from Mozambique to Lusaka, Zambia. According to PW1, he works as logistics

manager at Exports Trading Group Limited (ETG). That his duties are booking of trucks for cargo movement, documentation of cargo, communication and monitoring of imports from a sister company based in Beira, Mozambique.

PW1 recalled on the 15th March, 2017 he was communicated to by their Beira office that goods had been loaded and destined for Lusaka. It was submitted that the goods were 600 x 50 Kg bags of urea fertilizer. That the mode of transport was by truck and trailer motor vehicle which was subcontracted from a transporter namely Petroda. PW1 stated that the details of the goods and the person assigned to deliver them were sent on the company computer system. That the accused in this matter was the driver assigned to drive the truck and deliver the goods from Beira in Mozambique to Lusaka, Zambia. It was stated that the moment the details of the goods and driver were received on the system, the witness began monitoring the truck and its load. It was submitted that the transporter would give updates up to the point of offloading. PW1 asserted that previously a certain truck from the same transporter had received fake documents prior to this case. That the said truck went and offloaded in the wrong place. PW1 submitted that the matter was discussed and the transporter promised to be monitoring the trucks on the live basis. That on the 25th March, 2017 the transporter communicated that the accused had reached Lusaka and had parked at place called Sam Fuel in Makeni. According to PW1, it was unusual as all the trucks that reached Lusaka on that day reported directly at ETG in Chinika Industrial area, Lusaka. That the transporter was instructed to keep monitoring the truck. It was submitted that early the following morning, the transporter communicated to the witness that the truck had moved during the night and was heading towards Chongwe on its way to the border. It was submitted that thereafter the transporter kept sending live updates of the movement of the truck. PW1 submitted that he contacted one Tembo from the Anti-robbery squad of the Zambia Police who deployed members of his squad to chase after the truck. That PW1 further contacted one Nyawali ETG depot manager in Chongwe whom he asked to locate the truck as

it passed through Chongwe. It was submitted that the transporter informed the witness that the truck had stopped by the side of the road in Chongwe. That the information was relayed to Tembo and Nyawali. It was asserted that Nyawali was the first to locate the truck that was parked near the market in Chongwe opposite the district hospital. The accused was apprehended by Tembo's squad.

PW1 stated that he reported the matter at Lusaka Central Police Station where he found the empty truck and the accused. That all the 600 x 50 Kg bags of fertilizer valued at K153, 000 were not on the truck. It was submitted that to date nothing has been recovered.

The witness referred to and identified export documents that were found on the truck namely: the delivery note, weigh bridge slip, commercial invoice, inspection document, goods received note, certificate of origin, bill of lading and Beira customs document which were produced into evidence as exhibits P1, P2, P3, P4, P5, P6, and P7 respectively. That there was also a Zambia Revenue Authority (ZRA) document which is proof that the truck and its load crossed into Zambia. The same ZRA document was produced into evidence as exhibit P8. That the documents were issued to the driver. PW1 asserted that the documents did not reach ETG and the same were only retrieved from the truck following the apprehension of the accused.

In cross examination PW1 stated that he has parking space at ETG yard in Chinika area which is usually limited. That on the material night he had enough space for the accused to park his truck. PW1 submitted that the company did not send an individual dressed in ETG attire to talk to the accused about where he was going to offload the goods on the truck. PW1 stated that there had been incidents in the past dealings when drivers were told to go and offload goods directly at the premises of the company clients but that prior approval is sought from the transporter. That the transporter is advised on the exact location the goods would be offloaded and that usually the

transporter would communicate to the driver to go and offload at another place. PW1 contradicted himself when he stated that ETG can tell the driver to go and offload at the client's premises. PW1 further submitted that it was the practice of the company to sometimes just give the driver a checker or person to lead the driver to a place where the company want the driver to offload. It was submitted that the checker would be dressed in a company T-shirt with company logos. PW1 stated that among the documents found on the truck is exhibit P5 which is proof that the accused delivered the goods to ETG but that the document is fake.

The second prosecution witness PW2, was Nyawali Esau, depot manager ETG Inputs Zambia limited. The witness recalled at around 05:00 hours on the 25th March, 2017 he was in Chongwe when he received a call from PW1, the logistics officer based at the head office situate in Chinika area, Lusaka. It was asserted that PW1, indicated that there was a Petroda truck from Beira, Mozambique loaded with fertilizer and that the truck did not reach the ETG yard. That the truck was diverted to go and offload elsewhere. It was stated that PW1 instructed PW2 to go and report the matter at Chongwe police station which the witness did. It was stated that PW2 found the truck parked by Finance Bank. That the witness talked to the driver and five minutes later C-Five Police Squad arrived at the scene. That the officers made inquiries and ordered the driver of the truck to lead the squad to the place he had offloaded the fertilizer. It was submitted that the driver in the company of PW2 led the police officers to a place in Kaunda Square Stage I at an unidentified garage. According to PW2 when the police officers reached the said premises they did come out of the vehicle as they did not want to alarm the situation. PW2 submitted that he and the police squad saw some people repairing cars. That the accused showed the squad where he had offloaded the fertilizer and was turned back to Chongwe to go and collect the truck that was left parked in Chongwe. The accused drove the truck at Lusaka Central Police Station.

In cross examination PW2 stated that he found the accused had parked the truck in Chongwe at 07 00 hours.

The third prosecution witness PW3, was detective constable Yotam Banda. According to PW3, he recalled on the 25th March, 2017 he was on duty in shift number 1 which begun from 18 00 PM to 08 00 AM the following day. That whilst on duty at around 05 00 hours he received a phone call from PW1. It was asserted that PW1 informed the officer that a truck laden with 600 x 50 kg bags of fertilizer from Beira, Mozambique on global positioning system (GPS) tracking was scheduled to deliver the goods at ETG, in Chinika area was last seen near Munali Secondary School. That eventually the truck was spotted on the Great East road heading to Chongwe. PW3 stated that when his team reached Chongwe they located the truck and its driver. That a search was conducted on the truck and that it was discovered that the truck was empty. According to PW3 he asked the driver to lead his squad to where he had offloaded the goods. That the driver explained that the goods had been shifted to an unknown truck at a place he was able to lead the officers. It was submitted that the driver led the officers to unmarked and unfinished garage near Munali Girls in Kaunda Square Stage 1. According to PW3 the place was deserted.

That the accused was ordered to escort PW3 at Lusaka Central Police Station. It was submitted that at Lusaka Central Police Station one Badat the manager for Petroda was called to search the truck. That when Badat searched the truck he discovered documents and money amounting to USD\$3, 181. The USD\$3, 181 comprised of 26 x USD\$100 notes; 7 x USD\$50 notes; 6 x USD\$20 notes; 11 x USD\$10 notes and 1 x 1USD\$1 was produced into evidence as exhibits P9A, P9B, P9C, P9C, and P9C respectively.

That the accused was interviewed in connection with the money. It was stated that the accused explained that he had been selling fuel on his way from Mozambique to Zambia. It was submitted that accused was charged and

arrested for the subject offence. That under warn and caution statement the accused gave a free and voluntary reply denying the charge.

In cross examination PW1 stated that he did not find in the truck any tank or drums of fuel to believe the accused's story that he was selling fuel on his way to Zambia. That PW1 did not see the fuel side tank on truck. PW1 asserted that he did not know that the side tank could carry about 1400 liters of fuel and that PW3 learnt that fact from the accused. PW3 stated that he was told that the accused sold fuel in Zimbabwe. That PW3 thought the accused realized the money recovered from the truck from payment of the whole truck load of 600 x 50 kg bags of fertilizer that were stolen.

It was submitted that according to the delivery note, the goods were scheduled to be delivered to Kalomo, in Southern Province. The witness referred to and identified all the exhibits in this matter and produced the same in evidence.

There is a sharp conflict between the evidence of PW2 and PW3. PW2 stated that when the accused led the squad at a garage in Kaunda Square Stage 1 there were people and motor vehicles that were being repaired but the team did not leave the police motor vehicle to inspect the premises on account that they did not want to alarm the situation. On the other hand PW3, the arresting officer in this matter want to mislead court into believing that the accused led the police to a deserted, unfinished and unmarked garage in Kaunda Square Stage 1. I will revisit this issue in due course.

The accused gave evidence on oath and he called no witnesses. According the accused on the 15th March, 2017 he started off from Beira, Mozambique driving a Petroda truck and trailer loaded with 600 x 50 kg bags of fertilizer destined to Lusaka, Zambia. That the accused had travelled via Zimbabwe and crossed into Zambia through Chirundu border entry port. It was asserted that the accused did customs clearance at Chirundu and after two days he was cleared at around 14 00 hours. That the accused reached Lusaka at around 17 30 hours. It was submitted that the accused parked the truck at place called

Makeni Trucking near a fuel filling station. The accused stated that he was scheduled to go and deliver the fertilizer cargo at ETG in Chinika Industrial area about 3 to 4 kilometers from where he had parked. According to the accused he decided not to park at the ETG yard as it was already getting late and there was a long queue of other trucks that had parked outside the ETG yard. The accused further contended that he parked in Makeni because he feared he would not find space as numerous trucks had already occupied the space inside and outside the ETG yard. According to the accused the guards at ETG yard only provide security for trucks parked inside the yard. That as a driver he had a duty to secure the truck and its load. That in the circumstance, it was much safer to park at Makeni than at outside ETG yard.

It was asserted that after he had parked at Makeni, the accused went to buy food. That when he came back, the guards at the place he had parked informed the accused that his boss from ETG or Petroda had come looking for him. That the boss was described as a person of Asian origin. The accused stated that about 30 minutes passed after which a young looking man clad in ETG T-shirt came. That it was getting a bit dark. It was stated that the man had documents and greeted the accused. That the man asked if the accused was carrying ETG goods. That when the accused answered affirmatively, the man informed the accused that a boss at ETG had sent the man to go and offload the goods at a location he was going to show the accused. According to the accused, he refused to go and offload at night. That the man told the accused that the fertilizer had already been sold to a client and that the goods would just be put on another truck that was waiting.

It was submitted that around 18 00 to 19 00 hours the accused in the company of the man left Makeni and offloaded the fertilizer at a place which looked like a garage. According to the accused he saw buses and taxis parked in that place. That accused also saw two trucks of about 15 tones each. It was asserted that the accused saw a person who appeared to him to be a guard. That people came at the garage and started offloading the bags of fertilizer and

loading them on the 2 x 15 tones trucks. That when the fertilizer was completely offloaded from the truck the ETG man wrote an invoice with ETG logos or exhibit P5. According to the accused, exhibit P5 is proof that the goods were delivered and received by the ETG. The accused contended that the document (exhibit P5) is a proper document from ETG and it bears all the features of the company. The accused submitted that he did not forge the document. It was further asserted that the ETG man checked all the necessary document (that exhibits P1 to P8) and upon was satisfaction the accused was cleared by the man. That the man handed back the documents to the accused who even spent a night in the car park or garage.

The accused stated that at around 05 00 hours he woke up and headed towards Chongwe. That at around 07 00 hours police officers came and found the accused who had parked to check his truck. It was submitted that the police officers made inquiries into the 600 x 50kg bags of fertilizer. That the police informed the accused that he had offloaded the fertilizer in the wrong place. That the accused was shocked. It was stated that the accused was asked to lead police to the place he had offloaded from. That the accused showed the police all the documentation relating the goods. It was stated that the accused led police officers to the place from which he had offloaded. That the police officers did not even bother to interview the people at the crime scene. It was submitted the police officers just saw the premises and ordered the accused to leave. That the accused in the company of police officers went back to Chongwe and collected the truck and went parked it at Lusaka Central Police Station.

It was submitted that at the police station the accused found ETG and Petroda officials. According to the accused the official from ETG explained to the official from Petroda that sometimes the drivers do not offload at ETG yard but directly go to offload at the client's or customer's place. That the Petroda official told the ETG official that it was the ETG system of allowing drivers transacting directly with clients that confused the accused. That the official from Petroda searched the truck that was parked outside Lusaka Central Police Station.

That money was found together with documents. It was asserted that the money belongs to the accused. The accused submitted he withdrew money from his account and changed the money into United States dollars when he crossed into Zimbabwe. The accused further stated that he had bought fuel from Mozambique about 5 drums and had put the fuel in the truck's tanks. That the fuel was sold in Zimbabwe. It was submitted that the accused wanted to use the money to buy chillers for ice cream and maheu. The accused contended that he does business back at home. According to the accused, he did not steal the fertilizer but that he delivered the same in accordance with the course of dealing that obtains at ETG. The accused further contended that in the past he had delivered fertilizer at ETG before. That the accused whilst parked outside the yard, ETG officials in a similar manner would instruct the accused to go and offload at a farmer's or client's warehouse.

In cross examination the accused refused to say that he offloaded fertilizer in a wrong place because he was led by to that place by an ETG official. It was further stated that it was not mere coincidence that a person of Asian origin had come to see him and shortly thereafter the accused saw an officer clad in ETG attire with the company official documents bearing ETG logos. The accused stated that he could not doubt the instructions that ETG wanted the accused to go and offload goods at the client's warehouse. The accused stated that he did not have any documents to show proof of ownership of the money recovered from the truck as he had changed the money from black market.

Having heard all the evidence in this matter I now make a finding of facts. It is not in dispute that at 17 30 hours on the 25th March, 2017 the accused arrived in Lusaka from Beira, Mozambique driving a Petroda truck and trailer laden with 600 x 50 kg bags of urea fertilizer scheduled to be delivered at ETG yard in Chinika Industrial area in Lusaka. Further, it is not in dispute that the truck was fitted with a GPS and its movements were being monitored on the daily 24 hours basis beginning the 15th March, 2015 when the accused started off from Beira, Mozambique. It is not controverted that daily live GPS

monitoring updates of the truck and its goods in transit were being sent to PW1 the logistics manager at ETG situated in Chinika Industrial area in Lusaka. There is no dispute that when the truck arrived in Lusaka and parked at a place called Sam Fuel in Makeni, ETG officials were fully aware of the exact location of the truck and its goods. According to PW1, it was unusual for the accused to have parked the truck in Makeni as all the trucks that arrived on that day reported or parked directly at ETG in Chinika Industrial area in Lusaka. However, it is fact that there is only limited parking space at ETG yard. According to the accused, when he arrived it was already getting dark and there was a long queue of trucks already parked inside and outside ETG yard in Chinika Industrial area in Lusaka. This evidence was not contradicted or shaken by cross examination. It was submitted that parking in Makeni was safer for the truck and its goods.

It was not controverted that sometimes drivers do not offload at ETG yard but directly go to offload at the client's or customer's place. According to PW1 the system of allowing drivers transacting directly with clients has in the past made drivers to deliver goods in the wrong places. It was PW1's evidence that it is the practice of ETG to sometimes just give a driver a checker or person to lead the driver to a place where the company want the driver to offload. PW1 further submitted in cross examination that the checker would be dressed in a company T-shirt with company logos. The accused contended that was what exactly happened on the material night. It is not in dispute that the documentation found on the truck clearly indicate that the accused had delivered the goods in accordance with the standard practice as it obtains at ETG. The goods received note (exhibit P5) bears the ETG Inputs Zambia Limited logos and is clear proof that the goods were delivered by the accused and received by the company.

There are numerous gaps in the investigation of this matter. The goods received note (exhibit P5) bears the names of Choolwe Musa as a person from the company who approved receipt of the goods and Mulako Muyunda as the

person who received the goods. There is no evidence from the arresting officer as to what steps he took regarding interviewing and possibly getting statements from said persons. Honestly, PW1 cannot merely assert in cross examination that the document (exhibit P5) is fake when the same is an ETG Inputs Zambia limited original "goods received document". How can the original document with company logos be fake when I have not been shown how the authentic document looks like? The arresting officer did not give any comments regarding the document and neither is the accused charged with the offence of forgery. When the accused led the police officers accompanied by ETG official to the place he offloaded the fertilizer, the police officers did not care to get any statements from the owner of the premises or the people found on the scene but misled court by saying that the accused led the officers to a deserted unmarked garage. These are the facts in brief.

Having made a finding of facts, I now apply the law to the facts. The main issue to be determined in this case is: whether a magistrate is allowed to fill the evidential gaps latent in the prosecution case. In addressing this issue, I placed reliance on the case of **Kalebu Banda v The People** (1977) ZR 169 SC, in which case the Supreme Court said:

"Where evidence available only to the police is not placed before court it must be assumed that had it been produced it would have been favourable to the accused."

It is the duty of the police to obtain all relevant information whether it be favourable or prejudicial to a suspect. It must be remembered that courts are mandated to act only on the facts proved before them. In the case of **Phiri and Others v The People** (1973) ZR 47 CA, Doyle, and C.J.: stated:

"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 alternative 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."

The prosecution has failed to prove the essential elements that the accused stole goods in transit. In my view, it is also possible that the goods may have been stolen by ETG officials who knew about them and the exact location the truck parked. The original goods received note (exhibit P5) from ETG Inputs Zambia limited signed by Choolwe Musa and Mulako Muyunda is evidence that the accused delivered the goods which were received by the company. What about the money found in possession of the accused? The accused gave a reasonable explanation that back home he is business man and that he wanted to use the money to buy chillers for ice cream and maheu.

In the circumstance, I have reasonable doubts in my mind and I find the accused not guilty as charged of the offence of theft of goods in transit contrary to section 276 (c) of the Penal Code, Chapter 87 of the Laws of Zambia and I acquit him accordingly. I direct that he be set at liberty forthwith.

Delivered in Open Court this 8th day of August, 2017.



HUMPHREY MATUTA CHITALU

ACTING SENIOR RESIDENT MAGISTRATE.

