

IN THE SUBORDINATE COURT OF THE FIRST
CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

SSPB/067/2017

THE PEOPLE

V.

WILSON SINFUKWE & BORNFACE ZULU

Before Hon. Mwaaka Chigali Mikalile – PRM

JUDGMENT

Case referred to:

Dorothy Mutale And Richard Phiri v. The People (1997) S.J. 51 (S.C.)

The two juvenile offenders are jointly charged with one count of theft from person contrary to section 276(a) of the Penal Code Chapter 87 of the Laws of Zambia. Particulars of offence allege that the two juveniles on 19th July, 2017, at Lusaka in the Lusaka District jointly and whilst acting together with others unknown did steal 1 cell phone valued at K 750.00 from the person of Margaret Kalumyana the property of Emmeldah Mukuka

Both juveniles denied the charge.

I warn myself at the outset that the onus is upon the prosecution to prove the case beyond all reasonable doubt and there is no onus on the juvenile offender to prove his innocence. The juvenile is entitled to



give and call evidence or say nothing at all and if he elects to say nothing, this does not affect the burden on the prosecution. If after considering all of the evidence in this case there is any doubt in my mind as to the guilt of the juvenile, then he must be given the benefit of that doubt.

In order to establish the juveniles' guilt, the prosecution must satisfy me upon each and every ingredient of the offence charged. Therefore it must prove that:

1. that the juveniles acted fraudulently and without claim of right
2. that in so acting they took property namely a cell phone belonging to Emmeldah Mukuka
3. that the said property was on the person of Margaret Kalumyana at the time of such fraudulent taking
4. that the juveniles had no claim of right to that property.

In support of its case, the state called four witnesses. The first juvenile opted to remain silent while the second juvenile opted to give a statement not on oath. No other witness was called for the defence.

PW1 was Emmeldah Mukuka whose evidence was that on 19th July, 2017, she was walking near the rail line within Chawama compound in the company of her friend Margaret Kalumyana when about 10 boys suddenly appeared from nowhere. The boys approached them. About 3 particularly targeted her while the rest went to Margaret. According to PW1, Margaret had put her (PW1's) ITEL phone in her pocket. She said she was able to see the older boy in the group getting the phone from Margaret. When asked to identify the said older boy however, PW1 identified an accused that is not part of this case who was seated in the accused's dock.

It was PW1's further evidence that after getting the phone, the group of boys walked away and only when Margaret checked her pocket, did

she realise that the phone was gone. PW1 said she tried calling the missing phone but it was off. PW1 and her friend then started shouting "thief" whilst following the boys. The boys started throwing stones at them urging them not to follow them as they denied getting the phone. Unfortunately, no passers-by helped PW1 and her friend but instead advised them to stand down as they risked being hurt by the boys. They were informed that the boys are well known in Chawama and the best they could do was report them to the police. The names availed were K2, Bonny and Bobby and that the ring leader was K2. The matter was reported to Chawama Police Station and subsequently her brothers managed to apprehend one suspect, the now J2. Later on, PW1 was informed by J2's father that the leader K2 had been apprehended. When she went to Chawama Police, she not only found the said K2 but also the person that purchased her phone. The phone was recovered. PW1 identified it in court and it was marked ID1. She said it was only two weeks old at the time it was stolen and it is valued at K 750.00.

There was no cross examination from J1. When cross examined by J2, PW1 stated that she was not sure if J2 was there when the phone was stolen as there were many boys at the scene. She said J2 was apprehended in order for him to lead the police to the group leader.

PW2 was Gift Nyirenda, a businessman that sells cell phones and accessories. It was his testimony that on 20th July, 2017, around 15h00, he was at his shop when a young man, the now J1, came and was selling an Itel phone (ID1). When asked the reasons for selling, J1 said he wanted to raise money for rent. According to PW2, he checked the phone and found pictures of the juvenile and with this proceeded to buy it at K 330.00. About four days later, J1 returned to his shop and he was in the company of police officers. He was informed that he had purchased a stolen phone and was picked up. Before his apprehension, he gave the phone to someone called Ian

that he owed money. PW2 said he directed the police to Ian and the phone was recovered following which he was released.

When cross examined, by J1, PW2 stated that J1 was in the company of his friend when selling the phone. He also stated that J1 is the one that received the money.

When cross examined by J2, PW2 stated that J1 was not with him (J2) when he sold the phone.

PW3 was Ian Silavwe who confirmed having received the cell phone, ID1, from PW2 on 24th July, 2017. It was his testimony that PW2 asked him to observe the phone for a while and if it was okay, he was to keep it. Two days later, however, he received a phone call from PW2 informing him that he was at the police station because the phone he gave him was stolen. The phone was collected from PW3 and the following day he was summoned by the police.

When cross examined by J2, PW3 stated that he never saw J2 at the time of transacting.

PW4 was Dt. Const. Arnold Mubanga of Chawama Police Station whose evidence basically was that after he was allocated the case, he interviewed the now J2 who was already in custody. J2, in the presence of his father, revealed the name of the leader K2. Using this information, J2's father did his own investigations and located the said K2. With the help of the police, K2, the now J1, was apprehended. PW4 said he interviewed J1 who revealed that the stolen phone was sold to PW2 while he was with one Bob. It was PW4's further evidence that he visited the scene and later made up his mind to charge and arrest the two juveniles for the subject offence. under warn and caution statement, they both denied the charge. As custodian of the recovered cell phone, ID1, PW4 tendered it in evidence and it was admitted marked P1.

When cross examined by J1's guardian, PW4 stated that he learnt from J2 that he was with J1 and that J1 was the boss. When cross examined by J2, PW4 reiterated that J2 revealed to him that he was in the company of other friends and the boss J1 and it is on that information that his father assisted with investigations. When cross examined by J2's father, PW4 insisted that he was there when J2 made the revelations.

As stated earlier, J1 remained silent.

J2 in his unsworn statement told court that he played football on a date he cannot recall but on a Sunday. Days later, he was apprehended by people that he played football with and taken to the police. The police then detained him without explaining the charge to him.

This is all the evidence. The undisputable evidence on record is that PW1's Itel cell phone was stolen while in the possession of her friend Margaret Kalumyana. The two were walking on the streets when the phone was stolen by a group of boys. The phone was sold to PW2 a few days later and PW2 identified J1 as the person that sold the phone to him while in the company of another young man. After buying the phone, PW2 gave it to his acquaintance PW3. The phone was recovered from PW3.

Even though J2 denies any knowledge of the theft, it is clear from the evidence that the case was resolved due to his input. It is because he was able to reveal the whereabouts of J1 that the phone was recovered. Upon his apprehension, J1 revealed that the phone was sold to PW2.

From the foregoing facts, I am without a doubt in my mind that J1 was part of the group that stole the cell phone from Margaret Kalumyana. From the evidence of PW2 which was not even challenged to the effect that he found pictures of J1 in the cell phone, and the fact that J1 was able to lead the police to PW2's shop, it is clear that he (J1) exercised dominion over the phone and ultimately sold the phone to PW2.

I note that PW1 identified someone else in court as the older boy in the group but this is not fatal as there is sufficient evidence tying J1 to the subject offence.

In the circumstances, I am satisfied that the prosecution has proved the case against J1. Whilst acting with others, he stole the cell phone, P1, and later sold it to PW2. As such, I enter a finding of GUILTY against J1.

As regards J2, as found, it is because of him that J1 was apprehended leading to the recovery of the stolen phone. However, I have difficulties finding against him for the reason that PW1 could not, with certainty, state that he was amongst the group of boys at the scene. Further, PW2 was quite categorical that J2 was not with J1 when the phone was sold to him. So, in light of the fact that there is no evidence placing J2 at the scene of crime, I am left with no option but to find in his favour.

I am quite satisfied that J2 has knowledge of the activities of the group that attacked PW1 and her friend and that is why he was able to direct the investigation to J1 but this in itself is not sufficient to hold him accountable for the incident of 19th July. I will not even rule out the possibility that he was part of the group that stole the cell phone on 19th July. But as the Supreme Court has held in a plethora of cases one of which is **Dorothy Mutale and Richard Phiri v. The**

People (1) 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 favourable to an accused if there is nothing in the case to exclude such inference

Thus, the possibility of J2 being at the scene could be there but then again the possibility that he was not cannot be ruled out. In light of the holding in the above cited authority, J2 is hereby given a benefit of the doubt.

As such I enter a finding of NOT GUILTY against J2.

DELIVERED IN CLOSED COURT THIS *7th* OF SEPTEMBER, 2017

PRINCIPAL RESIDENT MAGISTRATE

