

2SPC/073/2017

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

(Criminal Jurisdiction)

The People versus	CHRISTOPHER ZILOLE SAKALA
BEFORE:	HIS WORSHIP F. KAOMA
FOR THE PEOPLE:	MALAMBO – PUBLIC PROSECUTOR
FOR THE ACCUSED:	IN-PERSON

J U D G E M E N T

CASES CITED

1. *R V SENOIR* [1899] 1Q.B.283
2. *GAYFORD CHOULER* [1898] 1Q.B. 217
3. *AUBREY KABWE (Suing in his capacity as Administrator of the Late Rosemary Mwanza) v CHARLES WILSON NKHOMA* (2012) ZR VOL TWO

CHARGE

In this case the accused charged with one count of malicious damage to property contrary to section 335(1) of the Penal Code as amended by Act NO 17 of 2007. The particulars of the offence allege that the accused on the 10th day of July, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, willfully and unlawfully did destroy 11 pillars valued at K5000=00 the property of MUSA MACHINYISE. The accused pleaded not guilty to this charge

I warn myself from the outset that the burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution. Notwithstanding the defenses available to an accused person, the primary responsibility to prove the allegations against such a person remains with the Prosecution and the standard

of proof is beyond all reasonable doubt. In the event of reasonable doubt, such doubt must be decided in favour of the accused and he must be accordingly acquitted.

At this point I propose to analyze the law creating this offence before considering the evidence adduced by both parties herein.

The offence of malicious damage to property is created by section 335(1) of the Penal Code as amended by Act NO 17 of 2007 which states as follows;

"Any person who willfully and unlawfully destroys or damages any property commits an offence, which, unless otherwise stated, is a misdemeanour and is liable, on conviction, if no other punishment is provided, to imprisonment for two years."

For the purposes of criminal law the word 'Property' is defined by section 4 of the Penal Code to mean;

"any description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise"

However the penal code does not define the word 'willfully' for the purposes of this offences neither is it defined anywhere in the Zambian authorities. Therefore, I have found solace in the definition provided in the ancient case of **R V SENOIR [1899] 1Q.B.283, 291** which definition I find both persuasive and instructive. It was defined to mean '**deliberately and intentionally, not by accident or inadvertence**'.

It follows therefore that for any act which is called into question to be willful it must have been done by the offender deliberately and intentionally and not by accident.

In the light of the foregoing therefore the prosecutions have the mandate to prove each of the following ingredients beyond all reasonable doubt that to say that;

- ❖ There was property within the meaning of the law

- ❖ Damaging of the property
- ❖ The identity of the person that damaged the property
- ❖ The intent of the offender at the time of damaging.

Having stated the law creating the offence in this matter, it is now imperative to analyze the evidence from both parties in order to satisfy myself as to its truth or falsity.

The evidence of the prosecutions is anchored on 4 witnesses and at the close of the prosecutions 'case I put the accused on his defense. He elected to give a sworn statement and called no witness which he is perfectly entitled to do at law. Evidence of both parties is as follows;

The first prosecution who I shall be referring to as PW1 was Francis Mwika a Bricklayer of unknown house No in Chazanga. This witness deposed that in 11/07/17 when he received his in law Musa Machinyise who accompanied him to his plot in Zani Muone West In Lilanda. That is how they went and found people putting a ceiling board in the house he had built. He tasked this witness to dig walls where to put poles for a wire fence. According to this witness it was not his first time go there as he used to go there to make pillars and do the landscaping. It was his evidence that at his in law's plot there is also a two roomed structure and behind it that is where Mr. Zilole Sakala stays. He identified accused in the dock to be Zilole. He further deposed that at the boundary with Mr. Sakala there were four pillars and the other side there was 11 pillars. On the material day as he was digging the holes he saw accused coming with a pick and a round bar. He greeted him and he answered. When he reached the first pillar he brought it down with a metal bar. He then started breaking the Pillars with pick. He damaged in total 11 pillars. This witness started calling his brother in law who was in the house. When he came out he found accused breaking the 11th pillar. Mr. Musa asked accused if he knew that what he was doing was a crime. They started arguing and later they went to the police where this witness gave a statement. When cross examined by accused he said that he knew accused and mentioned his name adding that he knows him from the plot. When further cross examined he deposed that what he know is that the plot is for Mr. Musa who bought it from Mr. Tembo. It was his evidence that accused did not tell that the plot was his when he was breaking the pillars. According to this witness Mr. Musa did not tell him that accused told him not to put up the pillars. In re-examination he stated

that accused's house is behind a two roomed house and the demarcation is the fence they put adding that pillars are inside the wall fence.

PW2 in this matter was David Tambula who is the headman for Lilanda Village in Chief Mungule's area. According to this witness his village is big and some of his duties are to look after his people. He added that the land is given according to what a person wants. It was his evidence that there are documents they give which are headed Lilanda Village and agreement forms. In relations to this matter he testified that on 17/08/17 Kenneth Tembo and Mr. Musa came to him. The reason was that Kenneth Tembo sold his land to Musa which was 41x40m. It was at that point that they indicated his name in the register. Before that on the agreement form he put his stamp, signed on it and his NRC. He then proceeded to go and see the plot in his village. He saw it and found that there was nothing. They just measured the meters and went back to register Mr. Musa. Thereafter Mr. Musa paid K20, 000 to Kennedy Tembo the seller. He thereafter date stamped the land agreement form. This witness positively identified the land agreement form between Kennedy and Musa which was later admitted in evidence and marked P1. According to this witness the first owner of the same piece of land was Kennedy Tembo who he registered and has been the owner for some time. He later heard of a dispute amongst Zilole, Kennedy and Musa. He later visited the area as area headman and found that pillars were damaged which pillars he said were in Mr. Tembo's farm.

When cross examined by accused he testified that Mr. Musa bought the plot from Mr. Tembo. However, he did not know anything between accused and Mr. Tembo over the same land. According to this witness if accused bought the plot from Mr. Tembo, it was Mr. Tembo to bring him to this witness.

PW3 was Musa Muchinyise a customs officer at ZRA of house No. 76/13 Kabanana Site & Service. This witness told this court that on 10/07/17, he went to his plot which is in Zani Muone West with his brother in law to monitor what was happening because there were people putting up a ceiling board. Whilst at the plot he assigned PW1 to dig holes where to put the wire fence. He added that he bought the plot where he is building in 2010 but the one where he was putting hole he bought it in 2016 from Kennedy Tembo his neighbor which was a 40 x 40 at K20, 000. He was inside the house when his brother in law came to call him that Mr. Sakala was damaging the pillars which pillars he said were at the boundary of the plot. When he went out he found that he had damaged 10 pillars and he was damaging the 11th one which he personally witnessed. This witness as well identified accused to be the person who was damaging the pillars. When he asked him why he was demolishing the pillars he said the plot was his where he put up the pillars. He was surprised because he bought the plot in September, 2016. He saw him when he bought but never said anything. After that he went to the police and reported. He also informed Mr. Tembo. This

witness estimated the value of the destroyed pillars at K5000. He further deposed that he had the land agreement on which he purchased the same land. This witness as well positively identified exhibit P1.

When cross examined by the accused he denied being told by accused not to put up pillars allegedly because the plot was not for Mr. Tembo. He denied knowing any agreement between accused and Mr. Tembo.

PW4 in this matter was Kennedy Tembo a farmer/Businessman of Zani Muone area. This witness deposed that he has a plot in Lilanda Village which he acquired on 25/11/10 from headman Lilanda. In 2011, he started processing title deed but he ended on the diagram. In 2013 Zilole Sakala asked him if he could stay at his plot since he was chased where he was living. That is how he took him to the plot to be keeping for him. He added that they didn't agree on any terms. He later subdivided the plot and started selling. He sold part of it which was 41 X 40 to PW3 ON 17/08/16. In July, 2017, PW3 phoned him and said Zilole Sakala was demolishing at his plot. By then he was in Nakonde. He advised PW3 to go to the police. He came back and on 15/07/17, he went to check and found that pillars were physically broken which pillars he said were in PW3's plot. It was his further evidence that when he sold the plot they filled in a form. He as well identified exhibit P1 as the agreement form he signed with PW3. According to this witness he sold the plot at K20, 000 and denied ever selling the same plot to accused. This witness as well identified accused in the dock by his name.

When cross examined by accused he asserted that he knows accused very well. He added that he used to come to do piece works where he does blocks. He reiterated that he came and asked him if he can live at his plot because he was chased. He denied ever making any agreement with accused. He added that he took accused to his plot. He asked for transport and he sent his brother to pick him and take him to the plot. This witness conceded to have seen accused's pigs but denied seeing his iron sheets. He refuted that it was accused who built a house at his plot. He however conceded that there was a temporal structure he put up using this witness's material. He denied agreeing with accused that he would give him a piece of land. When further cross examined he deposed that it was not true that accused worked for him and he gave him land as part of his benefit.

In re-examination he deposed that the structure was built on this witness's plot though not on the land he sold to Mr. Musa. He denied agreeing with accused to give him land.

PW4 was Detective Sergeant Susu Chiyongwe of Kabangwe police post. This witness testified that on 10/07/17, he was on duty at Kabangwe police post from 07:40hrs to 16:00hrs when he was allocated a docket of case of malicious damage to property in which the complainant was Musa Machinyise of Kabana

Site & Service. He complained that the pillars of his wire fence were maliciously damaged and he valued them at K5000. He further stated that it happened on 10/07/17 at Lilanda village at his plot. He then went to visit the scene of crime where he confirmed that the pillars built using 6 inch blocks were damaged. The following day the complainant brought to him land agreement form that showed that he bought the plot from Kennedy Tembo. On 8/08/17, he heard that the suspect was appearing in another court and managed to apprehend him and took him to Kabangwe police post. He interviewed in connection with the alleged offense. In response he said he demolished the pillars because they were placed on his plot. He requested for proof of ownership but he failed. Thereafter he made his mind to arrest and charged him with the subject offense. This witness as well identified accused in the dock to be the person he arrested and charged. He also identified the land agreement form which he accordingly tendered it as part of his evidence.

During cross examination by accused he deposed that as far as he was concerned the matter was just in one court. According to this witness accused's house is the other side while the pillars are on the boundary. However, he could not know if accused brought the matter to court of damaging his house to the police by Mr. Tembo.

On the other hand accused in his sworn statement deposed that it was in 2009 when he was looking for piece works. He got to Mr. Tembo's company. He found the piece work of molding blocks and he started working as a machine operator. Mr. Tembo liked him so he made an agreement with the four of them who were the owners of the contract of molding blocks. They were working for K80 per day. However, each time they worked Mr. Tembo had issues in giving them that money. That is how he told them to continue working and to be getting K30 so that the K50 can be reserved for the sharing them the plots. His friends failed to comply so he remained alone. He encouraged him to work and said the plot would be his. That is how he continued to work from 2009 to 2012. When they reached 2012 that is when he got him and went to show him that plot since the agreement had been fulfilled. They were the 3 of them including Joseph Fulai. He told him to continue working after showing him the plot. That is how he continued working and in 2014 he bought two more plots and built a house for rent. He also bought a canter and a tipper. He also bought a hydraulic machine. In 2014, he stopped going there and went to the village. When he came back he found beacons on the plot Mr. Tembo gave him which he said were like for 3 plots. He asked his wife who said they were put by Mr. Tembo. He then went to Mr. Tembo and asked and in response he said he had demarcated for his colleagues those who left work. That is how he refused because he told him to continue

working and would give him the whole plot. He assured him that he would remove them since he had complained and would take them somewhere. He asked him if he could sign and in the alternative pay him for the money he worked for 6 years and for the money he used to build the house. In response he said he did not build on paper but on the plot so he would give him anytime. In 2016, he went to Mr. Tembo to remind him and asked him to take him to the village headman so that he sells part of the land. He said to go to the headman he needed to go with a letter of sale so that he takes him. In November or December, 2016, he looked for a buyer and sold one side at K55, 000. On the other side he exchange with a motor vehicle. In December, 2016 whilst asleep he heard police officer calling him and told him to come with the keys. They went to the police where Mr. Tembo reported that he sold the plot which was not his which he refused and said he worked for the plot. He told the police that he wanted to give accused 15 x 20. According to accused he went home and after 2 days the person he sold the plot to, came and Mr. Tembo told him that he was a thief and should be taken anywhere. That is how they got him and took him to the police. He was later brought to court and appeared in court 4. The charge was read to him and he denied. In February, he went out on bail. On 1/04/17, Mr. Tembo went with people around 02:00hrs and forced the door open. They started beating him saying he should move out. They also started throwing his things outside and got his money amounting to K38, 000. They got him and took him to Ballastone side and dropped him there and threatening to kill him whilst pointing a gun at him. He went to Kabangwe police and reported. He booked a vehicle because the police said they had no fuel. They saw what happened. He went with the police to Mr. Tembo's house with the police but they didn't find him so a call out was left with his wife. On 4/04/17, Mr. Tembo went and demolished his house. Later Mr. Tembo was apprehended. According to accused he told the officers to take the matter to court but Mr. Fundulo said they were still investigating. Later Mr. Tembo came and put pillars and told Mr. Musa to also put pillars. They started writing on the pillars "Sakala a thief". When he came back from doing his piece works his children told him that Mr. Tembo had come and said they should leave the place. In the morning he waited for Mr. Tembo to come but the one who came was Mr. Musa. He explained to him that the matter was in court and asked why he was putting pillars. That is why he brought down the pillars because they were scaring the children. He complained that the pillars were valued at K5000 but that was not true because it was his thought that they just used a pocked of cement. It was his further evidence that on 30/08/17, he came from court and when he went out 2 Officers apprehended him and said he had another case. They took him in Mr. Tembo's car and drove him to Kabangwe police. After 9 days they brought him to Kamwala Remand. That is how he came to court.

During cross examination by the learned PP he reiterated that they were working for K80 per day which Mr. Tembo said was too much for him and when he had challenges he said he would be giving them K30 and the K50 would be going to the plot. By then he was with Moses, Morgan and Collins. He added that there are other workers but the 4 of them were the owners of the job. He maintained that they were later shown the plot by Kennedy Tembo and Joseph. According to accused he has not called those he was with because they abandoned the work. When further cross examined he said he did not know the size of the plot and had no proof that the plot was his but he built a house on it. Accused conceded to have demolished the 11 pillars that he said were for Musa. He further conceded to have seen the papers for the plot that he said were confirming that Mr. Tembo bought the plot from the headman and he sold to Musa. However, he insisted that there are several ways of obtaining land adding that he worked for the plot while Musa bought with cash. However, he had not documents to confirm ownership. According to accused Mr. Tembo supposed to give him the papers but he has not given him although he said the land was his. It was his further evidence that he did not give him the papers because he said he was busy.

This is the evidence of both parties in its entirety which I have carefully considered. It suffices to mention that it appears to me that accused does not dispute that he did demolish 11 pillars that were put on a subdivided plot which PW2 bought from PW3. It seems also not in dispute that accused lives near the same plot. I therefore find these to be facts in this case. What seems to be in dispute to me is the ownership of the plot in question which I propose to resolve as I apply the law to the facts.

The first question to be decided is whether or not property was damaged or destroyed within the meaning of the law

I must state here that going by the wording of section 335(1) of the Penal Code two things constitute the *actus reus* of this offense that is to say "destroy" or "damage" to the property. Proof of either of the two suffices to constitute the offense. However, in this case it is alleged that accused destroyed the property thus I have found necessary to restrict myself to the word "destroy" as opposed to damage. I must state from the outset that for the purposes of this offence the word "destroy" is not defined anywhere in the Penal Code. However, it is defined in the Concise English Dictionary 11th edition as follows;

"Put an end to the existence of (something) by damaging or attacking it". Whereas the noun "damage" for this purpose was defined in the case of **R V HEWITT 7 Cr App.R.219** to mean the cost of replacing the damaged property.

Illustrative of the meaning of damage is the principle stated in the ancient case of **GAYFORD CHOUER [1898] 1Q.B. 217** in which it was stated that damaging grass by walking over it was held to be damage within the meaning of the law.

It follows therefore that for the mens rea of this offense to be completed the offender must have damaged the property in question or destroyed it. To destroy entails putting the thing in question to an end or simply means the thing become of no use. Whereas to damage entail the cost of replacing the damaged part. Thus the whole thing need not be damaged.

Reverting to the case in *casu* the prosecutions have alleged that accused destroyed 11 pillars by demolishing them using a metal bar which accused does not dispute. I therefore need to stretch my mind to satisfy myself that demolishing pillars is sufficient evidence of destroying them or putting an end to their existence. I am therefore satisfied beyond all reasonable doubt that the property herein namely 11 pillars were destroyed within the meaning of the law.

The question that rises is as to the identity of the offender or simply put the person that destroyed the said items.

The prosecutions have alleged that it is the now accused that destroyed the items as per indictment. I wish to hastily state here that accused does not dispute to have destroyed the pillars in question thus I am satisfied beyond all reasonable doubt that it was the accused herein that destroyed the pillars as per indictment.

The question that rises at this point is whether or not at the time accused destroyed the pillars did so willfully and unlawfully.

I wish to state here that for the avoidance of doubt I have decided to re-state the definition of the adjective "willful" for the purposes of this offence. It was defined in **R V SENOIR [1899] 1Q.B.283, 291** to mean 'deliberately and intentionally, not by accident or inadvertence'.

Similarly, in the case of **M'DOWELL V MAYOR OF DUBLIN** [1903] 2 Ir.R.541, C.A. where a thief broke a window in order to reach and steal goods in a shop, it was held that his act was a misdemeanour within the meaning of malicious damage Act of 1861.

It follows from the foregoing that the motive of destroying the property in question is irrelevant provided the act of destroying was deliberate and intentional, not by accident or inadvertence.

In this matter it can be discerned from the evidence adduced that accused destroyed the pillars as per indictment because he believed the pillars were constructed on his land. It follows that he destroyed the pillars consciously and not by accident or inadvertently. The destroying of the pillars therefore was done willfully within the meaning of the law.

The question then is whether or not the damaging of the property was unlawful within the meaning of the law.

The adjective "unlawful" at law has been defined in Black's Law Dictionary (2004) 8th edition at 4775 as; "Not authorized by law; illegal"

It follows that for any act to be unlawful it should not be authorized by law or simply put a violation of the law.

In this case accused claims that the land is his where the pillars were constructed. Assuming that accused is the owner of the land where the pillars were erected, then accused will have a valid defence at law. In **AUBREY KABWE (Suing in his capacity as Administrator of the Late Rosemary Mwanza) v CHARLES WILSON NKHOMA (2012) ZR VOL TWO**, Justice P. Matibini (SC) following the principle established in *Namungandu v Lusaka City Council* (1978) Z.R. 358

"Squatters build on their own risk, and if the owner of the land withdrew their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatter's losses though very much regrettable are not recoverable in a Court of law."

In this case however, despite accused claiming that the land was his, he has not tendered before court any evidence to prove such assertion other than stating that PW4 promised to give him land in return for his services despite having the evidential burden to satisfy the court that he is the owner of the land. His assertion has been denied by PW4 who sided with PW2, the owner of the pillars. It was in fact PW4 who proved ownership of the same land and sold part of it to PW2. The sale transaction was confirmed by sale

of land agreement form which was witness by the headman of the village where the land is situated. According to the headman it is in fact PW2 who is entered in their village register as the owner of the land in question after he bought from PW4 the initial owner. In absence of proof of ownership therefore, accused cannot be said to be the owner of the land and such he had no right under whatsoever to demolish the pillars therefore the demolition of the pillars was unlawful.

In the circumstances and by the reasons of the foregoing therefore I am satisfied beyond all reasonable doubt that the prosecutions have proved this offence against accused as charged and as such I find him guilty and I accordingly convict him.

DELIVERED IN OPEN COURT DATED THE DAY OF 2017



FELIX KAOMA

RESIDENT MAGISTRATE

