

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

**IPG/115/2016**

**THE PEOPLE v JOSEPH MWAMBA & GREGORY KILEMBE**

Before Hon N. C. Simaubi this 10<sup>th</sup> day of October 2017

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**JUDGMENT**

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For The People : Mr P. C. Mbewe, PP.

For the Accused: In person.

**Legislation referred to**

Sections 4, 265 (1), 272, 277 of the Penal Code Cap 87.

**Cases referred to**

1. Credland v Knowler (1951) 35 Cr App R 48
2. Dawson v Mackenzie 1908 SC 648 at 649

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The accused persons stand charged with two counts. In count one, Joseph Mwamba (herein after A1) is charged with theft by servant contrary to section 272 and 277 of the Penal Code Cap 87 of the Laws of Zambia. The particulars allege that Joseph Mwamba, on unknown dates but between 1<sup>st</sup> December 2015 and 26<sup>th</sup> February 2016, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, being a person employed as a Hand man by ZESCO Limited, jointly and whilst acting together with other persons unknown, did steal 196 boxes of energy saving bulbs altogether valued at K38, 949.12 which came into his possession by virtue of his employment.





In the second count, Geoffrey Mwamba Kilembe (herein after A2) is charged with theft contrary to section 272 of the Penal Code Cap 87. The particulars allege that Geoffrey Mwamba Kilembe, on unknown dates but between 1<sup>st</sup> December 2015 and 26<sup>th</sup> February 2016, at Lusaka in the Lusaka district of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with Joseph Mwamba, did steal 196 boxes of energy saving bulbs altogether valued at K38, 949.12 the property of ZESCO Limited.

Both accused persons denied the charge.

The burden is upon the prosecution to prove the case beyond all reasonable doubt. There is no burden upon the accused person to prove his innocence. If, after considering all of the evidence in this case, there is any doubt in my mind as to the guilt of the accused, then the accused is entitled to the benefit of that doubt.

In order to establish the guilt of the accused, the prosecution must satisfy me on each and every ingredient of the offences charged. With regard to count one, **Section 277 of the Penal Code Cap 87** states as follows:

*277. If the offender is a person employed in the public service and the thing stolen is the property of the Government, a local authority or a corporation, body or board, including an institution of higher learning in which the Government has a majority or controlling interest, or came into his possession by virtue of his employment, he is liable to imprisonment for fifteen years.*

The count alleges that A1 is an employee of ZESCO Limited which, I take judicial notice, is a public enterprise. In other words, the accused is alleged to be a public servant. **Section 4 (iv) of the Penal Code** defines "person employed in the public service" as meaning:

*(iv) all persons in the employment of any department of the Government, or a person in the employ of any corporation, body or board, including an*





*institution of higher learning, in which the Government has a majority or controlling interest or any director of any such corporation, body or board;*

The section goes further to state:

*and the said term further includes-*

- i) ....
- ii) .....
- iii) .....
- iv) *all persons in the employment of any department of the Government, or a person in the employ of any corporation, body or board, including an institution of higher learning, in which the Government has a majority or controlling interest or any director of any such corporation, body or board;*

As such, it must be shown that the accused was a person in the employment of a corporation in which the Government has majority or controlling stake, and that the property was taken by virtue of his employment in such a corporation.

From the above, the prosecution must establish that:

1. The accused person, being a person employed in the public service;
2. Took;
3. Property;
4. Belonging to a public corporation;
5. Which came into his possession by virtue of his employment.

In count two, A2 is charged with the offence of theft. **Section 272 of the Penal Code** provides:

*272 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.*

**Section 265 of the Penal Code** defines theft in the following terms:





*265 (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.*

From the above the prosecution must show that:

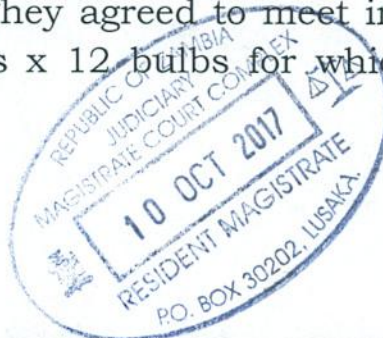
1. The accused fraudulently; and
2. Without claim of right;
3. Took;
4. Property belonging to another person.

In reviewing the evidence on record, I wish to note that the accused persons were initially represented by Mr Keith Mweemba and Mr S. Mbewe of Keith Mweemba Advocates. However, it appears that counsel withdrew from representing the accused as per the information tendered by both accused.

I wish to state that it is the practice that when counsel wishes to withdraw from representing a client, or the client has terminated their services, counsel are required to seek leave of court. In this case, this practice was not followed. It is my hope that in future, counsel will observe this long standing legal practice.

The prosecution called six witnesses in support of the charge. The accused both elected to give sworn evidence and called no witnesses.

**PW1, Elasto Soko** is a businessman that deals in hardware goods. He testified that in January 2016, Joseph Mwamba approached him by his shop and asked for the person selling at the next shop. However, the owner of that shop had knocked off. In the process of conversation, Mwamba told Soko that he supplies energy saving bulbs and they exchanged cell phone numbers after Soko expressed interest. Soko told the Court that about two weeks later, Mwamba phoned to say he had the bulbs. They agreed to meet in Kamwala where Mwamba delivered 20 boxes x 12 bulbs for which he paid

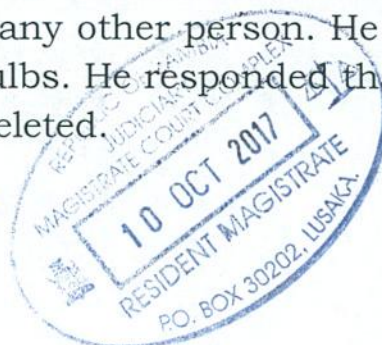




him K900.00. A week later, Mwamba phoned that he had some more boxes and sent Gregory Mwamba who brought 67 boxes. Soko paid him K3015.00 for the boxes. He explained that each box was being sold at K45.00. Again a week later, Mwamba phoned saying he had 30 boxes. These were delivered by Gregory who was paid K1350.00. He testified that later, Mwamba delivered about 70 boxes and was paid cash for them. A week later, Mwamba sent his young brother Martin Mwamba who delivered 35 boxes of energy saving bulbs. Soko testified that he received the bulbs at Kafue Road Shoprite and paid K45.00 for each box. He stated that he bought over 100 boxes of energy saving bulbs in all which he resold in his shop.

Soko testified that sometime later, he received a call from a friend that officers from Zesco Limited had visited his friend, Kelvin's shop and got all the energy saving bulbs they found and that they were looking for him. Later, he learnt that the officers apprehended his friend, Miyoba. Soko also learnt that police were looking for him so he reported himself to Lusaka Central Police. He later disclosed to police that Mwamba, Gregory and Martin supplied him the bulbs. Martin was then apprehended in Chilanga and led them to Mwamba and Martin. Soko stated that he did not know that the bulbs belong to Zesco though Mwamba told him that he was an employee of Zesco. He told the Court that police recovered 189 boxes of bulbs from his shop. He identified the 196 boxes of energy saving bulbs marked P1 collectively and identified the two accused persons as Joseph Mwamba and Gregory Mwamba.

In cross-examination by A1, Soko responded that he met A1 in Kamwala and paid him for the bulbs. He maintained that A1 supplied him twice and that A2 and Martin also supplied him. He stated that A1 used to phone to say A2 and Martin would deliver the bulbs. He denied buying from any other person. He maintained that he used to pay cash for the bulbs. He responded that the bulbs he bought had their Zesco labels deleted.





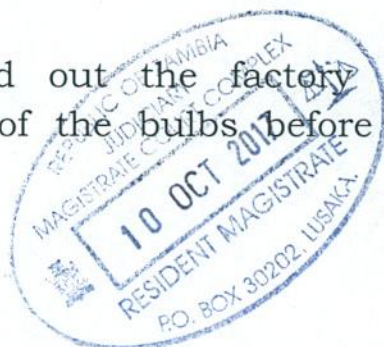
In cross-examination by A2, Soko stated that he bought some bulbs from him in a taxi at Downtown. He responded that A2 used to phone him and that they would meet at Downtown.

**PW2, Kelvin Lukoso Miyoba** is a businessman who deals in hardware goods. He testified that in January 2016 police apprehended him on allegations of having bulbs in his shop stolen from Zesco. He later led police to Elasto Soko who he said was his supplier but that they did not find him. He was detained and released later on bond. He told the Court that Soko used to supply him the bulbs but that he was never told where he got them from. Miyoba testified that Soko supplied him 190 boxes of Phillips energy saving bulbs. He stated that he did not know that the bulbs belonged to Zesco and that Zesco staff had to show him the labels for him to believe. Miyoba identified the 196 boxes of energy saving bulbs marked P1 which he bought at K65.00 per box containing 12 bulbs. He stated that the 190 boxes of bulbs were recovered from his shop.

A1 and A2 had no questions for cross-examination.

**PW3, Wilcliff Ngolwe Chipeta** is the Chief Engineer at Zesco. He told the Court that his duties include the procurement and installation of compact fluorescent lamps otherwise known as energy saving bulbs and the removal of ordinary bulbs so as to reduce demand of power. He explained that this is done free of charge. Chipeta recalled that on 3<sup>rd</sup> March 2016 he was visited by security personnel who asked him to identify some recovered energy saving bulbs. He told the Court that he identified the bulbs as Zesco property through the Zesco labels on them though some were erased. He identified the 196 boxes marked P1 and stated that they are worth K38, 949.12.

Chipeta testified that he carried out the factory acceptance assessment in Shanghai, China of the bulbs before they were





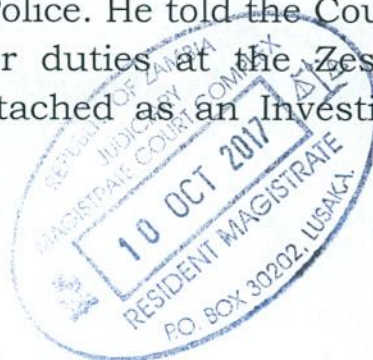
delivered to Zesco and that he is familiar with their features. He testified that Joseph Mwamba was employed by Zesco as a CFL Installer and that he is currently on suspension. Chipeta explained that a CFL Installer goes from door to door installing the bulbs in homes and also capturing information on the Data Capture Form which are given to the supervisor for further processing.

Chipeta further testified that sometime in January 2016, he was informed of an anomaly concerning the data entered by an installer called Joseph Mwamba. He explained that the anomaly arose from the customer details not corresponding with those supplied. He stated that a customer who was called denied being supplied the bulbs. Though reported to security, no evidence was found. Then on 23<sup>rd</sup> March 2016, he was visited by a Zesco team from the Copperbelt which recovered the bulbs which he identified. Chipeta identified Mwamba as a Zesco employee.

In cross-examination by A1, Chipeta responded that the security personnel told him that the bulbs were recovered from people selling them and that they were supplied by A1. He stated that personnel from the Copperbelt led by Mr Siame visited him and that other data sheets were looked at. He denied being told of an identification parade. He conceded that he was told that other people including Zesco employees were picked. Chipeta responded that each installer is given 20 boxes to install per day and that it would take about 10 days to install 196 boxes. He stated that suspicion arose from the fact that A1 was exhausting his load earlier than others.

A2 had no questions for cross-examination.

**PW4, Det. Ins Ben Nkansabwa** testified that in January 2016, he was operating from Solwezi Central Police. He told the Court that on 25<sup>th</sup> January 2016, he reported for duties at the Zesco Officer Northern Division where he was attached as an Investigator. Ins

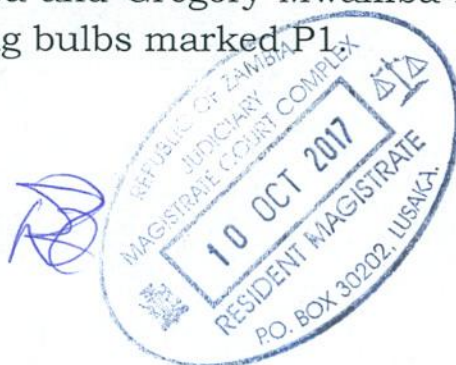




Nkansabwa told the Court that at around 1000 hrs, he received information from an informer that an unidentified person was selling some electrical bulbs that appeared to be for Zesco. In the company of Jason Chipango and Bizwell Mweemba, security employees of Zesco, he went to Solwezi Main Market where they found one Tryson Banda of Lusaka, selling some bulbs that were labelled 'Zesco' and had the Zesco logo on them. He testified that they recovered 8 boxes each containing 12 bulbs.

Upon being interviewed, Banda told Ins Nkansabwa that the bulbs belonged to his friend, a Lusaka businessman of Kamwala area. On 25<sup>th</sup> February 2016, Banda led Ins Nkansabwa, Ins Siame and Det Sgt Sichula all of Zesco Ndola, to Lusaka. After investigations in the market, a shop was located belonging to the person named by Banda from which 3x sacks containing boxes of the same type of bulbs were recovered. A further sack was recovered from an adjacent shop belonging to the same businessman. He told the Court that in all, 197 boxes of bulbs were recovered valued at K38, 949.12.

Ins. Nkansabwa testified that further investigations led to the arrest of Elasto Soko (PW1) who in turn led him to Kelvin Miyoba (PW2), a businessman of Kamwala Market. With the help of Miyoba, Martin Mwamba, now deceased, was apprehended. He told the Court that the deceased revealed to him that he was working with Gregory Kilembe Mwamba and one person from Zesco Head Office, Joseph Mwamba. He testified that this led to the apprehending of five other Zesco employees namely, Kennedy Kapola, Maybin Shampeta, Patson Kawewa and Kasoma Chambula. Ins Nkansabwa warned and cautioned these suspects before handing the matter over to Ins Chileshe based at Zesco Head Office for further investigations. He identified Joseph Mwamba and Gregory Mwamba in Court and the 197 boxes of energy saving bulbs marked P1.

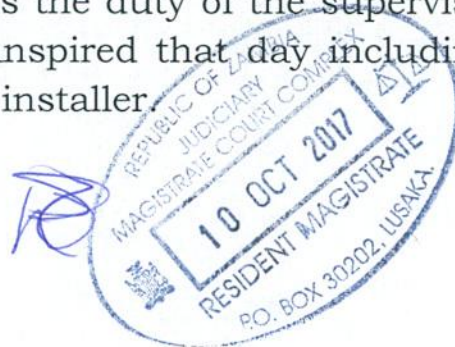




In cross-examination by Mr Mbewe, counsel for the respondents, Ins Nkansabwa responded that he was not given any evidence in Solwezi that the bulbs were gotten from the accused. He conceded that he did not show the Court the 8 boxes of bulbs he recovered in Solwezi. He maintained that 3x sacks of bulbs were recovered from the shops in Kamwala. He stated that he had no documentary evidence that A1 was the supplier of the sacks of bulbs. He maintained that Elasto Soko and Kelvin Miyoba mentioned A1.

In cross-examination by Mr Keith Mweemba, Ins Nkansabwa stated that the evidence of the theft are the bulbs that were recovered. He maintained that the 197 boxes of bulbs belong to Zesco. He could not say if the bulbs passed through A1. He stated that Zesco through A1's supervisor made a complaint to the police on behalf of Zesco. He conceded that no boxes were found with the accused persons. He conceded that the other suspects were not charged though they too were going into the field. He maintained that Soko and Miyoba named the accused.

**PW5, Mwape Katongolo**, is a Zesco technician who supervises a team of 20 installers of compact fluorescent lamps or energy saving bulbs. He explained that every day, the installers gather at the Demand Site Management container from where they are placed in groups of two and are then issued with 20 boxes of either 18w or 14w energy saving bulbs each. They then go into the field from door to door swapping the ordinary bulbs with the energy saving bulbs. After installing the bulbs, each installer fills in a Data Sheet Form which they get from their supervisor on that particular day. The form has details of the customers which the installer fills in. The supervisor then goes through each form at the conclusion of the exercise to countercheck whether the bulbs issued to the installer at the beginning are equal the number of installed bulbs. If the entries don't balance, it is the duty of the supervisor to interrogate the installer on what transpired that day including a sampling of the houses visited by the installer.



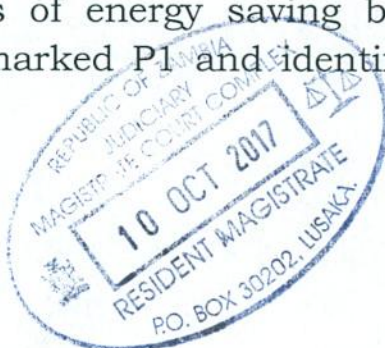


Katongolo testified that between 1<sup>st</sup> December 2015 and January 2016, a team went into the field to install energy saving bulbs. However, after collecting the Data Sheets, he and his other supervisors noticed that there was a discrepancy in the bulbs issued to a particular installer and what was recorded. He stated that discrepancy related to the number of bulbs issued not balancing and the particular houses written on the data sheet. He testified that one installer called Joseph Mwamba was questioned on the discrepancy but that he was not so positive in his responses. He then reported the matter to his superiors who in turn reported the matter to an internal investigation wing. Statements were recorded from himself and Mwamba and thereafter Zesco police took up the matter.

Katongolo testified that the investigators later said there wasn't enough evidence and that the discrepancy could have been due to poor information gathering from the customers they could not reach. Mwamba was then allowed to continue with his duties.

Katongolo testified that on 29<sup>th</sup> February 2016, he received a phone call from an internal investigation wing that there was a team from the Copperbelt Province conducting investigations on bulbs recovered from Solwezi. These investigations were leading to Lusaka and hence the team travelling there to conduct further investigations. He was interviewed as a supervisor by Ins Kasula of Lusaka who gave him names of person they were suspecting. He was asked to call all the installers and that when this was done, Kasomwe Chambula, Kennedy Kapaila, Patson Kawewe and Maybin Shampela were singled out while Joseph Mwamba was identified in absentia. Those present were taken to Lusaka Central Police for questioning and were detained in custody.

Katongolo testified that 196 boxes of energy saving bulbs were recovered and he identified them marked P1 and identified A1 as





Joseph Mwamba. He further identified two Data Sheets marked P2A and P2B.

In cross-examination by Mr Mweemba, Katongolo responded that A1 was given 20 boxes of bulbs but conceded that there was no document before Court showing that A1 received the 20 boxes. He conceded that the supervisors are not always present when the boxes are being loaded. He stated that he does not have information of a break in at Zesco. He stated that he never gave A1 196 boxes at once and that not all 196 boxes were given to Mwamba. He maintained that A1 filled in the Data Sheets. He stated that P2A is a photocopy but that it has writings in blue ink. He explained that the custodian of the data sheets at the relevant time was Judith Kalala Shula. He stated that there was no identification parade at Zesco.

In cross-examination by Mr Mbewe, Katongolo responded that he was not certain if at the material time they had started using a data log which is signed by the installer to confirm that they were issued such bulbs. He stated that only the data log could bear witness as to what transpired. He stated that he had only identified P2A and P2B among the many documents taken by the investigators.

In re-examination, Katongolo explained that A1 was never issued 196 boxes of bulbs at once because they do not issue such an amount at once. He explained that the data log is one of the many documents to identify transactions between supervisors and installers because the logs have provision for a signature.

**PW6, Det. Sgt. Chrisant Chileshe** is a police officer on secondment to Zesco Limited since 2011. He testified that on 24<sup>th</sup> March 2016, he was assigned a docket of case to re-investigate which was initially investigated by Ins Nkansabwa of Solwezi. On perusal of the docket, he discovered that Wilcliff Chipeta complained on behalf of Zesco Limited that 197 boxes of energy saving bulbs were stolen by

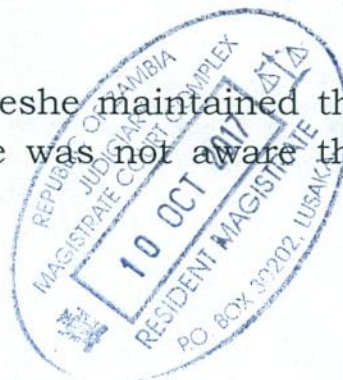




people that were installing them in the compounds. The bulbs were valued at K38, 949.12 and that 7 suspects had been apprehended namely; Kennedy Kapaila, Maybin Shampeta, Joseph Mwamba, Kasoma Chimbala, Patson Kawewe, Martin Mwamba and Gregory Mwamba. He interviewed all the witnesses and suspects and discovered that all the evidence was pointing at Joseph Mwamba, Martin Mwamba and Gregory Kilembe Mwamba. He told the Court that he further discovered that 197 boxes of bulbs had been recovered; 8 from Solwezi and 189 from two businessmen of Kamwala, Lusaka, namely Elasto Soko and Kelvin Miyoba.

Sgt. Chileshe testified that on being handed the boxes of bulbs by Ins. Nkansabwa, he discovered that some of the bulbs had Zesco logos on them while some had the logo erased leaving only the words "Phillips". He testified that as the evidence pointed to Joseph, Martin and Gregory, he decided to charge and arrest them for the offences. Joseph Mwamba, being a Zesco employee, was charged with theft by public servant while Martin and Gregory were charged with theft. Under warn and caution statement in English and Nyanja, the accused persons denied the charge. He identified A1 and A2 and explained that Martin Mwamba later died. Sgt. Chileshe told the Court that he did not charge the other four suspects because the evidence of Elasto Soko, the buyer of the bulbs pointed to the trio. He explained that Soko told him that he was buying the bulbs from A1 who later introduced him to A2 and the deceased saying that they would be delivering whenever A1 was unable to do so. Soko told him that the duo used to supply him the bulbs as well. He identified and produced the 196 boxes of energy saving bulbs marked P1 and the Data Sheets marked P2A and P2B. He explained that only the top page of P2B is a photocopy because it was handled by different prosecutors but that efforts to secure the original front page have proved futile.

In cross-examination by A1, Sgt Chileshe maintained that he was re-investigating the case and that he was not aware that officers





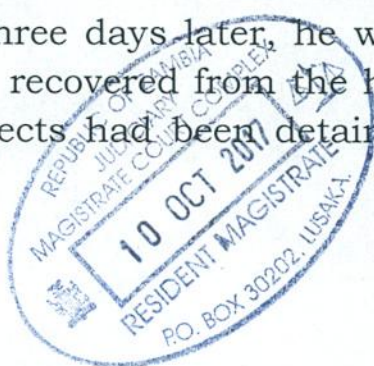
from the Copperbelt Province conducted an identification parade. He denied being related to the other four suspects or that they are related to Chipeta. He stated that at the time of investigations, Dr. Mulenga was his head of department. He responded that Kennedy Kapaila was a suspect but that he does not know if at all he is related to A1's supervisor. He stated that he did not find any bulbs with A1 and that there was nothing wrong with A1's data sheets. He stated that it was reported to him that the bulbs were recovered from Soko and Miyoba's shops. He maintained that all the evidence pointed at A1.

A2 had no questions for cross-examination.

This marked the close of the prosecution case. I found the accused with a case to answer and placed them on their defence. They elected to give sworn evidence and called no witnesses.

I remind myself that in this case, the accused are charged in one indictment but with different offences dealing with the same subject matter. They are thus alleged to have participated in the same crime. In this regard, there may be many reasons for a co-accused to tell lies and falsely implicate other people. For this reason, it would be very dangerous to act on his evidence alone unless there is some other independent evidence which not only confirms that the crime has been committed but implicates the other accused in that crime.

**DW1, Joseph Mwamba (A1)** testified that on 7<sup>th</sup> February 2016, he was on his way home from church with his family when he met A2. A2 told him that the deceased, had called him to the clinic. However, it was at this point that he was apprehended by two officers. He was taken to his home where a search was conducted but no bulbs were recovered. They were then taken to Lusaka Central Police Station and detained. Three days later, he was told that boxes of energy saving bulbs were recovered from the home of the deceased and that five other suspects had been detained. An





identification parade was conducted were a lady identified Maybin Shampeta, Patson Kawewe, Kennedy Kapaila and Kasoma Chambula. He was later charged with the offence. He was later referred to Sgt Chileshe where he saw the bulbs for the first time. He stated that he only came to know Elasto Soko in Court and that Soko led police to the other suspects. He stated that all the other suspects that were released are relations of Chipeta and have connections within Zesco except for him.

As for the data sheets, A1 argued that there was nothing wrong with them and that the customers should have been called. He stated that though he was positively identified, it was all a planned thing. He denied doing any wrong doing.

A2 had no questions for cross-examination.

In cross-examination by the prosecutor, A2 stated that he was working for the Demand Side Management Department since 2013 and was dealing with replacement of ordinary bulbs with energy saving bulbs. He stated that he used to be given 20 boxes containing 12 bulbs each. He stated that the bulbs are labelled Zesco and were not for sale but to be given free of charge. He responded that A2 is not a Zesco employee but his nephew while the deceased was his cousin. He stated that the deceased was a friend of Soko. He denied that A2 led the officers to him. He denied keeping 20 boxes of bulb at his home in December 2015 or returning 12 boxes to Zesco. He stated that his workmates identified him. He denied previously knowing Soko or giving him his phone number or that he had a shop in Kamwala. He denied leading police to Soko's shop or that he sold three boxes of bulbs to him. He denied sending A2 to deliver bulbs to Soko

**DW2, Gregory Mwamba-A2**, testified that on 7<sup>th</sup> March 2016, he was called by the deceased to meet him at around 1500 hrs. When he met him, he with two men who took him to a car where he





found Soko and another man. They then went to the house which was searched. He was then taken to Embassy Police Post and detained.

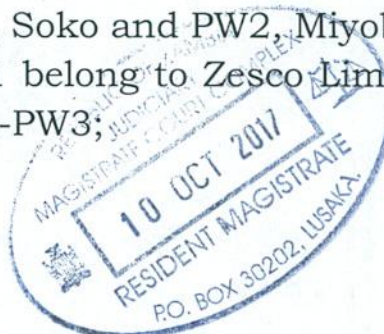
In cross-examination by A1, A2 responded that he came to know Soko sometime back as a business partner of the deceased.

In cross-examination by the prosecutor, A2 responded that A1 still works for Zesco Limited. When shown his police bond, A2 collected himself by saying that he was released on 2<sup>nd</sup> March 2016 and thus not apprehended prior to this. He stated that he was at A1's home when the deceased phoned him and that he found him the deceased with Soko and some police officers. He denied that Soko testified that A1 gave him his phone number to communicate with him. He maintained that he knew Soko prior to meeting him in Chilanga and denied delivering the bulbs to him. He conceded that the bulbs belong to Zesco Limited.

In re-examination, A2 stated that he used to deliver appliances for his deceased uncle but that it had nothing to do with bulbs. He stated that he only saw the bulbs in Court.

This marked the close of the defence case. At this point, I will proceed to state my findings of fact. The following facts are not in dispute:

1. That sometime on 25<sup>th</sup> January 2016, Ins Nkansabwa and other officers recovered 8 x 20 boxes of energy saving bulbs from one Tryson Banda in Solwezi market;
2. That this Banda led Ins Nkansabwa and other officers to Lusaka's Kamwala market from where they recovered 3 sacks marked P1 containing 188 x 20 boxes of energy saving bulbs from Elasto Soko's shops;
3. That the two shops belong to PW1, Soko and PW2, Miyoba;
4. That these energy saving bulbs-P1 belong to Zesco Limited as per the evidence of Wilcliff Chipeta-PW3;





5. That A1 is an employee of Zesco Limited employed as an Installer of energy saving bulbs under the Demand Side Management Department;
6. That the Data Sheet Forms-P2A and P2B, show that A1 was issued 20 x 12 boxes or 240 boxes of bulbs on 13<sup>th</sup> January 2016 to install and a further 240 boxes on 18<sup>th</sup> February 2016;

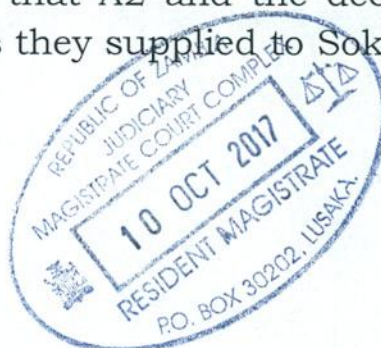
In considering the facts in dispute, I propose to deal with each count in turn.

### **COUNT 1: THEFT BY PUBLIC SERVANT**

Soko testified that A1 used to supply him the bulbs for resale and that he bought in excess of 222 boxes of energy saving bulbs at K35.00 per box. He stated that A1, A2 and the deceased delivered the bulbs to him on different occasions which he then resold in his shop and to Miyoba. Soko testified that A1 was his supplier and that he was assisted by A2 and the deceased, Martin Mwamba. One Tryson Banda, who was never called as a witness, is said to have named Soko as his supplier to Ins Nkansabwa-PW3. It was through this lead that Nkansabwa was able to trace Soko to Lusaka.

For his part, A1 denied any knowledge of Banda, Soko and Miyoba. He told the Court that he does not know Soko while A2 admitted knowing Soko as a business partner for his deceased uncle.

Taking into account the totality of the evidence before me, I am satisfied that one Tryson Banda was found with 8 boxes of energy saving bulbs in Solwezi. I am satisfied that Banda was supplied these bulbs by Soko. I have no doubt believing Soko that he was supplied the bulbs by A1, A2 and the deceased Martin Mwamba. Consequently, I find that the 196 boxes of energy saving bulbs were supplied to Soko by A1. I further find that A2 and the deceased, being relatives of A1, obtained the bulbs they supplied to Soko from A1.





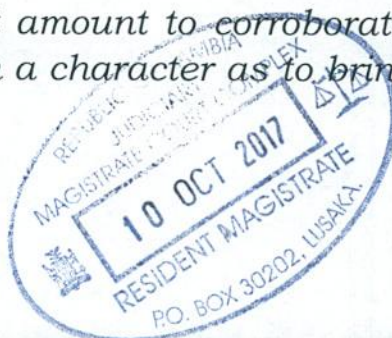
PW3, Wilcliff Chipeta identified the 196 boxes-P1 of bulbs valued at K38, 949.12 as Zesco Limited property. Chipeta explained that the Zesco labelled compact fluorescent lamps (CFLs) were meant to be installed free of charge to Zesco clients in an exchange framework with ordinary light bulbs. He stated that A1 is employed as a CFL Installer of Zesco Limited and that the exchange of bulbs was evidenced by Data Sheet Forms.

PW4, Mwape Katongolo testified that he and his other supervisors noticed that there was a discrepancy in the bulbs issued to a particular installer and what was recorded. He stated that the discrepancy related to the number of bulbs issued to A1 not balancing and the particular houses written on the data sheet. Though the data sheets were produced, Katongolo did not show the Court where the discrepancy was. However, both he and Chipeta testified that there was a discrepancy. Katongolo testified that one installer, namely A1, was questioned on the discrepancy but that he was not so positive in his responses. He then reported the matter to his superiors who in turn reported the matter to an internal investigation wing.

It is accepted that no one saw A1 taking the CFLs besides what was allocated to him on P2A and P2B. The thrust of the prosecution evidence is that it is from these allocations that A1 obtained the 196 boxes of CFLs that he later sold to Soko, Miyoba and Banda. These bulbs are individually labelled with the Zesco logo and as the Court heard, were meant for free distribution on an exchange basis. The prosecution argument is that from the circumstances of the case, the A1 had the opportunity to take the CFLs in view of his job.

The question of opportunity was dealt with in **Credland v Knowler (1951) 35 Cr App R 48<sup>1</sup>** where Lord Goddard, CJ, at page 55 quoted with approval the following dictum of Lord Dunedin in **Dawson v Mackenzie 1908 SC 648 at 649<sup>2</sup>**:

*"Mere opportunity alone does not amount to corroboration, but ... the opportunity may be of such a character as to bring in the*





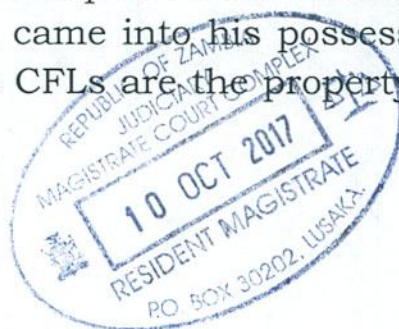
*element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration."*

A1, being an employee of Zesco, was charged with installing CFLs issued to him in the course of duty. This circumstance placed him in a privileged position to have access to the CFLs as evidenced by the data sheets, P2A and P2B. Through this access, suspicion arose that he had opportunity to take the CFLs for his own purposes. This suspicion finds confirmation in the sense that the CFLs can only be obtained from Zesco (where A1 works as a CFL installer) and the fact that Soko named A1 as the source of the CFLs. In this regard, I find that A1 is the person that took the boxes of CFLs from Zesco by virtue of his employment.

Though the CFLs were issued to A1 in the course of his duties to install in clients houses, I am satisfied that he did not install all of them but supplied them unlawfully to Soko as per Soko's testimony. The element of unlawful taking of the 196 boxes comes about in that A1 did not install them but sold them to Soko.

A1 sought to show that he was falsely accused as there were about five other Zesco employees that were initially apprehended but released. He argued that these employees, namely, Maybin Shampeta, Patson Kawewe, Kennedy Kapaila and Kasoma Chambula were released because they are relatives of PW3, Chipeta. However, this assertion was not supported by any other evidence. Further, this attempt to escape liability flies in the face of the evidence showing that he supplied the CFLs to Soko. Consequently, I must dismiss this defence as a lie.

Therefore, I find that A1, being a person employed by Zesco Limited, which is a public corporation, is a public servant within the meaning of section 4 of the Penal Code Cap 87. I am satisfied that A1 took the 196 boxes of CFLs which came into his possession by virtue of his employment and that the CFLs are the property of his





employer, Zesco Limited. A1 had no lawful excuse to take the 196 boxes of CFLs.

### **VERDICT: COUNT 1**

In these circumstances, I find that the case has been proved beyond reasonable doubt against A1. I find A1, Joseph Mwamba, guilty of the offence of theft by public servant contrary to section 272 and 278 of the Penal Code Cap 87 and I convict him accordingly.

### **COUNT 2: THEFT**

PW2, Elasto Soko testified that A1 introduced A2 to him and that he would supply the CFLs to him whenever he (A1) could not do so. Soko led evidence that A2 supplied him the CFLs on a number of occasions including once at Downtown Shopping Mall. A2 denied this saying he only supplied Soko other goods on behalf of his deceased uncle. Taking into account the testimony of Soko and my findings with regard to A1, I find that A2 did in fact supply Soko with the CFLs and received payment on behalf of A1.

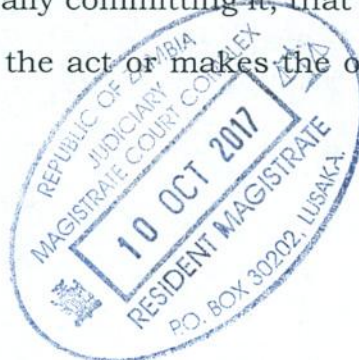
The question then is did A2 act fraudulently in supplying the CFLs to Soko?

The offence of theft is committed when a person fraudulently and without claim of right takes property belonging to another person. There is no doubt that the 196 boxes of CFLs belong to Zesco Limited and that A2 got them from A1 to sell on his behalf. However, did A2 act fraudulently in selling the CFLs on behalf of A1?

Section 21 of the Penal Code provides for parties to offences. The section reads as follows:

21. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

- a) every person who actually does the act or makes the omission which constitutes the offence;





- b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- c) every person who aids or abets another person in committing the offence;
- d) any person who counsels or procures any other person to commit the offence.

The evidence shows that A2 only participated in the selling of the CFLs. There is no evidence to suggest that he actually aided or abetted A1 in taking the CFLs from Zesco neither is there evidence to suggest that he did or did not do anything for the purpose of enabling or aiding A1 to steal the CFLs from Zesco. There is no room for a finding that A2 counselled or procured A1 to commit the offence.

If A2 had assisted A1 in actually taking the CFLs from Zesco or helping him to avoid detection while in the act of stealing, then he would be a party to the offence. In the circumstances, I find A2's involvement in selling the CFLs to be too remote to place any criminal liability on him. I accept that A2 may have known the source of the CFLs being a relative to A1, but this is too remote to suggest theft on his part.

### **VERDICT: COUNT 1**

In these circumstances, I find that the case has not been proved beyond reasonable doubt against A2. I find A2, Gregory Kilembe Mwamba not guilty of the offence of theft contrary to section 272 of the Penal Code Cap 87 and I acquit of the offence and set him at liberty.

**DELIVERED IN OPEN COURT THIS 10<sup>TH</sup> DAY OF OCTOBER 2017**



**N. C. SIMAUBI**

**MAGISTRATE CLASS 1**





