

**IN THE SUBORDINATE COURT OF THE FIRST CLASS
HOLDEN AT LUSAKA FOR THE LUSAKA DISTRICT
BEFORE MRS J.S CHIYAIKA**

(Criminal jurisdiction)

1PE/077/17

THE PEOPLE

V

KEBBY CHILWESA



JUDGMENT

In this case, the accused stands charged with 2 counts; Count 1 of assault occasioning actual bodily harm contrary to Section 248 of the Penal Code.

The particulars of the offence on count 1 allege that the accused on 17th June 2017 at Lusaka in the Lusaka District of the Lusaka Province of Zambia did assault Christopher Zulu thereby occasioning him actual bodily harm. The accused pleaded guilty.

On Count 2, the accused stands charged with Arson contrary to Section 328(a) of the Penal Code.

The particulars of the offence allege that the accused on 18th June 2017 at Lusaka in the Lusaka District of the Lusaka Province of Zambia wilfully and unlawfully did

set fire to the house of Christopher Zulu valued at K10,013.00. The accused pleaded not guilty.

I warn myself at the outset that the onus is upon the prosecution to prove its case beyond all reasonable doubt and that there is no onus on the accused to prove his *innocence*. The accused is entitled to give and call evidence or to remain silent and if he elects to remain silent, 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 accused, then the benefit of that doubt must be given to the accused.

In order to prove the guilt of the accused, the prosecution must satisfy me upon each and every ingredient of the offence charged. They must prove that:

1. The accused set fire to the complainant's house.
2. The house and its contents is valued at K10,013.00
3. Such act was unlawful



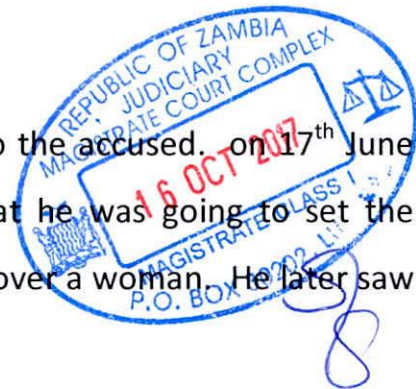
I will now consider the evidence in this case. The prosecutions called 6 witnesses. **PW1** was **Christopher Zulu**. On 17th June 2017, he met with the accused. The accused assaulted him over a lady. The accused informed him that if he could not kill him then he would burn him in the house. The accused was rescued by the uncle to the accused called Mr Mphusa. He remained at his house till 19:00 hours when he decided to go to his home. He spent a night at the neighbour's place. He went to his house around 05:00 hours and discovered that his house had been burnt down. The accused was found with a box of matches when he was apprehended. The matter was reported at the police station.

When cross examined, he stated that he reported the case of arson at the police station. The accused was the one who set his house ablaze because he was found with some matches. No one saw him set the house on fire.

PW2 was **Davy Phiri**. On 17th June 2017 between 21:00 hours and 22:00 hours, he was informed by the twin brother to the accused that the accused had gone to set the material house on fire. He went to the complainant's house in the company of Sam's father. They found the house on fire. He was one of those that apprehended the accused and found him with a box of matches.

He was not cross examined.

PW3 was **Arnold Chilweza**. He is the twin brother to the accused. On 17th June 2017 around 20:00 hours, the accused told him that he was going to set the complainant's house on fire because they had a fight over a woman. He later saw fire. He informed PW2.



When cross examined, he stated that it was true that the accused went to his home. This was about 20:00 hours.

PW4 was **Sylvester J. Banda**. He investigated the matter. He visited the scene of crime and discovered that 2 small huts had been burnt. An unassembled vehicle, battery, bucket, covers for phone and ashes of grains of maize were burnt. He found it difficult to ascertain whether the accused had burnt the 2 huts.

He was not cross examined.

PW5 was **Brian Munsanje**. On 18th June 2017, he was handed over the accused because he is one of the neighbourhood watch members. He was also handed over a box of matches allegedly found with the accused.

When cross examined by the accused, he stated that he found the box of matches with PW7.

PW6 was **Andison Chikasa**. He apprehended the accused on 18th June 2017. The accused asked him to get the matches from his pocket and throw it away. He got the matches that he handed over to PW5. He confirmed that a grass thatched mud hut was burnt to ashes.

When cross examined by the accused, he stated that he found the matches with the accused in his pocket. This was the prosecutions' evidence.



The accused testified on oath. He did not call any witnesses. **DW1** was **Kebby Chilwesa**. On 17th July 2017, he was escorting his girlfriend when he met the complainant. They differed over the same girl. He assaulted the complainant. The complainant bled. He does not know anything concerning the burning of the house.

When cross examined by the prosecutions, he admitted being with his girlfriend on 17th July 2017. He did not set fire to the material house. He is not in good terms with his brother because of the cattle left by his deceased father. He did not remind him of this. He did not tell PW3 that he would burn the complainant's house. He slept in his house on the material date. He did not instruct PW6 to remove the matches from his pocket

Having outlined the evidence, I now state my findings of fact. I am satisfied that the following have been proved without any dispute. On 17th June 2017, the accused was with a lady when he met the complainant. They differed over the same lady. The accused assaulted the complainant. The complainant suffered actual bodily harm. He was rescued by the accused's uncle and taken to his house. The hut belonging to the complainant was set on fire. The accused was apprehended the following morning.

Having outlined the evidence, I now apply the law to the facts. What evidence is there that it was the accused that burnt the material house. It is a fact that the material house was burnt. However, it will be noted that the prosecutions did not prove that the material house is valued at K10,013.00 as no evidence was laid regarding the value of the property burnt.

The bone of contention is who could have burnt the material house. The evidence against the accused reveals that he informed the complainant that he was going to burn him in his house. This evidence was confirmed by PW3 who stated that when he met the accused around 20:00 hours, the accused informed him that he was going to the complainant to set his house ablaze because they had quarrelled. Therefore, from the circumstances, the accused may have been the one who set the complainant's house ablaze. I have taken note that this evidence is purely circumstantial. In the case of **Nyambe v The People**, (2011) Volume 1, it was held that:

1. *Circumstantial evidence or indirect evidence is evidence from which the judge may, infer the existence of the fact directly.*
2. *It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue, but rather is proof of facts not in issue. But relevant to the facts in issue and from which an inference of the fact in issue may, be drawn.*

3. *A trial judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture, so that it attains such a degree of cogency which can permit only an inference of guilt.*

I have taken note that the accused did rebut the complainant's evidence and that of PW3 that he did not burn the material house. The other piece of evidence connecting him to the commission of the offence is that he was found with a box of matches. Although he rebutted this evidence, the witnesses maintained that the accused was found with a box of matches upon his apprehension.

Has the prosecution then proved beyond all reasonable doubt that the accused and not anyone burnt the same house. The evidence of PW4 reveals that he did not charge the accused for arson because he found it difficult to ascertain whether he was the one that set fire to the 2 houses. I concur with PW4 as there were no investigations carried out to ascertain where the accused was at the time the incident happened. Further, there is evidence before me that the complainant was being kept at the uncle to the accused's place. The question that remains unanswered is why the complainant decided to leave the place where he was being kept, went to his house and left without sleeping in the same house. There is no information before me to confirm the whereabouts of the complainant at the time of the incident. This leaves a lot of doubts in the mind of the court. The matter having not been investigated fully so that the circumstantial evidence has taken the case out of the realm of conjecture, so that it attains such a degree of cogency which can permit only an inference of guilt, I find that the prosecution has not proved their case beyond all reasonable doubt.



I am not satisfied that the prosecution has proved their case beyond all reasonable doubt. I find the accused not guilty as charged on count 2 of arson and I acquit him of the offence.

DELIVERED IN OPEN COURT THIS

J. S. CHIYAYIKA

MAGISTRATE CLASS I

