

**IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

APPEAL NO. 27,
28/2020

BETWEEN:

MABVUTO MWALE

KENNEDY LIYUNGU

AND

THE PEOPLE



1ST APPELLANT

2ND APPELLANT

RESPONDENT

Coram: Musonda DCJ, Kabuka and Chinyama, JJS.

On 1st September, 2020, 6th October, 2020 and on 19th April, 2024.

For the Appellants : *Mr. M. Kasaji, Messrs C. L. Mundia & Company*

For the Respondent : *Mrs. M. Chipanta – Mwansa, Deputy Chief State Advocate with Ms. P. Nyangu, Senior State Advocate both of the Director of Public Prosecutions and Mr. B. Chiwala, Chief Legal and Prosecutions Officer, Anti-Corruption Commission.*

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Phiri (Charles)-v-The People (1973) ZR 168.**
2. **Matongo-v-The People (1974) ZR 164.**

Introduction

- 1) At the hearing of this appeal, we were informed by learned Counsel for the appellants, Mr. Kasaji, that the 1st appellant had died and upon proof of his death, we deemed the appeal (No. 27 of 2020) in his respect to have abated, i.e., to have come to an end, in accordance with section 355 of the Criminal Procedure Code, Chapter 88, Laws of Zambia. The appeal (No. 28 of 2020), therefore, relates only to the 2nd appellant whom we will continue to refer to as the appellant. Where mentioned, the deceased will be referred to by that moniker.

Background

- 2) The appellant was initially acquitted by the Subordinate Court at Lusaka presided over by the Resident Magistrate of one count of the offence of Abuse of Authority of Office contrary to section 99(1) of the Penal Code, Chapter 87, Laws of Zambia. Particulars of offence were that, on dates unknown, but between 2nd June, 2009 and 13th June, 2009, the appellant, being a person employed in the Ministry of Mines as Director, Geological Survey, did abuse the authority of his office by authorising the services of the driver,

David Mugwagwa to use motor vehicle registration number ABJ 5580, Ford Ranger, on a private trip to Mumbwa, an act which was arbitrary and prejudicial to the interest of the Government of the Republic of Zambia.

- 3) The State appealed against the acquittal to the High Court. The High Court (Mchenga J, as he then was) quashed the acquittal and convicted the appellant. The appellant was sentenced to 5 months simple imprisonment. The appellant has now appealed to this Court putting up six grounds of appeal; five of them (grounds 1,2,3,4 and 6) are against conviction and the remaining one (ground 5) is against sentence.

The case in the Subordinate Court

- 4) At the trial in the Subordinate Court, the State called 7 witnesses. The appellant gave evidence for himself and did not call any other witness as he was perfectly entitled.
- 5) It was never in dispute, in this case and the appellant did admit that he had authorised the deceased to travel to Mumbwa, in his private capacity, using a Government motor vehicle, registration number ABJ 5580. The vehicle was driven by PW1, David

Mugwagwa, a driver in the department of Geological Survey in the Ministry of Mines on the stated dates. It was further not in dispute that the trip was to enable the deceased to conduct an environmental impact assessment to enable PW5, David Robert Britz, the owner of Bokomo Gold Mine, to obtain a prospecting licence for a gold prospect in Mumbwa that he had bought at an auction by the Sheriff of Zambia. PW5 paid the deceased the sum of eighteen (18) million kwacha (non-rebased at the time, now eighteen (18) thousand kwacha rebased) from which he paid PW1 an allowance of three (3) million kwacha (non-rebased at the time, now three (3) thousand kwacha) and met other needs for the trip.

- 6) What was in dispute was whether the appellant had power to authorise the deceased to undertake a private trip using government resources i.e., the institution's motor vehicle and a driver.
- 7) The evidence given by the prosecution established that neither the deceased nor PW1, took any leave of absence from work for the period they were away in Mumbwa. This was confirmed by PW1 himself, PW2 (Kondwani Mugala) who was transport officer at Geological Survey at the time and PW6, the Human Resources

Management Officer in the Ministry of Mines. PW6, in particular, stated that the use of government vehicles and time for private purposes were contrary to the conditions of service under which the deceased and the appellant were serving. PW3, (Dr. Godfrey Mooba Beene) Permanent Secretary at the Ministry of Mines, stated that it was wrong for a member of the public to pay for fuel and subsistence allowance to an officer to do private work using a government vehicle. Further that, private jobs were not allowed according to policy and officers were expected to declare interest in such matters. PW7 (Alpha Ngosha Nkonde) from the Anti-Corruption Commission (ACC) arrested and charged the appellant for releasing a government vehicle for a private job.

- 8) In defence, the appellant told the Court to the effect that he authorised the use of the motor vehicle and the driver in line with a directive from President Mwanawasa to help resolve the plight of former employees of the gold mine where the deceased had gone to do the environmental impact assessment. He also claimed that the Mines and Mineral Resources Act authorised him to assist members of the public.

Decision by the learned trial Magistrate

- 9) In his judgment, the trial Magistrate did not deal directly with the question whether the appellant had power to authorise the use of the motor vehicle and the driver by the deceased. Relying on the evidence of some prosecution witnesses that Surveyors in the department of Geological Survey could conduct private work and without addressing the issue whether this could be done using government resources, he concluded that the appellant had not committed any offence. He acquitted him.

Appeal to the High Court and decision by the learned Judge

- 10) On appeal to the High Court, as already pointed out, the learned Judge set aside the acquittal and convicted the appellant. He reasoned that the appellant did not have power to authorise the use of the motor vehicle and the driver on a private job by the deceased. He took the view that using government resources for private purposes and gain was arbitrary and prejudicial to the rights and interests of the Government of the Republic of Zambia within the terms of Section 99(1) of the Penal Code, which enacts

the offence of abuse of authority of office. The learned Judge discounted the defence that the appellant's action was in pursuance of a directive from the late President Mwanawasa, pointing out that the said directive was limited to and ended with the payment of the former employees' terminal benefits after the sale of the gold leach pad to PW5. The Judge also discounted the other argument that the appellant was required to assist members of the public under Section 124 of the Mines and Minerals Development Act. What was there was a requirement generally for the Director of Geological Survey to assist members of the public seeking information concerning geological matters. Clearly, this did not extend to authorising the use of Government resources for private work conducted by officers.

The appeal to this Court and our decision

- 11) The appellant has appealed to this court as it were. Just like in the two Courts below, the gravamen of the appeal is whether the appellant had power to authorise the use by the deceased of a Government vehicle and driver, in his private work.

- 12) We have, accordingly, taken into account the grounds of appeal and the arguments thereon both written and oral. We did note, in paragraph 9 above, that the trial Magistrate never dealt directly with the question whether the appellant had power to authorise the use of Government resources for private purposes. In the High Court, the learned Judge dealt with the issue and resolved it with the conclusion that the appellant had no authority to allow any officer to use Government facilities to make money for themselves and doing so was an arbitrary act. The Judge further found that the Government was prejudiced because the deceased and PW1 continued to earn salaries (from Government) when they were on a private errand. We agree with this view, bearing in mind that both the deceased and PW1 were not on leave, which indicates that they were using Government time for private gain. Surely, it ought to have dawned on the appellant that authorising the exercise in such circumstances was wrong.
- 13) Additionally, it is clear from the testimony of PW3, the Permanent Secretary responsible for the Ministry of Mines that it was wrong for a member of the public to pay for fuel and subsistence allowance to an officer to do private work using a Government

vehicle. PW6, the Human Resources Management officer in the Ministry also stated that the use of Government vehicles and time for private purposes were contrary to the conditions of service under which the appellant served. These statements were never seriously contradicted. In any case, as pointed out by the learned Judge, in his judgment, the fact that previous misconduct was condoned could not be the basis for excusing the accused in this case from prosecution. We share the same view.

14) One of the arguments put up in this appeal, which is the subject of grounds 1 and 3, was to the effect that the learned High Court Judge should not have relied on the evidence of PW3 that the appellant had no power to authorise the use of the motor vehicle because he was contradicted by the other witnesses namely: PW1, PW2, PW4 and PW5. Grounds 1 and 3 read as follows:

1. *The appellate court erred in law and in fact when it set aside findings of fact by the trial Magistrate who had the privilege of observing the demeanour and conduct of witnesses before him.*
3. *The appellate court erred in law and in fact when it upheld the evidence of PW3 when the evidence of other witnesses taken as a whole did not corroborate his evidence.*

15) As rightly demonstrated by the learned High Court Judge, a perusal of the evidence given by PW1, the driver and PW2 does not

show any contradiction with the evidence of PW3 as both of them essentially acknowledged the authority of the appellant to issue weekend passes. The extra point made by PW3, which was not contradicted by any of the prosecution witnesses was that PW3 had overall oversight as regards the use of transport in the Department/Ministry. As for PW4 and PW5, we agree with the learned Judge's view that they never talked about the authority of the appellant in matters of transport as they were not employees in the Ministry. PW4 was merely one of the former employees at the gold mine, who represented the other miners in their quest to secure their terminal benefits from the former owners of the mine. PW5 was the person who bought the gold prospect out of whose proceeds the miners were paid. It was, therefore, not correct to allege that the two witnesses confirmed the appellant's authority to allow the use of the motor vehicle when they were in no position to have that knowledge. Having noted the foregoing, however, it is our settled view that the arguments put up in grounds 1 and 3 of the appeal contributed nothing towards the resolution of the issue whether the appellant had power to authorise the use of

Government resources in the conduct of private work. There is clearly no merit in the two grounds.

- 16) Another issue contested in the appeal which in our view is rather of pedagogical value only, is the argument in ground 2 relating to the propriety of charging the appellant with the offence of abuse of authority of office when according to the appellant it was not a criminal offence to misuse a Government vehicle. Ground 2 was as follows:

2. The appellate court erred in law and in fact when it came to the conclusion that whilst it was not a criminal offence to misuse a vehicle, it erroneously came to the conclusion that because the accused persons were not charged with the offence of misuse of a vehicle but that of abuse of authority of office, the appellate court ignored that the genesis of the charge was the use of a motor vehicle.

We are unable to appreciate the argument in the ground of appeal but note the simple fact that the alleged misuse of the vehicle is what led to the offence preferred. Needless to assert that the elements of the offence as brought out by the learned Judge in his judgment clearly imply misuse of Government property and we agree with this position. Clearly Ground 2 does not demonstrate any merit.

17) There is also the issue of the deceased and other surveyors in the department being allowed to do private consultancy as argued in relation to ground 4 of the appeal. The ground is as follows:

4. The appellate court erred in law and in fact when it found that the appellants herein were not allowed to carry out private consultancy when in fact PW3 admitted in cross-examination that private consultancy was permitted but with his permission, the fact not supported by documentary evidence.

We are quite convinced that this ground and the arguments around it skirted the central issue of whether the appellant had power to authorise the use of Government resources for private purposes. While it may be argued that officers in the department could carry out private work or consultancies, it is obvious as pointed out by the learned Judge, that such exercises could be undertaken outside official Government time and without using Government resources. This ground as well has no merit.

18) In ground 6, the contention was that the High Court did not evaluate the evidence of the defence properly. This was in relation to the power of the Director of Geological Survey to release the motor vehicle to a subordinate for an assignment. The ground states:

6. *The appellate court erred in law and in fact by its failure to evaluate the evidence of the defence, particularly the central issue of the powers of the Director of Geological Survey under the Mines and Minerals Act but relied exclusively to some extent on the evidence of PW3 a mere public servant who admitted that he was not aware of the powers of the Director under the Mines and Minerals Act and admitted under cross-examination that the Director as the Head of Department had authority to release a motor vehicle to any of his subordinates as was the case in other assignments before the current case.*

Our view is that the issue was amply and ably dealt with by the learned Judge in the High Court. A reading of section 124 of the Mines and Minerals Development Act (No.7 of 2008) referred to by the appellant shows that no such power as claimed in the ground was given to the Director of Geological Survey. The section states:

(1) The Director of Geological Survey shall-

- (a) advise the Minister on geological matters;*
- (b) undertake the geological mapping of Zambia;*
- (c) undertake prospecting and exploration operations on behalf of the Republic;*
- (d) be responsible for-*
 - (i) granting preliminary investigating rights, prospecting permits, prospecting licences and mineral processing licences;*
 - (ii) promotion of value addition to mineral and metals; and*
 - (iii) regulating, prospecting, mineral processing and value addition activities;*

- (e) provide data concerning the geology and mineral resources of Zambia, and generally assist members of the public seeking information concerning geological matters; and
 - (f) maintain such laboratory, library and record facilities as may be necessary for the performance of the functions under this Act.
- (2) The Director of Geological Survey shall be responsible for analysing minerals and mineral products and issuing mineral analysis certificates and valuation certificates in respect of-
- (a) applications for the import or export of minerals, mineral products or samples;
 - (b) mineral or mineral products at mines or mineral processing plants.
- (3) The mineral analysis certificate issued by the Director of Geological Survey under subsection (1) shall be admissible as evidence in the assessment of royalty and other payments due to the Government.
(Underlining for emphasis)

From the foregoing section, it is clear that the power to assist could only be exercised under paragraph (e) of section 124 (1) with regard to providing:

“data concerning the geology and mineral resources of Zambia, and generally assist members of the public seeking information concerning geological matters...”

It is our settled view that there is no way in which this provision can be said to give power to the Director, Geological Survey to

authorise the use of Government resources for private excursions.

Suffice to say, we find no merit in the ground.

- 19) Finally, there was ground 5 that challenged the appropriateness of the sentence imposed on the appellant. The contention was that the appellant should not have been given a custodial sentence because the offence was a misdemeanour and the appellant was a first offender. The ground stated:

5. The appellate court erred in law and in fact when it sentenced the 2nd appellant to a custodial term when in fact the offence was a misdemeanour for which in a deserving case a fine/and or lesser sentence should have been imposed as first offender.

A perusal of the record of appeal does not show any reasons why the learned Judge preferred the particular sentence. The foregoing notwithstanding, the principles that guide courts in determining the appropriate sentence where the conviction is for a misdemeanour and the provision creating the offence does not stipulate the punishment are well settled. The starting point is section 38 of the Penal Code which states:

“When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both.”

In the judgment the learned Judge found and rightly so, based on the evidence, that the appellant had not derived any benefit from the transaction between the deceased and PW5. He however, found and justifiably so, that the action by the appellant allowing the deceased to use Government resources in his private enterprise was arbitrary and prejudicial to the rights and interests of Government, and that this proved the offence, albeit, a misdemeanour. In the case of **Phiri (Charles)-v-The People**¹, the Court of Appeal gave the following guidance:

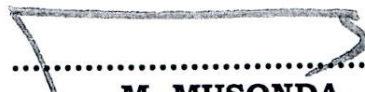
“The considerations to be taken into account when sentencing for a misdemeanour are well known and, for instance, a first offender will normally be fined rather than imprisoned unless, in the circumstances, the court considers that a fine is not appropriate even in the case of a first offender.”


In the case before us, there were no antecedents given in respect of the appellant on the record. We are, therefore, entitled to assume that he was a first offender. We do not also see any serious or other aggravating circumstances in the manner in which the offence was committed. We are inclined to follow the guidance in the **Phiri (Charles)** case. We take the view that the sentence of imprisonment was rather harsh and came to us with some sense of shock. A fine would have sufficed. We accordingly

set aside the sentence of imprisonment imposed by the learned High Court Judge. In its place we direct that the appellant pays a fine in the sum of K10,000, in default, 3 months simple imprisonment. The fine shall be paid within 14 days of the delivery of this judgment. In imposing this sentence, we have taken into account what we said in the case of **Matongo-v-The People²**, to the effect that a fine should not be such as to make a convict fail to pay so that he ends up in prison.

Conclusion

20) To the extent of our decision above, ground 5 relating to the appeal against sentence succeeds. However, the appeal against conviction has failed and it is hereby dismissed.

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M. MUSONDA
DEPUTY CHIEF JUSTICE

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J. K. KABUKA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE