IN THE HIGH COURT FOR ZAMBIA **HPA/32/2024**
HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)
BETWEEN:

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
JUDICIARY
24 JUN 2025
CRIMINAL REGISTRY 2
P.O. BOX 50067, LUSAKA

THE PEOPLE

Vs

VIVANCE NGIRIBATWARE

BEFORE HONOURABLE LADY JUSTICE ANN MALATA-ONONUJU IN OPEN COURT ON THE 24TH DAY OF JUNE, 2025

For the Applicant: *Mr. S. Banda with Ms. L. Tembo – State Advocates, National Prosecutions Authority*

For the Respondent: *Mrs. T. Mulubwa - Legal Aid Advocate, Legal Aid Board.*

JUDGMENT ON APPEAL AGAINST CONVICTION

CASES REFERRED TO:

1. *Attorney General Vs Marcus Kampumba Achiume (1983) Z.R.1 (S.C.);*
2. *Kelvin Hang'andu and Company (A Firm) Vs Webby Mulubisha 2008 Z.R. 82 Vol. 2 S. C.;*
3. *Antonio Ventriglia and Another Vs Finsbury Limited Appeal No. 2/2019;*
4. *The Director of Public Prosecutions Vs Ng'andu [1975] Z.R. 253;*
5. *Sevelino Zulu and Watson Kachenjela Vs The People Appeal No 123, 124/2021;*
6. *Mushemi Mushemi Vs The People (1982) Z.R. 71 (S.C.);*

7. *Wilson Masauso Zulu Vs Avondale Housing Project Limited (1982) Z.R. 172 (S.C.); and*
8. *Kausa Mwachindala and Felix Kandolo Vs Mathews Musona and Others Appeal No. 1/2021.*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Immigration and Deportation Act No. 18 of 2010 of the Laws of Zambia;*
2. *The Citizenship of Zambia Act No. 33 of 2016 of the Laws of Zambia;*
3. *The Passport Act No. 28 of 2016 of the Laws of Zambia;*
4. *The Refugees Act No.1 of 2017 of the Laws of Zambia;*
5. *The Criminal Procedure Code Chapter 88 of the Laws of Zambia; and*
6. *Blacks Law Dictionary 11th Edition. Bryan A. Garner Editor in Chief. Thomson Reuters.*

1. INTRODUCTION

1.1 This is an Appeal against the Judgment of the Subordinate Court which acquitted the Respondent, Vivance Ngiribatware, for the offences in Count One of Concealing of True Identity contrary to **Section 52(2)**, in Count Two Giving of False Statement contrary to **Section 52(4)**, and in Count Three Employing a Foreigner whose status does not authorise that person to be employed contrary to **Section 43(1)(b)** and **56(1)** of the **Immigration and Deportation Act No. 18 of 2010** of the **Laws of Zambia**.

1.2 The Particulars of the Offences for which the Respondent was acquitted were as follows:

1. *Count One: The Accused Person, being a Rwandese national, on 23rd February, 2023, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, wilfully did conceal his true identity to an Immigration Officer namely, Shadrick Mwamba, as a Congolese national when in fact not.*
2. *Count Two: The Accused Person, being a Rwandese national, on 30th November, 2021, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, wilfully did give false information to the Commissioner of Refugees of Zambia when being granted Asylum Seeker Certificate as a Congolese national when in fact not.*
3. *Count Three: The Accused Person, being a Rwandese national, on 30th November, 2021, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did employ **Theoneste Ndahimana**, a Rwandese national whose status does not allow.*

1.3 The Appellant, being dissatisfied with the Judgment of the Lower Court, filed Notice of Appeal Against Acquittal on 23rd August, 2024, and advanced the following Grounds of Appeal:

1. *The learned Trial Court erred in law when it acquitted the Respondent on the basis that he did not wilfully and with intent conceal his identity, citizenship or country of origin in Count One against the weight of the evidence on Record proving all the ingredients of the offence.*
2. *The learned Trial Court erred in law when it acquitted the Respondent of the offence of concealing his true identity as it is a requirement under the procedure for recognition of refugees to surrender all passports to the Commissioner of Refugees.*
3. *The Court erred in law when it acquitted the Respondent on grounds that he did not give a false statement to the Arresting Officer when it is on Record that he told the Dealing officer that he was a recognized Congolese refugee in Zambia.*
4. *The Court erred in acquitting the Respondent on the basis that the State failed to prove that the Respondent did not give false information to the Commissioner of Refugees about his true nationality when he informed them that he was a Congolese national.*
5. *The Court erred in law when it failed to take Judicial Notice of the fact that the State witness produced two passports with different names belonging to the*

Respondent which were used to travel to different countries.

6. *The Court erred in law when it acquitted the Respondent on grounds that the State failed to prove the case beyond reasonable doubt when they submitted evidence that Mr. Theoneste was found working at the Accused's company.*
7. *The learned Trial Court erred in law when it acquitted the Respondent in Counts Two and Three in light of the evidence on Record.*

2. APPELLANT'S HEADS OF ARGUMENT

2.1 The Appellant filed Heads of Arguments, erroneously referred to as Respondent's Heads of Arguments, on 3rd February, 2025.

2.2 Counsel for the Appellant began by giving a brief background to the Matter as stated above at 1.1. and proceeded to submit that they would be arguing **Grounds One** to **Five** as if they were one Ground.

2.3 Counsel submitted that the learned Trial Court erred in law when it acquitted the Respondent on the basis that he did not wilfully and with intent conceal his identity, citizenship or country of origin against the weight of the evidence on Record proving all the ingredients of the offence and that he did not give a false statement.

2.4 In support, Counsel quoted **Section 52(2)** of the **Immigration** and **Deportation Act** as follows:

"Any person who willfully and with intent to conceal that person's identity, citizenship or country of origin—

> ***(a) fails to comply with a lawful requirement made under this Act; or***
>
> ***(b) when required under this Act to answer questions put to that person, makes any representations by words, writing or conduct of a matter of fact, which representation is false in fact;***

commits an offence."

2.5 Counsel submitted that there is evidence on page 14 of the Court's Judgment from PW8, Shadrick Mwamba, an Immigration Officer, that information obtained from the Immigration System shows that the Respondent entered Zambia through Nakonde border in January, 2018, and his Rwandese passport has a visa and other endorsements which are genuine. It was submitted that PW8 testified that according to their system, the Respondent was a Rwandese national who concealed his national identity when acquiring the refugee status.

2.6 It was submitted that at page 14 of the Court's Judgment, PW8 testified that he requested the Respondent to produce his identity card and he was given an Investor's Permit in the names of Jean Pierre Nkubana, a Congolese national.

2.7 Counsel submitted that there is also evidence from PW2 who testified that at the material time, he seized two metallic safes from the Respondent's Company. That the Respondent told PW2 that he did not have access to the safe as the keys were lost. That PW4 testified that the safe was forcefully opened by Mr. Nyirenda, a Drug Enforcement Commission (DEC) Officer, using a grinder. That inside the safes they found four (4) Rwandese documents, two (2) passports a blue one and a green one in the names Vivance Ngiribatware, a driver's license and an identity card. That all the documents had the Respondent's portrait.

2.8 It was submitted that PW8 produced the two Rwandese passports marked P3, a Rwandese identity card marked P4, and a Rwandese driver's license marked P5, all bearing the names Vivance Ngiribatware.

2.9 Counsel contended that from the foregoing, the Respondent's conduct showed that he wilfully and intentionally hid his Rwandese identity or dual citizenship from the Officers which information is material according to **Section 34(1)(b)** of the **Immigration and Deportation Act**.

2.10 Counsel submitted that the word 'identity' is not defined in the **Immigration and Deportation Act**, but **Section 2** refers to 'national document of identity' which means a national registration card or passport. Further that the **Citizenship of Zambia Act No. 33 of 2016** defines 'national identity document as a document used to verify aspects of a person's personal identity.

2.11 Counsel submitted that in view of the above definitions, P3, being two (2) Rwandese passports, and P4, being a Rwandese identity card, verifies the Respondent's personal identity as Vivance Ngiribatware.

2.12 It was submitted further that **Section 2** of the **Passport Act No. 28 of 2016** defines the word 'passport' as an official document issued by a government, certifying the holder's identity and citizenship and entitling the holder to travel under its protection to and from a foreign country.

2.13 Counsel submitted in relation to the above that P3 is an official document issued by the Rwandese Government, certifying the Respondent's identity and citizenship and entitling the holder to travel under its protection to and from a foreign country.

2.14 Counsel submitted that there is evidence on page 14 from PW8 that when he asked the Respondent about his true status, the Respondent produced an Investors Permit (D4) in the names of Jean Pierre Nkubana, a Congolese refugee from Congo.

2.15 That in his defence, the Respondent does not deny concealing his identity and told the Lower Court that he came to Zambia in 2011 using the Rwandese passport and he did go to the Commissioner of Refugees and gave them his true names as Jean Pierre Nkubana because he did not want to hide anymore.

2.16 Counsel submitted that on page 16 of the Court's Judgment, PW8 told the Court that the false information given was that the Respondent was a Congolese refugee in Zambia.

2.17 Counsel stated that according to PW3, evidence proving false statement is P2, being the Office of Refugees' document. That **Section 37** of the **Refugees Act No.1 of 2017** provides as follows:

> ***"(1) The personal status of a recognised refugee shall be governed by the laws of the country of the recognised refugee's domicile, or if the recognised refugee has no domicile, by the laws of Zambia."***

2.18 In **Grounds Six** and **Seven**, Counsel submitted that the State proved that the Respondent employed Theoneste Ndahimana, a foreigner whose status does not authorise to be employed by the Respondent. It was submitted that PW1, PW2, PW7 and PW8 told the Court that on 23rd February, 2023, they visited the Respondent's Company called Viva Manufacturing Limited in Chinika Industrial Area where they apprehended three (3) foreign nationals namely, Theoneste Ndahimana, Isimbi Nkubana a Rwandese national, and Ferdinand Ngiwora, who were on the Company premises.

2.19 Counsel submitted that on pages 13 and 14 of the Court's Judgment, PW7, Abraham Chafilwa an Assistant Immigration Officer, informed the Court that the Respondent was asked how many employees he had and he told them 32 and among the

32, two were none Zambians being Theoneste Ndahimana and Ferdinand Ngiwora; and among the two, one was deported.

2.20 Counsel submitted that PW8 told the Court that on the day of the operation, Theoneste Ndahimana was found in the Control Room, while Ferdinand Ngiwora locked himself in a room. That PW8 further told the Court that Theoneste was convicted and fined K2,500.00 after his admission and was still in the Country. That Isimbi Nkubana was convicted and fined K10,000.00 and later removed from the Country, while Ferdinand Ngiwora did not appear in Court because he was removed from the Country.

2.21 Counsel submitted that **Section 2** of the **Immigration and Deportation Act** defines 'work' as including the following:

> ***"(a) Conducting any activity normally associated with the running of a specific business; or***
> ***(b) being employed or conducting activities consistent with being employed or with the profession of the person, with or without remuneration or reward;"***

2.22 Counsel further submitted that **Section 43(5)** of the **Immigration and Deportation Act** states that:

> ***"If an illegal immigrant is found on any premises where a business is conducted, it shall be presumed that such illegal immigrant is or was employed by the***

person who has control over the premises, unless prima facie evidence to the contrary is adduced."

2.23 Counsel contended that it is clear from the above that the Prosecution proved that Theoneste was found working at the Respondent's Company.

2.24 Counsel submitted that in the light of the foregoing, that this Court sets aside the acquittal and convict the Respondent on all Counts.

3. RESPONDENT'S HEADS OF ARGUMENTS

3.1 Counsel for the Respondent begun by giving a summary of the Matter as provided in brief at 1.1, 1.2, and 1.3 above and submitted that the Appellant filed in seven (7) Grounds of Appeal against the acquittal of the Respondent. Counsel stated that they will proceed to present their arguments in response to all of the Grounds of Appeal as if there were one Ground.

3.2 In response to **Grounds One** to **Seven** of the Appeal, Counsel submitted that the Appellant argue that the Trial Court erred in law when it acquitted the Respondent on the basis that he did not wilfully and with intent conceal his identity, citizenship or country of origin, and that he did not give a false statement. That additionally, that the State proved that the Respondent employed a Theoneste Ndahimana, a foreigner, whose status does not authorise to be employed by the Respondent.

3.3 Counsel submitted that in response to the State's Grounds of Appeal, all seven (7) Grounds are misconceived and incompetent before this Court.

3.4 Counsel submitted that it is trite law that the Director of Public Prosecutions can only Appeal on the point of law and not on a finding of fact supported by evidence. That the arguments made by the Appellant on Grounds One to Five of the Grounds of Appeal are clearly attacking the Court's finding that the Respondent did not conceal his identity and give a false statement, while Grounds Six to Seven they argue against a finding of fact supported by evidence that the Respondent did not employ Theoneste Ndahimana, a foreigner whose status did not authorise to be employed.

3.5 Counsel submitted that the above is fortified by the provisions of **Section 321A (1)** of the **Criminal Procedure Code Chapter 88** of the **Laws of Zambia**, which provides as follows:

> ***"(1) If the Director of Public Prosecutions is dissatisfied with a judgment of a subordinate court as being erroneous in point of law, or as being in excess of jurisdiction, he may appeal against any such judgment to the High Court within fourteen days of the decision of the subordinate court."*** (Emphasis theirs)

3.6 It was argued that the above provision lacks ambiguity as it is clear that the Director of Public Prosecutions can only appeal a point of law or as being in excess of jurisdiction. Counsel contended that the Appellant's arguments do not attack the Judgment of the Lower Court as being erroneous on point of law or as being in excess of jurisdiction; that instead, the Appellant argue the finding of facts by the Lower Court supported by evidence in all seven Grounds of Appeal.

3.7 Counsel submitted that the acquittal by the learned Trial Court of the Respondent on all three Counts was premised on a finding of fact with supporting evidence; that it is trite law that a finding of fact by the Trial Court can only be reversed by the Appellate Court if the same was made in absence of relevant evidence.

3.8 For credence of the submission, Counsel drew the Court's attention to the case of **Attorney General Vs Marcus Kampumba Achiume** (1) where the Supreme Court held as follows:

> ***"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or <u>made in the absence of any relevant evidence or upon a misapprehension of the facts</u> or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."*** (Emphasis theirs)

3.9 It was Counsel's argument that since the finding of facts in all three Counts that led to the acquittal of the Respondent were supported by evidence, this Appeal in its entirety is destitute of merit and should be dismissed accordingly.

3.10 On the issue of Jurisdiction, Counsel argued that the seven Grounds of Appeal are incompetently before this Court as an Appellate Court, hence, this Court has no jurisdiction to entertain the same in light of the provisions of **Section 321A** of the **Criminal Procedure Code**.

3.11 Counsel submitted that it is trite law that a Court can only hear a matter if it is possessed of the requisite jurisdiction. The court was referred to the case of **Kelvin Hang'andu and Company (A Firm) Vs Webby Mulubisha** (2) where the Supreme Court guided, inter alia, as follows:

> ***"The jurisdiction of the High Court is unlimited, but not limitless, since the court must exercise its jurisdiction in accordance with the law."*** Emphasis theirs)

3.12 Counsel submitted that **Section 321A** of the **Criminal Procedure Code** clearly sets out the instances when the Director of Public Prosecutions can appeal, and that is, if Judgment of the Subordinate Court is erroneous on the point of law or being in excess of jurisdiction. That the Appeal by the Appellant before this Court is devoid of the said requirements.

3.13 Counsel stated that in a plethora of cases, including **Antonio Ventriglia and Another Vs Finsbury Limited** [(3)] it was held, *inter alia*, that:

> ***"Jurisdiction is everything (and that) without it, a court had no power to make one more step."***

3.14 It was Counsel's submission that from the argument above, supported by authority, this Honourable Court has no jurisdiction to entertain this Appeal as the arguments made by the Appellant are premised on the Lower Court's finding of facts supported by evidence and as such, Counsel prayed that this Honourable Court dismisses the said Appeal forthwith and uphold the Lower Court's decision.

4. HEARING

4.1 The hearing of the Appellant's Appeal was on 30th April, 2025, with Counsel for both Parties present. Other than an Application made by Counsel for the Appellant to have their Heads of Argument amended to read "Appellant's Heads of Arguments" which received no objections, both Parties relied on the documents filed without further augmentation and agreed to have the matter set down for Judgment.

5. CONSIDERATION AND DETERMINATION OF THE COURT

5.1 I am indebted to learned Counsel for the Appellant and the Respondent for their submissions which will aid this Court in reaching its decision.

5.2 The Appellant has put forth seven (7) Grounds of Appeal and they have argued Grounds One to Five as one Ground; and Grounds Six to Seven as one Ground. Counsel argued that based on the evidence on Record, which evidence supports the conviction of the Respondent on the three offences he was charged with, this Court should set aside the acquittal and convict the Respondent on all Counts.

5.3 In response, the Respondent argued all the Grounds of Appeal as one.

5.4 The Respondent argue that it is trite law that the Director of Public Prosecutions can only Appeal on a point of law and not on a finding of fact supported by evidence. They fortify their submission by referring to **Section 321A** of the **Criminal Procedure Code** as quoted at 3.5 above.

5.5 It was contended that the Grounds of Appeal and arguments in support presented by the Appellant clearly attack the Lower Court's finding of fact that the Respondent did not conceal his identity, did not give false statement and did not employ Theoneste Ndahimana, a foreigner whose status did not authorize to be employed.

5.6 It was argued that the Appellant's arguments do not attack the Judgment of the Lower Court as being erroneous on point of law, but instead argues the findings of fact by the Lower Court supported by evidence. It was submitted that the findings of fact, as was done in the Lower Court, can only be reversed by this Court if the same was made in the absence of relevant evidence. Counsel placed reliance on the holding of the Supreme Court in the case of **Attorney General Vs Marcus Kampumba Achiume** [(1)].

5.7 Armed with **Section 321A** of the **Criminal Procedure Code** as well as the above-mentioned case, Counsel for the Respondent submitted that this Court has no jurisdiction to entertain this Appeal as the arguments made by the Appellant are premised on the Lower Court's findings of fact supported by evidence and as such, this Court must dismiss the Appeal forthwith and uphold the Lower Court's decision to acquit the Respondent on all charges.

5.8 Based on the totality of the Grounds of Appeal and arguments presented by both Parties, in support and in response as well as the evidence on Record, this Court must determine whether the Grounds of Appeal as presented, did not raise points of law, but rather were only concerned with questions of fact which subsequently answer the question whether this Court has the jurisdiction to hear and determine this Appeal.

5.9 **Section 321A** of the **Criminal Procedure Code** as quoted by Counsel for the Respondent above at 3.5 states that in order for the Director of Public Prosecutions to launch an appeal in this Court against a decision of the Lower Court, the Director of Public Prosecutions can only Appeal on a point of law or the decision being in excess of jurisdiction. The Director of Public Prosecutions cannot appeal on a question of fact.

5.10 In determining whether the Appellant's Grounds of Appeal are on points of law or on questions of fact, the findings of the Lower Court and each Ground of Appeal and its arguments in support must be examined accordingly.

5.11 I am guided in doing so by the holding of the Supreme Court in the case of **The Director of Public Prosecutions Vs Ng'andu** [4] as follows:

> ***"A finding of fact is a question of law on which the Director of Public Prosecutions can appeal under s. 12 (4) of the Supreme Court of Zambia Act 1973 only if it be alleged that it was made without any evidence or on a view of the facts which could not reasonably be entertained."*** (Emphasis mine)

5.12 Therefore, based on **Section 321A** of the **Criminal Procedure Code** and the above holding of the Supreme Court, I will need to examine each Ground of Appeal and the attendant arguments in order to determine whether the findings were made without any evidence or on a view of the facts which could not reasonably be entertained.

5.13 In the Court of Appeal case of **Sevelino Zulu and Watson Kachenjela Vs The People** [(5)], wherein **Section 321A** of the **Criminal Procedure Code**, *inter alia*, was under consideration, it was stated as follows at J15 to J16:

> ***"In many cases and especially in those cases where the grounds of appeal have been properly crafted, it is possible to determine on their face, that they are concerned with either a point of law or a question of fact.***
>
> ***9.4. However, the mere fact that a ground of appeal has the words "point of law" or "question of fact" in the text, does not necessarily mean that the ground of appeal is actually on a point of law or on a question of fact.***
>
> ***9.5. Most of the time, even with well drafted grounds of appeal, <u>the question whether a ground of appeal is actually on a point of law, can only be decisively determined after examining both the ground of appeal and the arguments in support</u>.***
>
> ***9.6. This is because there are instances where arguments in support of a ground of appeal which has been presented as one being on point of law,***

actually show that what is being contested is a finding of fact. (Emphasis mine)

514 The Grounds of Appeal are stated at 1.3 above. Grounds One to Five as argued by the Appellant and which relate to Count One and Two in the charge, speak to the Respondent concealing his identity, citizenship or country of origin and doing so in relation to the requirement under the procedure for recognition of refugees to surrender all passports to the Commissioner of Refugees, when giving a statement to the Arresting officer, when giving information to the Commissioner of Refugees about the Respondent's true nationality, and in the face of the State witness producing two Rwandese passports with different names belonging to the Respondent.

5.15 Grounds Six to Seven as argued by the Appellant relate to Count Three in the charge and speak to the evidence that Mr. Theoneste was found working at the Accused's or Respondent's company. Further that the learned Trial Court erred in law when it acquitted the Respondent in Counts Two and Three in light of the evidence on Record.

5.16 In the Heads of Argument in Support filed by the Appellant, it was submitted that the learned Trial Court erred in law when it acquitted the Respondent on the basis that he did not wilfully and with intent conceal his identity, citizenship or country of origin against the weight of the evidence on Record proving all the ingredients of the offences and that he did not give a false statement.

5.17 Counsel for the Appellant in arguing Grounds One to Five referred this Court to **Section 52(2)** of the **Immigration and Deportation Act** which makes it an offence to wilfully and with intent to conceal ones identity, citizenship or country of origin, fails to comply with a lawful requirement made under the **Act** or when required under the **Act** to answer questions put to that person, makes any representations by words, writing or conduct of a matter of fact, which representation is false in fact.

5.18 Counsel contended that from the foregoing, the Respondent's conduct showed that he wilfully and intentionally hid his Rwandese identity or dual citizenship from the Officers which information is material according to **Section 34(1)(b)** of the **Immigration and Deportation Act**.

5.19 In arguing Grounds Six to Seven, Counsel submitted that the State proved that the Respondent employed Theoneste Ndahimana, a foreigner whose status does not authorise to be employed by the Respondent, more so when **Section 43(5)** of the **Immigration and Deportation Act** is considered.

5.20 Perusal of the Arguments in Support of Grounds One to Five as well as Grounds Six to Seven show that they are hinged on the Lower Court's alleged lack of consideration of the evidence tendered in support of the charges laid against the Respondent. The Appellants argue that the Lower Court failed to take into consideration what they allege is clear evidence presented backed by provisions of the law proving the ingredients of each charge; that on a proper assessment of the evidence before him, the trial Magistrate would not have come to the conclusion that resulted in the acquittal of the Respondent.

5.21 Based on the above, I find that the Grounds of Appeal as presented by the Appellant are based on points of law and questions of fact. I am fortified in my finding by the case of **The Director of Public Prosecutions Vs Ng'andu** [(4)], *supra*, where it was held that a finding of fact is a question of law on which the Director of Public Prosecutions can appeal if it is alleged that the decision of the Court was made without any consideration of the evidence presented.

5.22 I therefore find that the Appeal is competent and this Court has the jurisdiction to hear it.

5.23 Having found as above, what remains is to consider is the Grounds of Appeal, the arguments in support, the evidence on Record, as well as the Judgment of the Lower Court in deciding whether to set aside the acquittal and convict the Respondent on all Counts as prayed for by the Appellant.

5.24 A summary of the evidence shows that according to PW1, an Immigration Officer, he was assigned on an operation to go to Kanyama to check on the compliance of foreign nationals. There, they found a lady who stated that she was a Rwandese national and produced a Rwandese identity card, but however gave the Officers the status of a refugee from Congo.

5.25 PW1 stated that the lady led them to her father's workplace, a manufacturing plant, where another team had already arrested persons of foreign origin working without permits making ginger beer.

5.26 The lady gave the name of her father as being Jean Pierre Nkubana, whom PW1 called and requested his presence at the location as he was the owner of the company.

5.27 In his testimony, PW1 identified the Respondent and stated that he was a Rwandese national and a Congolese refugee. PW1 was referred to an Investor's Permit in the names of Jean Pierre Nkubana which stated that his nationality was Congolese.

5.29 PW1 was referred to a Refugee Certificate from UNHCR as well as an Alien National Registration Card issued to the Respondent both stating that he is Congolese.

5.30 PW2, an Investigations Officer from Drug Enforcement Commission (DEC), who, armed with a Notice of Seizure testified to seizing metal safes from the premises called Viva Manufacturers Limited and the Director there being the Respondent named Jean Pierre Nkubana.

5.31 PW3, a Legal Advisor for the Commissioner of Refugees, Ministry of Home Affairs, testified to the mandate of the Commission as derived from the **Refugees Act**. He testified that the Department of Immigration was trying to find out the nationality of Jean Pierre Nkubana and his office assisted them by requesting Jean Pierre Nkubana to proceed to their offices in order to verify his nationality, and stated that the registration records in the system stated the Respondent's nationality as Congolese. That the information in the system was given to them by the Respondent. PW3 produced the document (ID2) verifying the Respondent's name as being Jean Pierre Nkubana and his nationality as being Congolese and which had his picture. PW3 testified that the Respondent gave false information to his office as regards his nationality.

5.32 PW4, a DEC Senior Immigration Officer, testified that Officers from Immigration came to her office for the purpose of opening the safes seized as the keys could not be found. She testified that the safes were opened using a grinder and that this was done in the presence of the Respondent. That inside one of the safes they found two, one blue and one green, Rwandese passports and a driver's license and one identity card. She testified that the Rwandese passports were in the names of Vivance Ngiribatware, the Respondent, and had his portrait. PW4 identified the Respondent.

5.33 PW5, an Investigations Officer from DEC, testified to the opening of the safes using a grinder in the presence of other Officers.

5.34 PW6, a Chief Investigations Officer at DEC, testified to the opening of the safes using a grinder in the presence of the Respondent, and to the contents therein being, *inter alia*, the passports belonging to the Respondent. PW6 identified the Respondent.

5.35 PW7, an Assistant Immigration Officer, testified that on the material day, he and other Officers booked out for an operation to a company called Viva Manufacturing Limited in Chinika Industrial Area where they apprehended three (3) foreign nationals who were found working. He stated that the foreign nationals were Theoneste Ndahimana, Ferdinand Ngiwora, and the Respondent.

5.36 PW7 testified that when the Respondent was asked how many employees they have as a company, his response was 32 and among them two were non-Zambian. He testified that one of the foreign nationals was deported and the other was still in the country.

5.37 PW8 was an Immigration Officer who testified that an operation was conducted at a company called Viva Manufacturing where three foreign nationals were found being the Respondent, Vivance Ngiribatware also known by the name Jean Pierre Nkubana, Theoneste Ndahimana, and Ferdinand Ngiwora.

5.38 That when a request was made for their national identification cards, the Respondent produced an Investor's Permit in the name of Jean Pierre Nkubana a Congolese refugee, Theoneste

Ndahimana produced a Refugee Certificate as a Congolese refugee and Ferdinand Ngiwora produced a Rwandese passport with visiting days.

5.39 PW8 testified that the Respondent was asked if the two foreign nationals were his employees and if they had employment permits to which the Respondent answered that Theoneste Ndahimana had not obtained an employment permit and Ferdinand Ngiwora had a visiting permit.

5.40 PW8 testified that four safes were seized and taken to DEC offices and opened and in one of the safes were, *inter alia*, two Rwandese passports, a Rwandese national identification card and a Rwandese driver's license. That further investigations revealed that one of the passports was used by the Respondent to travel from Rwanda to Tanzania, and the other was used by the Respondent to travel from Rwanda to Tanzania and into Zambia with a Visa issued at Nakonde border. That the date of entry into Zambia was January, 2018, which was verified by the Immigration System.

5.41 PW8 testified that when asked about his other status, the Respondent produced the refugee status showing he was from Congo. PW8 testified that further investigations with the Commissioner of Refugees revealed that the Respondent was a refugee from the Democratic Republic of Congo and his name was listed as Jean Pierre Nkubana.

5.42 PW8 stated that based on his investigations, the Respondent is a Rwandese national who concealed his national identity when acquiring the refugee status and this convinced him to charge the Respondent accordingly.

5.43 With regards to the other two foreigners, PW8 testified that he asked the Respondent about them as they were found at his Company and he told PW8 that he employed them. PW8 testified that during the operation they found Theoneste Ndahimana in the Control Room and that Ferdinand Ngiwora had locked himself in a room. That Theoneste Ndahimana was fined and is still in the Country whilst Ferdinand Ngiwora was removed.

5.44 PW8 gave further testimony that on 23rd February, 2023, a lady called Isimbi Nkubana was found with a Rwandese national identity (card) who claimed to be a Congolese in Zambia. That she was charged with the offence of Concealing Identity and was convicted and fined K10,000.00 in default to 6 months Simple Imprisonment. That she paid the fine and was later removed from the Country.

5.45 PW8 testified that Isimbi Nkubana claimed that the Respondent was her uncle and that he was from Rwanda. A copy of Isimbi Nkubana's Statement recorded at the time was admitted into evidence as ID11.

5.46 In Cross Examination, PW8 contended that the Respondent concealed his true identity and gave false information to the Officers at the Commissioner of Refugees. That the false information he gave was that he was named Jean Pierre Nkubana and that he is a Congolese refugee in Zambia. That this information also appears on his Investor's Permit. That he has a pink National Identity Card for aliens issued by the Zambian authority which states that he is a Congolese. That the two passports (P3), and the identity card (P4) that were found in his safe show that he is a Rwandese national.

5.47 In his defence, the Respondent stated that his name is Jean Pierre Nkubana, a Congolese national. He stated that he was born in Congo and had a birth certificate, entered into evidence, verifying his details.

5.48 He testified that he showed the Officer his Company documents and Investor's Permit but they maintained that he was not Congolese.

5.49 The Respondent testified that he was born in 1974 in Congo and fled the country in 1995 during the civil war to Rwanda whilst his wife and son fled to Uganda. That whilst in Rwanda, he stayed with his parent's relatives called Ngiribatwares. He testified that due to the continued conflict and because the Nya Mulenga tribe of the Congo were looking for people to fight in Rwanda, his Rwandese family advised that he get "dual citizenship" and they gave him a new name of Vivance Ngiribatware.

5.50 That consequently, he was issued with a registration card (P4), passport (P3) and a driver's license (P5) so that he could work.

That he was issued with dual nationality by the Rwandese Immigration Officers and produced a printout of the Rwandan Constitution showing that dual citizenship is allowed in Rwanda.

5.51 He stated that he came to Zambia in 2011 using his Rwandese passport. The Respondent stated that because he did not want to hide anymore, he went to the Commissioner of Refugees and gave them his real name of Jean Pierre Nkubana and obtained an Investor's Permit in the same names. He identified his Zambian alien National Registration card with the name Jean Pierre Nkubana.

5.52 The Respondent refuted employing any foreigners at his Company with no work permits and stated that the people the Officers found at his Company were doing piecework. He denied employing the two foreigners and stated that he employed a lot of people and did not commit a crime in Zambia. That he had no reason to hide his identity in Zambia.

5.53 In Cross Examination, the Respondent stated that the Nya Mulenga people were looking for him to go and fight in the war and that the Rwandese people were also searching for him so he decided to come to Zambia. He narrated that he liked Zambia too much because there is peace and he was at peace.

5.54 Perusal of the Judgment in the Court below shows that the learned Trial Magistrate considered the testimony of the witnesses and the documentary evidence tendered into Court.

5.55 The Trial Court at page J28 of the Judgment stated as follows:

> ***"I must also hasten to add that in respect of count one the prosecution must prove that:***
>
> ***i. The accused person wilfully and with intent to conceal his identity, citizenship or country of origin to Shadrick Mwamba (PW8)***
>
> ***ii. That the representation was made by words, writing or conduct of a matter of fact***
>
> ***iii. That the representation was false."***

5.56 At J29 the learned Magistrate found as follows with regards to Count One:

> ***"The question therefore in the mind of this Court [is] did the accused person wilfully and with intent to conceal his nationality to PW8? The answer is in the negative this accused did disclose to PW8 his true identity and nationality when questioned by PW8 as Jean Pierre Nkubana, PW8 in his testimony did not mention that when he asked accused for his names and nationality he mentioned his names to be Vivance Ngiribatware according to PW8, accused his investor's permit in the names of Jean Pierre Nkubana when asked for an identity document by PW8 and I see no intent to conceal his nationality to PW8. I feel unsafe to rest the convictions on the flimsy evidence***

when from the evidence adduced there was no willful and intent by the accused to conceal his true identity to PW8, with this finding, I find that the state have failed to prove the case beyond reasonable doubt in count one and I acquit accused person accordingly.

5.57 With respect to Count Two, the Trial Magistrate found as follows at J29:

> ***"...it was crucial during the trial in count two to show that the accused person wilfully made a false statement to the Commissioner for Refugees of Zambia when being granted asylum as being a Congolese national, the witness called to aid this count was PW3, it was her testimony that the Commissioner for Refugees office received a request from the Immigration department requesting for the record of the accused person and according to PW3 the record on their system was that Jean Pierre Nkubana was a Congolese refugee and according to her this information was provided by the accused person, again I have noted gaps in the evidence of the State in respect to count 2 no evidence has been laid that accused wilfully gave false information to the Commissioner of Refugees when being issued with an asylum seekers certificate that he was a Congolese national the only evidence laid by PW3 was as stated***

above, that the record showed that Jean Pierre Nkubana was a Congolese refugee so I ask myself at which point did accused give false information to the Commissioner of Refugees. The defence evidence cannot be ignored D1 and D2 establish that Jean Pierre Nkubana was born on 12th of April 1974 in Uvira South Kivu in the Democratic Republic of Congo, D4 the alien national registration card issued in Zambia indicates Jean Pierre Nkubana's birth place is Congo, D5 the investors permit issued by the Immigration Department indicates Jean Pierre was a Congolese national, the result of these gaps is that the State has failed to prove their case in respect of count 2 beyond reasonable doubt and I find accused not guilty and acquit him accordingly."

5.58 The Appellant, in their Heads of Argument, argued Grounds One to Five in relation to the Lower Court's findings in Count One and Two as stated above. It was their contention that the Trial Magistrate erred in law when it acquitted the Respondent on the basis that he did not wilfully and with intent conceal his identity, citizenship or country of origin against the weight of the evidence on Record proving all the ingredients of the offence and that he did not give a false statement.

5.59 The evidence as adduced by the State shows that an operation on the Respondent's businesses led them to Theoneste

Ndahimana who stated that the Respondent was his uncle or father and a Rwandese national. Theoneste Ndahimana himself stated that he was Rwandese but had Congolese refugee status.

5.60 The State conducted an operation at the Respondent's other premises in Chinika where the Respondent, having been summoned, informed the Officers that he was Congolese and he produced evidence to support his assertion. These were the Investor's Permit, the Refugee Certificate issued by the Commissioner of Refugee Zambia and the alien National Registration Card.

5.61 A search of the Respondent's premises uncovered four safes which the Respondent, when asked to open them, stated that he had lost the keys to the safes. The Officers legally seized the said safes and took them to the DEC offices to be opened with a grinder in the presence of the Respondent. Upon opening one of the safes, there was discovered two passports, an identification card and a driver's license all from and issued from Rwanda.

5.62 Further investigations at the Commissioner of Refugees revealed that the Respondent provided information stating that he was Congolese and obtained a Refugee Certificate accordingly.

5.63 Based on the evidence tendered by the defence, the Respondent was born Jean Pierre Nkubana in 1974 in the Democratic Republic of Congo based on his birth certificate. He allegedly fled to Rwanda in 1994 to escape the civil war in Congo, a fact the Trial Magistrate took judicial notice of. From the evidence tendered by the Respondent he changed his name and obtained two passports, an identification card and drivers license in Rwanda in the name Vivance Ngiribatware.

5.64 It has not been established why the Respondent has two Rwandese passports, one blue and the other green. It has been established that the Respondent entered Zambia using one of his Rwandese passports. The Respondent states that he entered Zambia in 2011, whilst the evidence from the State as obtained from the Immigration Department system states he entered Zambia in January 2018. That using the document, supposedly his birth certificate, he applied for and obtained Congolese refugee status from the Commissioner of Refugees in Zambia.

5.65 According to **Section 2** of the **Passport Act**, the Respondent, having not one, but two Rwandese Passports, is a Rwandan citizen. He also has a Rwandan identity card which according to the **Citizenship of Zambia Act** defines a national identity document as a document used to verify aspects of a person's personal identity. Those documents are his national documents of identity, identifying him as a national or citizen of Rwanda.

5.66 **Section 11(1)** of the **Refugee's Act**, states as follows:

> ***"An asylum seeker or a person who is within Zambia, whether that person has entered Zambia lawfully or otherwise, and wishes to remain in Zambia as a***

recognised refugee under this Act may, within seven days of entering Zambia, apply for recognition as a refugee to the Commissioner or an authorised officer."

5.67 Though it is unclear when the Respondent applied for recognition as a refugee, the above provision is clear that it is up to the Respondent to apply for the recognition.

5.68 When applying for refugee status in Zambia, the **Refugee's Act** is clear on the need to provide material facts pertinent to one's application. **Section 17** of the **Act** states as follows:

> ***"(1) The Commissioner may request the Committee to cancel or revoke the recognition of a person as a refugee where there are reasonable grounds to believe that the person concerned—***
>
> ***(a) has committed an offence under this Act or any other written law;***
>
> ***(b) obtained the recognition through fraud, false submission of information or <u>concealment of a material fact</u>;"*** (Emphasis mine)

5.69 The Respondent, during the State's operation at his premises, did not disclose his Rwandese nationality to the officers, even when they stated to him that he was a Rwandese national and despite his knowledge of what was contained in the safes. He maintained that he was a Congolese refugee. Further, according to PW3, the Respondent, when making his application to be recognised as a refugee, did not present his Rwandese passports showing that he is a citizen of that country, but instead chose to submit a birth certificate from Congo and on his application state that he is a Congolese national.

5.70 It is my considered view that the Respondent did conceal material facts to both the Immigration Officers and to the Commissioner of Refugees. This is in contravention of **Section 52(2)** of the **Immigration and Deportation Act** quoted above as follows:

> ***"Any person who willfully and with intent to conceal that person's identity, citizenship or country of origin—***
>
> > ***(a) fails to comply with a lawful requirement made under this Act; or***
> >
> > ***(b) when required under this Act to answer questions put to that person, makes any representations by words, writing or conduct of a matter of fact, which representation is false in fact;***
>
> ***commits an offence."***

5.71 Further **Section 34(1)(b)** of **the Immigration and Deportation Act** clearly states as follows:

> ***"(1) The Director-General of Immigration may, by notice in writing, revoke any permit issued under this Act if the holder—***

(a) has contravened any provision of this Act or any other law;

(b) obtained a permit by means of any representation which was false in any material particular or by means of the concealment of any material information;"

5.72 The Respondent should have revealed his circumstances which would have included his identity, citizenship and country of origin to both the Commissioner of Refugees and the Immigration Officers.

5.73 In his consideration, the Trial Magistrate failed to consider the two Rwandese passports bearing the name Vivance Ngiribatware and the image of the Respondent found in a safe the Respondent claimed to have lost the keys for and which had to be opened using a grinder. He failed to take into consideration the fact that the Respondent entered this Country using a Rwandese passport, bearing the name Vivance Ngiribatware, thereby establishing his nationality and citizenship in 2018, prior to his application for refugee status. He failed to consider the Rwandese identity card also bearing the name Vivance Ngiribatware and the image of the Respondent also found in the safe equally cementing his identity.

5.74 The Trial Magistrate failed to take into consideration **Sections 52(2)** and **Sections 34(1)(b)** of the **Immigration and**

Deportation Act as quoted above, in the face of the glaring evidence presented by the Appellant during the trial as well as the relevant provisions of the law as shown above that support the charges in Count One and Two against the Respondent.

5.75 It is further unclear why the Trial Magistrate chose to ignore the evidence presented by the Appellant; there were no reasons tendered sufficiently to show cause why the testimony of the Respondent was favoured over that of the Appellant and its witnesses.

5.76 I am guided by the Supreme Court case of **Mushemi Mushemi Vs The People** (6) wherein it was held that:

> ***"(i) A conviction which is based on finding of fact which is in direct conflict with the overwhelming balance of the evidence, that evidence having been glossed over, cannot be upheld.***
>
> ***(ii) The credibility of a witness cannot be assessed in isolation from the rest of the witnesses whose evidence is in substantial conflict with that of the witness. The judgment of the trial court faced with such conflicting evidence should show on the face of it why a witness who has been seriously contradicted by others is believed in preference to those others."***

5.77 The Trial Magistrate in a manner that can only be described as shocking, completely glossed over evidence presented by the

Appellant in favour of the Respondent and failed to give sufficient, if any, reasons why he did so.

5.78 Ground Six and Seven of the Appellants Heads of Argument relate to the Trial Magistrate's acquittal of the Respondent in Count Three. At J30 of the Trial Magistrate's Judgment it was stated as follows:

> ***"In respect of count 3 the State must prove that the accused person employed Theoneste Ndahimana a foreigner whose status does not authorise to be employed by the accused person, it was PW8's testimony that whilst at the accused company three persons were apprehended who included the accused person, Tionese [Theoneste] Ndahimana and Ferdinand [Ngiwora] who according to him Tionese [Theoneste] Ndahimana was a Congolese refugee who produced her Refugee Certificate which was produced as P8, PW8 testified that Tionese [Theoneste Ndahimana] was convicted and fined K2,500.00 upon her own admission and she remained in the country, however during cross examination PW8 testified that he had not produced evidence in court that the accused person employed Tionese [Theoneste] and that he did not interview any officer from the labour office or an independent person to confirm that the accused employed Tionese [Theoneste].***

The net result I find in the absence of any evidence establishing that Tionese [Theoneste] Ndahimana was indeed an employee of the accused person is that the State have failed to prove beyond doubt that accused person did employ a person namely Tionese [Theoneste] Ndahimana a person whose status does not authorise to be employed as such I find accused person not guilty in count 3 and I accordingly aquit him."

5.79 The Appellant submitted that the State proved that the Respondent employed Theoneste Ndahimana, a foreigner whose status does not authorise to be employed by the Respondent.

5.80 Theoneste Ndahimana was found on the premises of the Respondent's Company, specifically in the Control Room. When questioned, the Respondent stated that he employed 32 people at his Company and Theoneste Ndahimana was one of two foreigners that he employed. When asked about the work permits of the two foreigners, the Respondent readily replied that they had none.

5.81 In his defence, the Respondent denied employing the two foreigners and submitted that work they did was piecework. The Respondent in his testimony stated as follows:

"I did not employ any foreigner only when immigration officers came to my company on the 23/3/23 they find people that were doing piecework

one was washing clothes the other person was found outside my gate. I was told I had employed people with no work permits. I told them that the two people came to my office for the second time looking for piecework."

5.82 The Appellant in their Heads of Arguments referred this Court to **Section 2** of the **Immigration and Deportation Act** which states that 'work' includes the following:

> ***"(a) conducting any activity normally associated with the running of a specific business; or***
>
> ***(b) being employed or <u>conducting activities consistent with being employed</u> or with the profession of the person, <u>with or without remuneration or reward;</u>"*** (Emphasis mine)

5.83 Work under the **Act** includes activities consistent with being employed. **Blacks Law Dictionary** at page 1387 defines 'work' as:

> ***"Work done or paid for by the piece or job done."***

5.84 The Appellant further referred the Court to **Section 43(5)** of the **Immigration and Deportation Act** which states as follows:

> ***"If an illegal immigrant is found on any premises where a business is conducted, it shall be presumed that such illegal immigrant is or was employed by the***

person who has control over the premises, unless prima facie evidence to the contrary is adduced."

5.85 It is clear from the above definitions and from the Respondent's own admission that Theoneste Ndahimana and Ferdinand Ngiwora worked, albeit, piecework, for the Respondent. When considered with **Section 43(5)** of the **Immigration and Deportation Act**, the onus of proving, *prima facie*, that they both did not work for the Respondent was on the Respondent. Perusal of the Record shows that the Respondent, being the owner and Director in Viva Manufacturing Limited and therefore having control over the premises, failed to adduce sufficient and satisfactory *prima facie* evidence that they did not work nor were employed by him. Contrary to the Trial Magistrate's finding, the burden of proof shifts and it is the Respondent who needed to adduce evidence, including independent evidence, to dismiss the Appellant's submissions.

5.86 In the case of **The Attorney General Vs Marcus Kampumba Achiume** [1], the Supreme Court held as follows:

> ***"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make."***

5.87 Further in the case of **Wilson Masauso Zulu Vs Avondale Housing Project Limited** [7], it was held that:

> ***"An Appellate Court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were perverse or made in the absence of any relevant evidence or upon misapprehension of the facts."***

5.88 I am equally guided by the Supreme Court in the case of **Kausa Mwachindala and Felix Kandolo Vs Mathews Musona and Others** [8] wherein it was held at J47 to J48 that:

> ***"It is trite that an appeal from a decision of a trial Court operates as a re-hearing on the record. Thus, an appellate court, be it the Supreme Court, the Court of Appeal or the High Court, in the exercise of its appellate jurisdiction, considers the whole evidence on the record, both oral and documentary, given in the trial Court as well as the Judgment appealed against. There is caution however, and this is that an appellate court which has had no benefit of seeing and hearing the witnesses at first hand should not lightly interfere with findings of facts by a trial Judge, unless it can be demonstrated that one or more of the conditions laid down in NKHATA, MARCUS KAMPUMBA ACHIUME and a host of other authorities exist."***

5.89 It is my considered view that the findings of the Trial Magistrate leading to the acquittal of the Respondent on all three Counts were perverse, made in the absence of any relevant evidence and upon misapprehension of the facts.

5.90 Having considered the entire Record and all the evidence therein, both oral and documentary given in the Trial Court as well as the Judgment Appealed against, and having taken into consideration the caution in the above case, I reverse the finding of the learned Magistrate in the Court below. I find that the Trial Magistrate, astonishingly, failed to take proper consideration of the evidence tendered by the State during trial.

5.91 I find merit in the Appeal and all seven Grounds of Appeal succeed.

5.92 The acquittals granted to the Respondent in the Court below in Count One, Count Two and Count Three are forthwith set aside.

DELIVERED IN OPEN COURT THIS 24TH DAY OF JUNE, 2025.

A. MALATA-ONONUJU

HIGH COURT JUDGE