

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

Appeal No. 79/2024

BETWEEN:

ZEBRON MAKANDA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga, DJP, Majula and Muzenga, JJA
On 14th October 2025 and 25th March 2026

For the Appellant: Mr. M. Shiwanga, Messrs Kawisha & Co.

For the Respondent: Mr. J. Zulu, National Prosecution Authority

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Mwewa Murolo v. The People (2004) Z.R. 207**
- 2. Phiri and Others v. The People (1973) Z.R. 47**
- 3. Saidi Banda v. The People – SCZ Appeal No. 144 of 2015**
- 4. David Zulu v. The People (1971) Z.R. 157**
- 5. Saluwema v. The People (1965) Z.R. 4**
- 6. Jutronich & Others v. The People (1965) Z.R. 9**

7. **Adam Berejena v. The People (1984) Z.R. 19**
8. **Alubisho v. The People (1976) Z.R. 11**
9. **Noah Kambobe v. The People (2002) Z.R. 57**
10. **Abednigal Kapeshi and Best Kanyakula v. The People – SCZ Selected Judgment No. 35 of 2017**
11. **Ezious Munkombwe and Others v. The People – CAZ Appeal No. 7, 8, 9 of 2017**

Legislation referred to:

1. **The Penal Code Chapter 87 of the Laws of Zambia.**
2. **Authentication of Documents Act Chapter 75 of the Laws of Zambia.**

1.0 INTRODUCTION

- 1.1 The appellant was convicted, by the Subordinate Court at Serenje, of the offence theft of motor vehicle contrary to **Section 281A of the Penal Code Chapter 87 of the Laws of Zambia**. He was committed to the High Court for sentencing, where Kamwendo, J sentenced him to 9 years imprisonment with hard labour.
- 1.2 The particulars of offence were that the appellant on the 27th day of October 2021 at Serenje in the Serenje District of the Central Province of the Republic of Zambia, did steal one motor vehicle namely caterpillar excavator unregistered valued at K2,992,000.00 the property of Jimmy Kalunga.

1.3 He has appealed against both conviction and sentence.

2.0 EVIDENCE IN THE COURT BELOW

- 2.1 Jimmy Kalunga (PW1) owned an excavator (the machine), which is the subject of the charge. He was in the business of buying minerals from artisans in Serenje. He provided the artisans with his excavator which they were using to extract or mine minerals, in particular, Manganese, after which he would buy from them. He stopped buying Manganese in the year 2020 when the prices dropped, with the desire to resume when the prices pick up. The excavator (the machine) remained at the site and was being watched by the community who equally abandoned it.
- 2.2 On the 22nd October 2021 he received a phone call from a person who enquired from him if he sent people to collect the excavator (the machine), to which he declined. He sent PW3 and another person to immediately rush to Serenje. They then met PW2 and the appellant with pieces of the excavator loaded on the truck which was being driven by the PW2. PW3 stopped them, at which point the appellant claimed ownership of the pieces of the excavator, after which they all

agreed to go to Serenje Police Station where the appellant was detained.

- 2.3 The events leading to the loading of the pieces of the excavator (the machine) were that PW2, who was a driver of a Volvo truck, was hired by the appellant to go and pick the excavator from Congo. When they got to the place where the excavator was in Congo, PW2 informed the appellant that his truck could not carry the excavator (machine) as it was big. Then the appellant decided to cut it into pieces and they loaded it on the truck. In the process of getting the machine, Congolese police came to query the appellant, who then showed them his documentation and they left.
- 2.4 The appellant and PW2 left Congo after loading, got stuck on the way, offloaded some pieces, after which the vehicle managed to come out and proceeded with the journey. Thereafter they met PW3 who intercepted them and they went to the Serenje Police Station. The appellant explained to the police that the machine was confiscated by the Congolese authorities in Congo, after which he bought it at a court auction in Congo as scrap, as it was not a runner, at the cost of \$3,000.00.

- 2.5 The appellant provided the arresting officer, PW5, with the requisite documents, which were in French and he had them translated into English. The arresting officer produced into evidence both the French and English versions of the documents marked "**P10.**"
- 2.6 PW1 equally provided contract documents showing he had purchased the machine, though he had not changed ownership yet and it was unregistered.
- 2.7 This generally marked the close of the prosecution case. The appellant was found with a case to answer and placed on his defence. He gave evidence on oath and called one witness.

3.0 DEFENCE

- 3.1 The appellant informed the trial court that he was in the mining business and had the requisite documentation, which the trial court for reasons not given refused to admit into evidence. The appellant used to buy manganese in a village called Mupala, which is 25 Km from the boarder on the Congolese side. In the year 2021 there was an auction arising from a number of vehicles, including the used machine in question, which were impounded by the Congolese authorities. He

participated in the auction at which he purchased the machine as scrap, as it was not moving, at the cost of \$3,000.00.

3.2 The appellant brought to court the notice of auction and the receipt as proof of payment, which were certified by the Police in Zambia. He attempted to produce them into evidence but the trial court refused on grounds that they were executed outside the jurisdiction, relying on **Section 3 of the Authentication of Documents Act.**

3.3 After he paid for the machine he cut it into pieces and loaded it on the truck he hired, which was driven by PW2. He loaded it in the presence of Congolese authorities and the rest of what happened thereafter was as given by the prosecution witnesses.

3.4 The appellant's witness, was a Congolese national, who lives in Congo and was a miner of manganese in the same area where the machine was. He stated that he used to sell manganese to both the appellant and PW1. According to this witness, the machine in question was being used by the Chinese and was impounded by the Congolese authorities in 2018, among other vehicles/machinery. The machine remained at the same location as it was not moving but the rest of the impounded things were taken.

3.5 Sometime in 2021, he heard something like a machine was being cut. He went there and found that the appellant was cutting the machine. He asked the appellant what he was doing. The appellant replied that he had bought the machine at court. The witness reported to the Chief, in Congo and the Chief in turn, sent Police Officers to check. When the officers came, the appellant showed them documents which he had. They allowed him to proceed, after seeing the documents. The Chief then wrote a letter to the Court which this witness delivered.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 The trial court, in relying on circumstantial evidence found that the appellant is the one who carried the machine from where it was left in Zambia to the Congolese side and cut it into pieces for purposes of stealing it. The trial court held that the appellant cannot be said to have bought the machine in Congo. The trial court was satisfied that the prosecution had established the offence of theft of motor vehicle beyond all reasonable doubt, convicted the appellant and committed him to the High Court, where he was sentenced to 9 years imprisonment.

5.0 GROUNDS OF APPEAL

5.1 Disconsolate with the conviction and sentence, the appellant launched the present appeal fronting three grounds structured as follows:

- 1) **The learned trial court erred in law and in fact when it convicted the appellant on insufficient evidence.**
- 2) **The learned trial court erred in law and in fact when it convicted on circumstantial evidence which did not raise the inference of guilt as the only inference.**
- 3) **In the alternative the learned judge misdirected himself when he imposed a sentence of 9 years with hard labour when circumstances did not warrant such a sentence.**

6.0 APPELLANT'S ARGUMENTS

6.1 In ground one, reliance was placed on the case of **Mwewa Murono v. The People**¹ for the argument that the prosecution needed to prove that the appellant took away the excavator from Zambia to Congo DRC but there was no such evidence. That PW5's evidence exonerated the appellant when he testified that the area PW3 claimed to have parked the motor vehicle was clear with no signs of the excavator and that the reason why there were no marks could be due to lapse of time.

6.2 It was argued that PW2's evidence was to the effect that on 20th October 2021 he was called by the appellant who asked him to pick an

excavator from Congo. That he and the appellant went to Congo the following day and found the excavator. Further that the prosecution case established that when PW4 and PW5 visited the sites they did not visit a third site the appellant claimed to have found the machine as it was in the depth of Congo.

6.3 From the foregoing, it was contended that the excavator was not moved into Congo on 22nd October 2021 as the same was already in Congo and the notion that there were no marks of the motor vehicle due to lapse of time does not hold water and the fact that there was a third site in the depth of Congo that was not visited supports the appellant's case that the excavator was abandoned by the Chinese in Congo. That the trial Magistrate did not have any evidence before her to support her finding but filled in the gaps by making assumptions. Reliance was placed on the case of **Phiri and Others v. The People.**²

6.4 In relation to the 2nd ground of appeal, it was contended that to rely on circumstantial evidence, a trial court must be satisfied that the evidence is cogent and compelling, such that no other rational hypothesis could be made other than the fact that the appellant is guilty of the crime. Our attention was drawn to the case of **Saidi**

Banda v. The People³ where the Supreme Court stated that: **“the circumstances from which the inference of guilt is sought to be drawn must be cogent and firmly established.”**

6.5 It was contended that the circumstantial evidence against the appellant, as identified by the trial court, was that **“the fact that the accused cut the excavator in pieces and carried part of those pieces is circumstantial evidence from which an inference can be drawn of the fact that no one else carried the excavator from where it was left to where it was cut in pieces.”** It was however argued that this evidence is insufficient to establish guilt beyond reasonable doubt, as guided in the case of **David Zulu v. The People.⁴**

6.6 Regarding the issue of cutting the excavator into pieces, it was submitted that this was done on the advice of PW2, not for purposes of stealing, but to enable PW2 to carry the same without damaging his crane. It was argued that this raises doubts about the inference of guilt, and that a conviction based on circumstantial evidence cannot thus be sustained, as supported by the case of **Saluwema v. The People.⁵**

- 6.7 We were urged to allow the appeal, quash the conviction, set aside the sentence, and set the appellant at liberty.
- 6.8 Arguing in the alternative in ground three, it was submitted that the custodial sentence of 9 years imposed on the appellant, a first offender, was wrong in principle and manifestly excessive. According to the principle expounded in the case of **Jutronich & Others v. The People**,⁶ the court should consider whether the sentence is wrong in principle, manifestly excessive, or if there are exceptional circumstances that would render it an injustice if the sentence were not reduced.
- 6.9 Given the evidence, the appellant's argument is that the court should interfere with the sentence, as supported by the cases of **Adam Berejena v. The People**⁷ and **Alubisho v. The People**.⁸ Further reliance was also placed on the precedent set in **Noah Kambobe v. The People**,⁹ which held that a first offender ought to be accorded leniency reflected in the sentence.
- 6.10 We were urged to set aside the sentence and substitute it with a lighter sentence that reflects the leniency a first offender deserves.

7.0 RESPONDENT'S ARGUMENTS

- 7.1 Counsel for the respondent argued ground one and two together that there was sufficient or overwhelming evidence upon which the learned trial court based its conviction of the appellant and relying on the case of **Abednigal Kapeshi and Best Kanyakula v. The People**¹⁰ we were urged not to interfere with the findings of fact by the learned trial court.
- 7.2 It was submitted that from the evidence, it was clear that the appellant knew PW1 and PW3 as the owners of the excavator and that they left it in Zambia the time they went back to Ndola after taking a break from mining. That despite having no direct evidence proving that it was the appellant who took the excavator from where it was to where it was cut in pieces, the trial court guided itself in arriving at the conclusion by relying on circumstantial evidence. Counsel thus argued that the court did not err in convicting the appellant based on circumstantial evidence as there was only an inference of guilt, which is the guilt of the appellant. Reliance was placed on the case of **David Zulu v. The People** *supra*.

7.3 It was Counsel's argument that from the evidence, it was established that that the appellant was well known to PW1 and PW3 and that the appellant could not be said to have bought the excavator in Congo because he did not follow customs regulation when bringing the pieces of the excavator in Zambia. It was submitted that these facts and other strands of evidence led to an inference of the guilt of the appellant as the one who moved the excavator from Zambia to where it was being cut in Congo. Counsel relied on the case of **Eziou Munkombwe and Others v. The People.**¹¹

7.4 It was further argued that the trial court was not wrong to reject the explanation tendered by the appellant in his defence regarding how he came into possession of the motor vehicle. That if the appellant legitimately acquired and bought the excavator in the manner he did, he was not going to evade customs. It was argued that the appellant would also not have failed to give the arresting officer documents he claimed he got from Congo, instead, the document surfaced after his release from custody on police bond.

7.5 It was counsel's contention that the documents the appellant was found with did not match with the vehicle as there was no engine or

chassis number when the document that PW1 produced clearly corresponded with the motor vehicle that was found in the appellant's possession.

7.6 We were urged to dismiss the first two grounds of appeal as they lacked merit.

7.7 In ground three, it was argued that the court was on firm ground when imposing the sentence of 9 years on the appellant. Relying on the case of **Alubisho v. The People** *supra* it was submitted that the trial court cannot exercise its discretion below the mandatory minimum or above the maximum sentence where the law imposes mandatory minimum sentences. That after considering all the circumstances of the case, the court exercised its discretion to impose a sentence between 5 and 15 years. That following the sentencing principles in **Jutronich, Schutte and Lukin v. The People** *supra*, the sentence of 9 years was neither wrong in principle nor excessive.

7.8 All in all, we were urged to dismiss the appeal for lack of merit.

8.0 HEARING

8.1 At the hearing of the appeal, the learned counsel for the appellant placed full reliance on the documents filed. On behalf of the State,

counsel informed the court that the State would equally rely on the heads of argument filed before the court.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the record, the arguments by counsel and the impugned judgment of the court below. The issue in this appeal is whether the prosecution had established to the required standard that the appellant stole the machine.

9.2 The appellant's contention is that the trial court convicted on insufficient evidence, more so that the conviction was anchored on circumstantial evidence, which did not raise an inference of guilt as the only inference. We state from the onset that it is not in dispute that the appellant was found in possession of parts of the machine.

9.3 The definition of theft under section **265(1) of the Penal Code** is as follows:

“(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.”

9.4 To establish the charge of theft, the taking must be fraudulent. Mere taking with a claim of right thus negates fraud.

- 9.5 From the evidence, it is clear that the appellant was consistent from the time that they were intercepted up to the time he appeared in Court that he bought the machine at an auction sale in Congo. The arresting officer was furnished with the proof of purchase, which documents the officer produced into evidence and the Court marked them as "**P10.**"
- 9.6 The question therefore is whether the appellant had established a *bonafide* claim of right. PW1 told the court in his evidence that he was not the one using the machine to excavate minerals, but the artisans, whose details he did not give. The appellant's witness indicated that Chinese Nationals were the ones using the machine and it was impounded by the Congolese authorities. PW1 could not certainly know whether the machine was being taken or used by the Chinese. In any case, PW1 had left the machine in the hands of the community, who equally abandoned it.
- 9.7 The inference made by the trial court that the appellant took the machine to Congo in order to cut it into pieces and steal it is not supported by evidence. The evidence is that the machine was in Congo and the appellant got it from Congo. The witness the appellant called

was very clear that the machine was impounded by Congolese authorities and that it was being used by the Chinese in Congo to mine manganese. This witness is the one who reported the appellant to the Chief and the Chief to the Congolese authorities when he saw the appellant cutting and taking the machine. Therefore, the inference that the appellant is the one who took the machine to Congo is not supported by evidence, especially that PW1 was not the one using the machine and stopped going to buy manganese a year prior to the taking of the machine.

- 9.8 It is therefore possible that the people who were using it to mine manganese are the ones who took it to Congo or some other people. The evidence as adduced before the trial court therefore undermines a straightforward or sole inference that the appellant personally took the machine with intent to steal.
- 9.9 The prosecution was given sufficient information and documentation, which they had duty to thoroughly investigate and provide evidence to negate it. They could have contacted the Congolese authorities and possibly even secure witnesses to consolidate their case. The appellant had no duty to prove his innocence. He provided sufficient

information supporting his case. It remained for the prosecution to negative it to the required standard.

9.10 Leaning therefore on the possession of a purchase document and the absence of clear proof of fraudulent intent on the part of the appellant while acknowledging weaknesses in the prosecution's investigations, the inference of guilt is not the sole inference to be drawn from this case as envisaged in **David Zulu v. The People** *supra*. We hold the view that the taking herein by the appellant was not fraudulent as he purchased the machine and as such had authority to take it.

9.11 By way of providing guidance to trial courts, we wish to comment on the trial court's exclusion of the notice of auction and the receipt on the strength of **Section 3 of the Authentication of Documents Act**, for want of authentication, being foreign documents.

9.12 The relevant portion of **Section 2 of the Authentication of Documents Act** reads as follows:

"Document" means any deed, contract, power of attorney, affidavit, or other writing, but does not include an affidavit sworn before a Commissioner of the High Court."

And "authentication," when applied to a document, means the verification of any signature thereon."

9.13 The interpretive question from the foregoing is whether the meaning of document extends to receipts, notice of action, shipping documents, proof of payments, bank transfers, et cetera. The words "**other writing**" in the definition are general and a casual look at the word would appear as though it applies to everything in writing. However, when the rules of interpretation are applied, the meaning is different. The particular rule of interpretation applicable is the *ejusdem generis* rule, which provides that where general words are preceded by specific words, the general words are taken to fall in the category of the specific words.

9.14 In light of the fact that what is being authenticated is a "**signature**" on the document, the other writings would be writings which fall within the category of a deed, contract, power of attorney, an affidavit, and therefore excludes receipts, notice of auction, shipping documents, customs clearance documents, proof of payment, Bank transfers et cetera. The trial court was therefore wrong to refuse to admit a receipt and a notice of auction on the basis that there were not authenticated as per the requirement in the **Authentication of Documents Act**.

9.15 We, therefore, find merit in grounds one and two of the appeal. The view we have taken is that the prosecution failed to establish the offence of theft and that an inference of guilt, on the circumstantial evidence, is not the sole inference which could be drawn from the evidence adduced. The conviction is, in our view, unsafe.

9.16 Because of the position we have taken, we find it unnecessary to consider ground three, which relates to sentence.

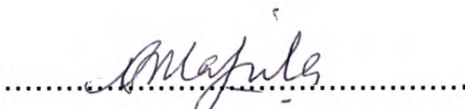
10.0 CONCLUSION

10.1 Having found merit in the appeal, we allow it. The conviction and sentence are quashed. The appellant is hereby acquitted and set at liberty forthwith.



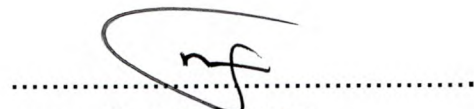
C. F. R. MCHENGA

DEPUTY JUDGE PRESIDENT



B. M. MAJULA

COURT OF APPEAL JUDGE



K. MUZENGA

COURT OF APPEAL JUDGE