

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HPA/38/2024

AMOS CHANDA
VS
THE PEOPLE



Before the Honourable Lady Justice S. Chocho, on 12th May ,2025.

For the Appellant: Mr. K Bwalya of Messers KBF and Partners.

For the Accused: Mr. S Mainza (State Advocate) National Prosecution Authority.

J U D G M E N T

Cases referred to:

- 1. *The People v Chrison Mwambana (1971) ZR 160.***
- 2. *Peter Yotam Hamdenda v The People (1972) ZR 184.***
- 3. *George Lipepo v The People Judgement No. 20 of 201.***
- 4. *Dorothy Mutale v Richard Phiri SCJ NO. 51of 1977.***
- 5. *Kasebya Mwaba v The People CAZ Appeal No 135 of 2018.***
- 6. *Changwe and Another v The People SCZ No. 8 of 1989.***
- 7. *Kenny Figo v The People CAZ appeal No. 91 of 2023.***
- 8. *The People v Austin Chisangu Liato v Appeal No. 291/2014.***
- 9. *The People v Mwelwa Muruno (2004) ZR 207.***
- 10. *Chimbini v. The People (1973) ZR 191.ss***

Legislation and other authorities referred to:

- 1. Section 272 of the Penal Code, Chapter 87 of the Laws of Zambia.**
- 2. Section 111 of the Penal Code, Chapter 87 of the Laws of Zambia.**
- 3. Section 265(1) & (5) of the Penal Code, Chapter 87 of the Laws of Zambia.**

1. INTRODUCTION

- 1.1. This is an appeal against the decision of the Court below in which the Appellant was convicted on May 10th, 2024 for the offences of Theft contrary to **Section 272 of the Penal Code, Chapter 87 of the Laws of Zambia** and Destroying Evidence contrary to **Section 111 of the Penal Code, Chapter 87 of the Laws of Zambia**.
- 1.2. The Appellant was subsequently sentenced to 12 months imprisonment with hard labour on Count 1 and to pay a fine of K5,000.00 on Count 2.
- 1.3. The Appeal is based on the following grounds:
 - i) That the learned trial Court erred in law and fact when it convicted the Appellant in count 1 on the charge of theft contrary to **Section 272 of the Penal Code Chapter 87 of the Laws of Zambia**.
 - ii) That the learned Court below erred in law and fact when it grossly misdirected itself by relying on the evidence of PW1,PW2 and exhibits P1,P2,P3 and P4 when all that evidence was discredited, contradictory and totally unreliable.
 - iii) That the trial Court below misdirected itself in law and fact when it failed to attach any evidential weight to the testimony of PW5, PW6 and PW7 who as officials in the Judiciary maintained that the

case record No. CRMP/001/2020 was not stolen, but merely missing or misplaced within the Court premises of the Registry.

- iv) That the trial Court below grossly misdirected itself in law and fact when it asked itself wrong questions thereby committing a logical fallacy by answering the wrong questions which were unsupported by evidence ending up by wrongly convicting the Appellant.
- v) That the learned trial Court below erred in law and fact when it convicted the Appellant in Count 2 on the charge of Destroying Evidence contrary to **Section 111 of Chapter 87 of the Laws of Zambia.**
- vi) That the trial Court below erred in law and fact when it made seriously wrong assumptions in relation to Count 2 on the indictment when there was no evidence to support such findings.
- vii) That the trial Court below grossly misdirected itself by over relying on the discredited evidence of PW1 and PW2 and their exhibits when it was clear that the recording the Court was relying on was done almost 20 hours before the Appellant is alleged to have met his co-accused's at Sarovar Hotel.
- viii) That the Court below further misdirected itself when it failed to take into account other possibilities of how exhibits P1, P2, P3 and P4 could have been fabricated more so that the time line did not agree between the evidence of PW1 and PW2 when compared to the electronic devices relied on.
- ix) Such other grounds may be argued in person.

2. **EVIDENCE IN THE COURT BELOW**

PW1 – JONAS MAMBO SISAMBA

- 2.1. PW1 was **JONAS MAMBO SISAMBA** Investigations Officer at the Drug Enforcement Commission aged 41 years old of Salama Park, Lusaka. His evidence was that on September 30th, 2022 in the company of one Philip Nkhuwa and one Mutale Malundu and whilst at Sarovar Hotel; he heard a Lebanese national (Walit) speaking on the phone loudly and he kept mentioning the names Soko and Amos.
- 2.2. PW1 testified that he saw a gentleman who he identified as Zindaba Soko having had prior interaction with him and that the said Zindaba Soko went to sit at the table where Walit was seated.
- 2.3. PW1 testified that he decided to follow Zindaba Soko to the Gents because he had been re-arrested together with the Appellant and Walit.
- 2.4. PW1 testified that Walit was calling someone and when the call ended, he hinted to Mr. Soko that the person they were waiting for was almost at the hotel.
- 2.5. PW1 testified that at around 22:38 and 22:45 hours the Appellant walked in and sat on the same table as Mr. Soko and Mr. Walit.
- 2.6. PW1 testified that when he saw the Appellant, he turned on the recorder and pushed it into a flower bed close to the table.

- 2.7. PW1 testified that he overheard the Appellant explain that he passed through the house of one Mr. Vaiden Findlay and explained briefly the case he was facing and how it was a weak case.
- 2.8. PW1 testified that he overheard the Appellant refer to the previous case and stated that the file is not there as he got it and burnt it into ashes. Further, that the case record had 398 pages and that he burnt it himself.
- 2.9. PW1 testified further that he heard the Appellant talk about immunity that he did not find the document and immunity but paid K45,000.00 which was receipted and the receipt is evidence enough that he has immunity.
- 2.10. PW1 testified that the he also heard the Appellant say that Mr. Findlay told the former President Mr. Edgar Chagwa Lungu that he is only standing because the Appellant has not said anything.
- 2.11. PW1 testified that he heard Mr. Soko say that he hoped there were no people listening to their conversation.
- 2.12. PW1 testified under cross examination that he heard the Appellant refer to a Court record but did not mention which Court and neither did he hear the Appellant refer to CRMP/001/2020.
- 2.13. PW1 further testified under cross examination that he did not hear any complaint that a record was missing and neither did he investigate the matter.

PW2: JEFF SITALI

- 2.14. PW2 was **JEFF SITALI** Cyber Security Specialist aged 38 years old. His testimony was that on January 6th, 2023 he received a request from the Drug Enforcement Commission to extract recordings made on September 30th, 2022 from a recording device.
- 2.15. PW2 testified that that he proceeded to examine the device which was submitted and he went on to explain how the recording was extracted.
- 2.16. PW2 testified that he checked the recordings then proceeded to extract the recordings and prepared a report.
- 2.17. PW2 testified that he extracted four recordings dated September 30th, 2022 and the files were not modified in any way.
- 2.18. PW2 testified under cross examination that the recordings are audio and the report does not say who the voices were in the recording.
- 2.19. PW2 testified under cross examination that the recording was done at 02:55 hours on September 30th, 2022 and that the time on the device could have been configured wrongly.

PW3- JAMES HEBASIMBI

- 2.20. PW3 was **JAMES HEBASIMBI** Waiter at Sarovar Hotel aged 33 years old. His testimony was that on September 30th, 2023, whilst on duty he was serving a regular customer by the name of Mr. Walid between 19:00 hours to 22:00 hours.
- 2.21. PW3 testified that Mr. Walid had two guests, one arrived at 19:00 hours and the other arrived around 22: 00 hours.

- 2.22. PW3 testified that when he was about to knock off around 22:00hours to 23:00 hours, the Appellant joined the table and he identified him as one Amos Chanda as he was a public figure.
- 2.23. PW3 testified that he run a bill of K 6,000.00 plus and Mr. Walid signed the bill.
- 2.24. PW3 testified under cross examination that the bill shows that Walid was with other people but it does not state that he was with the Appellant and Mr. Soko.
- 2.25. PW3 testified under cross examination that the table was opened at 19:03 hours and closed at 23:34 hours.
- 2.26. PW3 further testified under cross examination that the person who was serving Mr. Walid knocked off at 15:00 hrs and table 24 was transferred to table 22.
- 2.27. PW3 testified that the only person Mr. Walid sat with known to him was the Appellant.

PW4- ANTHONY MUTONGA

- 2.28. PW4 was **Anthony Mtonga** aged 43, Chief Security Officer at Sarovar Hotel.
- 2.29. PW4 testified on oath that on October 12th, 2022 while doing rounds in the car park, he received a call form the General Manager one Mr. Rashidi asking him to go to the reception were DEC officers awaited him.
- 2.30. PW4 testified that when he went to meet the Officers, they informed him that they came to check the CCTV footage for the activities that took place on the 2nd floor on September 30th, 2022.

- 2.31. PW4 testified that they produced a search warrant from Court which the General Manager approved and signed and instructed him to show the officers whatever they were requesting from the CCTV room.
- 2.32. PW4 testified that he took the officers to the CCTV room and they requested that he plays the cameras starting from 20:00 hours to 23:30 hours.
- 2.33. PW4 testified under cross examination that he opened the cameras in the basement and they started playing it around 20:08 Hours when they saw Mr. Zindaba Soko coming from the car in the lower basement.
- 2.34. PW4 testified that they viewed the cameras until between 20:10 to 20:15 hours when the officers asked him to pause and identified one man as Zindaba Soko.
- 2.35. PW4 testified that they played the upper basement cameras from 20:00 Hours up to 22:25 Hours were the saw the Appellant coming from a black Mercedes Benz.
- 2.36. PW4 testified that they continued to play the cameras until between 22:30 to 22:35 when the Respondent was identified coming from the lift.
- 2.37. PW4 testified that the officers noted the timings and told him that was all they wanted to see.
- 2.38. PW4 testified that Mr. Zindaba Soko and the Appellant sat on the same table and were seen leaving together between 22:30 to 23:35 Hours.
- 2.39. PW4 further testified that on October 27th, 2022, he received another phone call requesting him to go to the reception where he found three officers and identified one of them as Boyd Munalula.

- 2.40. PW4 testified that after producing a letter of seizure from Court, he placed the footages on a flash and handed the flash to the officers.
- 2.41. PW4 testified that it was not possible to manipulate the footage as the cameras record the events as they happen and cannot be tempered with.
- 2.42. PW4 further testified that only himself and the General Manager have the password.
- 2.43. PW4 testified under cross examination that from the footage, you could not see the people on the tables as the camera cuts/shows half.
- 2.44. PW4 testified under cross examination that there was no camera footage showing the Respondent destroying evidence.
- 2.45. PW4 testified under cross examination that there was no security feature on the flash disk and he could not tell if the flash can be tampered with.
- 2.46. PW4 testified under cross examination that from the time the Respondent arrived and up to the time he left, he did not have any documents.
- 2.47. PW4 testified under cross examination that it was against policy to give out footage but the officers had a Court Order hence PW4 released the footage.
- 2.48. PW4 testified under cross examination that the vehicle in the footage was not a Mercedes Benz.
- 2.49. PW4 testified under cross examination that there is no live band in the footage and that they do not have a band at Sarovar.
- 2.50. PW4 testified under cross examination that there was no Lebanese National in the footage.

2.51. PW4 further testified under cross examination that there was no evidence of the Respondent burning papers in the footage.

PW5- ZINTHAMBO SAKALA

2.52. PW5 was one **Zinthambo Sakala** aged 35, who is a Senior Clerk of Court at the Lusaka Magistrate Court who testified on oath that he was approached by two DEC officers and among the was Mr. Boyd Munalula.

2.53. PW5 testified that the officers came to inquire on the case of Amos Chanda and Zindaba Soko under cause number CRMP/001/2020.

2.54. PW5 testified under cross examination that he asked a registry clerk to pull out the file who after 30 minutes said the file could not be found.

2.55. PW5 testified that he then asked the DEC officers to give them a week to find the record.

2.56. PW5 testified that he asked one Annie Mweemba who is the Criminal Registry Supervisor if she found the record, but unfortunately, she did not.

2.57. PW5 testified under cross examination that the record was last scanned on May 12th, 2020 and the last person to handle it was the said Annie Mweemba.

2.58. PW5 testified that when the DEC officers came back, he informed them that the record was not found.

2.59. PW5 testified under cross examination that the DEC officers did not come with a search warrant.

- 2.60. PW5 testified under cross examination that he reported to the Chief Resident Magistrate that the record is missing but has never reported to the Police Station.
- 2.61. PW5 testified under cross examination that this is not the only record that has gone missing as records go missing in rare cases.
- 2.62. PW5 testified under cross examination that he does not know anything about a theft and that the record is missing and not stolen.
- 2.63. PW5 testified under cross examination that the records are kept safe as there are lockable doors and a grill door.
- 2.64. PW5 testified under cross examination that there has been no record of a break in.
- 2.65. PW5 was not subjected to re-examination.

PW6- CATHERINE TEMBO

- 2.66. PW6 was one **Catherine Tembo** aged 43, Network Support staff at Judiciary Subordinate Court who testified that sometime in October 2022, she was asked for a soft copy of the record under cause number CRMP/001/2020 which she retrieved and put on a flash disc.
- 2.67. PW6 testified under cross examination that she was not sure if a case record could be stolen but the record on the system cannot be stolen.
- 2.68. PW6 testified under cross examination that there was not report from the Judiciary that a record was stolen.
- 2.69. PW6 testified under cross examination that once a matter reached Judgment, they cease to scan the record.
- 2.70. PW6 was not subjected to re-examination.

PW7- ANNIE MWEEMBA

- 2.71. PW7 was one Annie Mweemba aged 26, Registry clerk at the Lusaka Subordinate Court who testified that she checked the box where she kept Honourable Mwale's finished cases but could not find the record.
- 2.72. PW7 testified under cross examination that the Appellant cannot access the offices and neither were the offices broken into.
- 2.73. PW7 testified under cross examination that no search was done on the record.
- 2.74. PW7 testified under cross examination that the finished cases are placed in a box and that she placed the finished record in a box.
- 2.75. PW7 testified under cross examination that the place is locked by the caretakers.
- 2.76. PW7 testified under cross examination that non staff members can access the office as it is a public office but there are boundaries indicated out of bounds.
- 2.77. PW7 testified under cross examination that she knows of a missing record and not a stolen record.
- 2.78. PW7 was not subjected to re-examination.

PW8- OLIVER CHOONGO

- 2.79. PW8 was one **Oliver Choongo** aged 48, sales person at AA Electric who testified that the recorder used by the DEC officers uses default set time which may not be the correct time as you have to set the time.
- 2.80. PW8 testified under cross examination that the recordings come in files and can only be deleted or extracted.

- 2.81. PW8 testified under cross examination that he is only a sales person and not a technician and only came to testify as to how the gadget works.
- 2.82. PW8 testified under cross examination that they learnt how to use the gadget as they are told how to use it and get basic instructions of how to use the gadget.

PW9- PITNEY CHIPENDE

- 2.83. PW9 was one **Pitney Chipende** aged 49, Accountant at Securities and Exchange Commission who gave testimony I do not find relevant to these proceedings.

PW10- BOYD MUNALULA

- 2.84. PW10 was one **Boyd Munalula** aged 48, Senior Investigations Officer under Anti Money Laundering Investigations who testified that he charged the Appellant with two others for the offence of money laundering and the State in that matter entered a Nolle Prosequi.
- 2.85. PW10 testified that he received an instruction to re-arrest the three and weeks later, he received a recording from one Jones Siasamba who witnessed and recorded the three at a meeting they had at Sarovar Hotel.
- 2.86. PW10 testified that in the recording, the Appellant narrated that he had taken the Court record and burnt it and that he paid National Prosecution Authority \$45,000 and was given receipt for immunity.
- 2.87. PW10 testified that he then went to the Subordinate Court to confirm if the record has been taken by the Appellant where he was told that the record could not be found.

- 2.88. PW10 testified that he charged the Appellant with the offence of theft because the Appellant in the recording said he go the record and the record was not found at the Subordinate Court.
- 2.89. PW10 testified under cross examination that he never received a report from the Subordinate Court that a record was missing.
- 2.90. PW10 testified under cross examination that he is not an expert and cannot tell if the voice was the Appellant's.
- 2.91. The Appellant elected to remain silent and did not call any witness in his defence.

3. **DECISION BY THE COURT BELOW**

- 3.1. The Trial Court examined the testimonies of the witnesses before the Court and addressed its mind to various evidential principles which I shall not reproduce verbatim as the same are on record.
- 3.2. The Court below addressed its mind to the ingredients that must be established in order for the prosecution to prove its case beyond reasonable doubt. The Court stated that the following ingredients must be proved:
- i) That the Appellant (who was the accused in the Court below) took the said record CRMP/001/2020;
 - ii) That the Appellant had no claim of right;
 - iii) That the Appellant wanted to deprive the owner permanently;
 - iv) That the Appellant wilfully removed the record CRMP/001/2020;
 - v) That the Appellant destroyed the said record CRMP/001/2020;

J15

- vi) That the Appellant knew it may be required in evidence in a judicial proceeding; and
 - vii) The intention was to prevent it from being used.
- 3.3. The Trial Court stated that there was no direct evidence as to who got the record but relied on the testimonies of PW1,5,6,7 and 10.
- 3.4. The Trial Court further stated that there was no evidence that the accused went to the Lusaka Subordinate Court to get the record CRMP/001/2020 and that it was subsequently discovered that the record was missing after PW8 did a search.
- 3.5. The trial Court stated that the matter involved the Appellant and the persons he was seen with at Sarovar on September 30th, 2020. And that in the recording, the name of Appellant and the two person he was with were constantly mentioned and that from the recordings, the Appellant stated as follows:
- “For this case to restart, they have to make reference to the proceedings of the previous case no two ways about it ... printed notes for the Judge are not there I took them the handwriting everything and even me I don't have they are in ashes I burnt them myself 198 pages I burnt them. Handwritten copy half of it is handwritten had the record’.*
- 3.6. The trial Court raised an issue as to how the Appellant knew that the record had 198 pages if he had never seen the record.
- 3.7. The Court below placed reliance on **Section 265(5) of the Penal Code** and stated that the original case record was moved from the premises of

the Judiciary and that the Appellant had no right to take the record from the Registry.

- 3.8. The learned trial Court stated that the Appellant was at Sarovar Hotel on September 30th, 2022 and that the corroboration that the Appellant made those statements at about 22 hours notwithstanding that the recording indicated 02 hours are the footage and recordings and that there was no explanation from the State as to why the time was set or it was pre-set like that.
- 3.9. The Court below went on to say that the accused needed to say something in his defence although he is not obligated to do so but he needed to in order to state if he was at the hotel or not and if the statements made were his or not.
- 3.10. The trial Court stated that there is no other explanation as to why the Appellant was talking about the record where he was co accused with Walid and Soko when he could have talked about any other record apart from where he was an accused and a Nolle Prosequi was entered in which they were discharged.
- 3.11. The Court found that the prosecution proved its case beyond reasonable doubt and found the Appellant guilty of theft and accordingly convicted him.
- 3.12. In relation to Count 2, the Court below stated that the Appellant knew that the case record in issue required to be used in either evidence or otherwise and the Appellant confirmed having burnt the record.

- 3.13. The trial Court went on to say that though there was no evidence that the record could have been used in any Judicial proceedings at any time, it can be concluded that the Appellant having burnt the record destroyed it and he was preventing the record from being used/identifiable for use.
- 3.14. The Court found that the prosecution proved the case beyond reasonable doubt and found the Appellant guilty of the offence of destroying evidence and subsequently convicted him.

4. **APPEAL TO THIS COURT**

- 4.1. The Appellant has appealed to this Court on eight grounds which are reproduced 1.3 above.
- 4.2. In relation to grounds 1 to 4, the Appellant submits that for any Court to convict any citizen of theft, the citizen must take and move the thing capable of being stolen or must cause that thing to be moved placing reliance on **Section 272 and 265(1) & (5) of the Penal Code**.
- 4.3. The Appellant submits that the fundamental elements are missing as the testimonies of PW5,6 and 7 maintain that the record was not stolen but is merely missing. Further, that there is a possibility of the record being misplaced as it is not unusual for a record to be misplaced or misfiled.
- 4.4. The Appellant further submits that PW10 was biased and negligent in his investigations as he relied on a story fabricated by PW1. The Appellant relied on the cases of **The People v Chrison Mwambana (1971) ZR 160¹**, **Peter Yotam Hamdenda v The People (1972) ZR 184²**

and **George Lipepo v The People Judgement No. 20 of 2014³** which I have taken note of.

- 4.5. The Appellant submits that the Court below believed the testimonies of PW1 and PW10 regarding what was said on September 30th, 2022 at Sarovar Hotel.
- 4.6. The Appellant submits that PW10 did not provide any credible corroboration to the story PW1 told him and deliberately neglected to interview material witnesses.
- 4.7. The Appellant submits that the Court below fell into grave error by assuming that the Appellant took the case record from the Judiciary premises as no witness testified that the Appellant took the record from the Court premises.
- 4.8. The Appellant also submits and takes issue with the time line concerning the activities of September 30th, 2022 as PW1 told the Court that the Appellant and two other persons left around 23:00 hours when the files were created on September 30th, 2022 at 02:55 hours.
- 4.9. The Appellant submits that the testimonies of the PW1 and 2 as relates to the audio recording were discredited and unreliable recordings recorded by unreliable recorders.
- 4.10. The Appellant submits that the evidence the trial Court relied on was defective and inconsistent and that the testimonies of PW1, PW2 and PW10 were totally discredited when the witnesses could not justify why a purported meeting that took place between 22:38 hours and 23:00 hours was recorded almost twenty hours earlier.

- 4.11. The Appellant submits that PW1 told the Court that he was in the company of one Phillip Nkhuwa and Mutale Mulundu who were not called as witnesses yet PW1's testimony is that it was Mr. Nkhuwa who identified the Lebanese.
- 4.12. The Appellant submits that the Court below fell into grave error when it glossed over the element of the time of the recording as that is what corroborates the testimony of the of PW1.
- 4.13. The Appellant submits that the recording was made approximately 20 hours before the Appellant met Walid and Soko and that there is a possibility of the evidence being made to suit a crime.
- 4.14. The Appellant submits that the alternative possibility was never analysed and disputed and dispelled by the trial Court. And that the law is clear where two or more inference over the same facts seem to contradict. Reliance was placed on the case of **Dorothy Mutale v Richard Phiri SCJ NO. 51 of 1977⁴** in which it was stated as follows:

“Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the Court will adopt the one which is more favourable to an accused if there is nothing in the case to exclude such inference”.

- 4.15. The Appellant further submits that by failing to appreciate the disparity in the time line of the recording evidence, the trial Court failed to look at other inferences and possibilities favourable to the Appellant.
- 4.16. The Appellant submits that the Court below failed to prove the essential elements of the offence of theft.

- 4.17. In arguing grounds 5 to 8, the Appellant submits that there was no evidence that the Court record in issue was burnt and that the Court officials that gave testimony stated that the Court record was missing or misplaced but the Court below ignored their evidence and made no adverse finding of evasive demeanour or untruthfulness.
- 4.18. The Appellant submits that the missing case record CRMP/001/2020 was a closed file with no evidential benefit to the Appellant and any subsequent proceedings.
- 4.19. The Appellant submits that PW10's investigations exhibit a serious dereliction of duty and must operate in favour of the Appellant.
- 4.20. The Appellant submits that the doctrine of recent possession does not apply in this case and is misleading as in cases of recent possession, the first fact is that the Accused person is found with the alleged thing to have been stolen and in the present case, the Appellant was never found with the case record.
- 4.21. The Appellant submits that the case must be proved beyond reasonable doubt and that there is reasonable doubt in the matter in casu.
- 4.22. In response, the Respondent submits that the Appellant's assertion that the evidence was discredited, contradicted and totally unreliable is without merit and that PW1 is a law enforcement officer who encountered a highly suspicious conversation involving persons who were previously charged with criminal offences.
- 4.23. The Respondent submits that the discrepancy in the time frame was adequately explained by PW2 and PW8.

- 4.24. The Respondent further submits that whether the recording occurred at 22:30 or 02:55 does not negate the fact that the Appellant made a voluntary confession and the discrepancy is inconsequential and relied on the cases **Kasebya Mwaba v The People CAZ Appeal No 135 of 2018⁵** and **Changwe and Another v The People SCZ No. 8 of 1989⁶**.
- 4.25. The Respondents also submit that the evidence is clear and straight forward and was duly considered by the Trial Court and that it corroborates the offense of theft and supports the allegation of evidence destruction.
- 4.26. The Respondent submits that the testimony of the judicial officers establishes that the case record was moved from its original location and that the debate of whether it was missing or merely misplaced is another attempt to assess isolated pieces of evidence in vacuum rather than considering the case as a whole.
- 4.27. The Respondent submits that the evidence was presented to determine which record was taken and from where not to establish whether the Appellant was responsible for taking it as that question is to be addressed by separate evidence.
- 4.28. The Respondent submits that the purpose of evidence is a twofold the first being to prove a fact in issue and the second being to establish a fact relevant to the issue.
- 4.29. The Respondents further submit that the findings in the Court below were based on a proper evaluation of the evidence and that the CCTV footage provided clear and compelling evidence of the Appellant's

presence and actions. The Respondent placed reliance on the case of **Kenny Figo v The People CAZ appeal No. 91 of 2023**⁷ and submitted that video recordings can be as reliable as eye witness testimony.

- 4.30. The Respondent submits that the Appellant contends that the conviction was based on insufficient evidence, particularly circumstantial evidence of which the Respondent disagrees as circumstantial evidence is evidence based on inference rather than direct observation.
- 4.31. The Respondent submits that regarding the doctrine of recent possession, there rarely is direct evidence of the suspect physically stealing the item in question. Instead, the Courts rely on the fact that the suspect was found in possession of the missing property and draw a guilty inference supported by corroborative evidence.
- 4.32. The Respondent submits that the Appellant cannot fault the Court for its decision when the only evidence before it was that of the prosecution and that during trial the accused failed to raise any cogent defence.

5. **COURTS DECISION**

- 5.1. I have had occasion to review the Appeal having heard Counsel for the Appellant and Respondent, read the submissions in support of and against the Appeal for which I am grateful.
- 5.2. It is a trite principle of law that the burden of proof in criminal cases lies with the prosecution. The Supreme Court in the case of **The People v Austin Chisangu Liato Appeal No. 291/2014**⁸ stated as follows:

“We agree that burden of proof in criminal proceeding lies and remains through out on the prosecution to prove its case against the accused person beyond reasonable doubt...”

5.3. In the case of **The People v Mwelwa Muruno (2004) ZR 207⁹** the Court stated that the standard of proof required in criminal cases is proof beyond reasonable doubt. This entails that the Prosecution is required to furnish sufficient evidence to prove the accused’s guilt and the evidence should be so convincing that any reasonable person can draw an inference of guilt.

5.4. In the first count, the Appellant was charged with the offence of theft, contrary to **Section 272 of the Penal Code, Chapter 87 of the laws of Zambia. Section 272** provides as follows:

“Any person who steals anything capable of being stolen is guilty of the felony termed "theft", and, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years”.

5.5. Further, **Section 265 of the Penal Code** defines theft 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.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say:

(a) an intent permanently to deprive the general or special owner of the thing of it;

- (b) an intent to use the thing as a pledge or security;*
- (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;*
- (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;*
- (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.*
- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of it.*
- (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.*
- (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.*
- (6) For the purposes of this section, "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question".*

5.6. I shall collectively deal with grounds 1,2,3,4,7 and 8 as they raise the same question. The question for determination is whether the Respondent in the Court below did prove beyond reasonable doubt that

the Appellant committed the offence of theft by taking the Court record from the Lusaka Subordinate Court.

- 5.7. I am of the considered opinion that the first thing that must be established is whether indeed the Court record was taken from the Court premises. Once it has been established that the record was taken from the Court premises, then it must be shown that it was the Appellant who took the Court record.
- 5.8. The Court below in convicting the Appellant for the offence of theft relied on the testimony of PW1, the recording and CCTV footage. I must however, state from the onset that the credibility of the audio recording is questionable.
- 5.9. The trial Court relied on the contents on the recording and was of the view that the recording contained a confession by the Appellant that he took the case record, which was subsequently burnt.
- 5.10. I am of the view that apart from providing the recording as evidence, the prosecution ought to have taken a step further and show that it was indeed the Appellant who uttered those words or link the Appellant to the audio and satisfy that it was indeed the Appellant's voice contained in the audio recording. The mere fact that the Appellant and two other persons were seen in a CCTV footage at the material place is not sufficient to prove that that the Appellant uttered the words or made the alleged confession. No expert witness/evidence was adduced to identify the voice on the recordings as that of the Appellant.
- 5.11. The existence of the audio recording and the presence of the Appellant at Sarovar on the material day creates a balance of probabilities, which is not an adequate standard of proof in criminal matters. The Court in the case of **The People v Mwelwa Muruno (2004) ZR 207⁹** guided that the required standard of proof is proof beyond reasonable doubt.

- 5.12. The Respondent also ought to have brought before Court an expert to explain the discrepancies in the time frame in order to prove that indeed the recording was taken at the time when the Appellant was at the Hotel. The different timeframe creates a doubt in my mind as to whether the recording was indeed taken at the time the Appellant was at the hotel and whether it was indeed the Appellant's voice or if was the Appellant who uttered the alleged words/confession.
- 5.13. The Respondent has referred this Court to the cases of **Kasebya Mwaba v The People CAZ Appeal No 135 of 2018⁵** and **Changwe and Another v The People SCZ No. 8 of 1989⁶** and argue that the discrepancies are inconsequential. I am of the considered view that the cases referred to can be distinguished from the matter in casu; the discrepancies the in the **Kasebya⁵** case were found to be minor, immaterial and did not go to the root of the case. I am of the view that the discrepancies in casu have caused me to entertain doubts as to the credibility and veracity of the evidence, and thus goes to the root of the case.
- 5.14. The Respondent did not prove that the case record was taken from the Court premises, and the possibility that it has merely been misplaced remains prevalent in the absence of proof that it was indeed taken. The defacto owners of the record PW5 and PW6 testified on oath that the record was not stolen but misplaced in the registry. Who then is the complainant of the alleged theft? Was there a theft?
- 5.15. In relation to Count one, I find that the Respondent failed to prove the ingredients of the offence of theft and the Appellant's guilt beyond reasonable doubt. I hereby reverse the findings of the Court below and acquit the Appellant, on Count 1.
- 5.16. I shall now deal with grounds 5 and 6. The Appellant was charged with the offence of Destroying Evidence contrary to **Section 111 of the Penal**

Code Chapter 87 of the Laws of Zambia. Section 111 provides as follows:

“Any person who, knowing that any book, document, or thing of any kind whatsoever, is or may be required in evidence in a judicial proceeding, wilfully removes or destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour”.

- 5.17. By the above provision, the Respondent ought to have proved that the Appellant knew that the case record may be used in evidence and wilfully destroyed it in avoidance for it or any part of it to be used in evidence. I am of the considered view that the fact that the hard copy record was not found/missing in no way points to destruction of evidence. The Court’s notes and record documents are scanned and kept as soft copy as testified to by PW6 the record can be reconstructed.
- 5.18. The evidence the Court below relied on to establish that the offence of destroying evidence was committed by the Appellant is the recording in which the Appellant purportedly confessed to having burnt the case record. As already stated in paragraphs 5.10 and 5.12, the mere production of the audio recording does not prove that the Appellant indeed uttered the words contained therein or indeed that he stole the record. The Respondent should have provided sufficient evidence linking the Appellant to the audio and prove that he indeed destroyed the case

record. The recording relied on by the Court below raises issues of credibility.

5.19. In the absence of sufficient proof that the case record was stolen and destroyed, let alone by the Appellant, I reverse the findings of the Court below and find that the Respondent did not prove Count 2 beyond reasonable doubt. The testimony of Prosecution Witnesses is highly contradictory and it is trite that where evidence against an accused person is purely circumstantial and his guilt is a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can be drawn from the facts. The case of **Chimbini v. The People (1973) ZR 191**¹⁰ refers. In this case it would not be unreasonable to draw inferences that the record was never stolen or destroyed. One can also infer that the recording was not the voice of the Appellant.

5.20. In light of the foregoing, the decision of the Court below is reversed and I hereby acquit the Appellant.

6. **CONCLUSION**

6.1. The Appellant's Appeal succeeds on all grounds and the Appellant is hereby acquitted on both counts.

6.2. Leave to appeal is granted.

Delivered at Lusaka on 12th May, 2025.



**S. CHOCHO
JUDGE**

