ANDINE ALI TEMBO
v
THE PEOPLE

HIGH COURT
DR. MATIBINI, SC, J.
25th FEBRUARY, 2011.
HJA/12/2011.

[1] Criminal law - Defence of bona fide claim of right - Conditions to be satisfied.
[2] Criminal law - Sentencing - Principles thereof.

The appellant was convicted in the Subordinate Court of the First Class for the Chipata District for obtaining money by false pretences contrary to section 309 of the Penal Code. He was sentenced to two years imprisonment with hard labour. This was therefore an appeal against conviction and sentence.

Held:

1. The defence of bona fide claim of right is not confined to those cases where an accused person believes the property in question was his or has become his; it is applicable also in those cases where the accused has a bona fide belief that he has the right to keep, or deal with somebody's property.

2. The defence of bona fide claim of right is predicated on honesty of purpose in dealing with property of others.

3. There is nothing in section 8 of the Penal Code which suggests that any property is the subject of the defence of bona fide claim of right should be capable of being stolen as defined in section 264 of the Penal Code.

4. The defence of bona fide claim is not restricted to the offence of theft, or offences, where theft is an essential ingredient. The defence can be relied on in relation to movable or immovable property.

5. A statement is hearsay and, therefore, inadmissible if the object of the evidence is to establish the thrust of what is contained in the statement. It is not hearsay and is admissible when by the statement it is not intended to establish the truth, but merely to establish that a statement was made.

6. In deciding the appropriate sentence, the Court should be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced not

only with the object of punishing crime, but also in the hope of preventing it.

7. In dealing with an appeal against sentence, the appellate Court should ask itself three questions: is the sentence wrong in principle; is it manifestly excessive so that it induces a sense of shock; and are there any exceptional circumstances that would render it an injustice if a sentence were not reduced.

8. A sentence of two years is not wrong in principle; it does not come to one with a sense of shock; and there are no exceptional circumstances on the facts of this case that would render it an injustice if the sentence was not reduced.

Cases referred to:

1. R v Hemmings [1864] 4 FrF 50.
2. Coghlan v Cumberland [1898] 1 Ch. 704.
3. R v Ball [1951] 35 Crim. App. R. 164.
4. Chiteta v R [1960] R and N 169.
5. R v Malamula [1962] R and N 550.
6. Mutambo and Others v The People (1965) Z.R. 15.
7. Jutronich and Others v The People (1965) Z.R. 11.
8. Enotiodes v The People (1965) Z.R. 114.
9. Mwachilama v The People (1972) Z.R. 286.
10. Chishimba v The People (1972) S.J. Z. 114.(unreported)
11. Choombe v The People (1972) C.A.Z. No. 6 of 1972 (unreported).
12. The People v Sailas (1973) Z.R. 355.
13. Chizonde v The People (1975) Z.R. 66.
14. Phiri and Others v The People (1978) Z.R. 79.
15. Mambwe v The People HNA/209/1972 (unreported).
16. Willard v The People (1998) S.J. 34 (unreported).
17. R v Bernnard 26 Cr. Ap. R. 137.

Legislation referred to:

1. Penal Code, cap. 87, ss 8, 264, 308, and 309.

Works referred to:

1. Hodge M. Malek, Phipson on Evidence, Seventeenth Edition, (London, Sweet and Maxwell, 2010).
2. Daniel Greenberg, Stroud's Judicial Dictionary of Words and Phrases, Seventh Edition, (London, Sweet and Maxwell, 2006.)

J. Phiri, Assistant Legal Aid Counsel; Legal Aid Board for the appellant.
C.C. Soko, State Advocate in the Director of Public Prosecutions chambers, for the respondent.

DR. MATIBINI, SC, J.: This is an appeal against conviction and sentence. The appellant was convicted in the Subordinate Court of the first class for the Chipata District on 6th September, 2010, of obtaining money by false pretences contrary to section 309 of the Penal Code, chapter 87 of the laws of Zambia. The appellant was sentenced to two years imprisonment with hard labour with effect from 9th April, 2010.

The particulars of the offence were that the appellant on the 9th November, 2009, at Chipata, in the Chipata District of the Eastern Province of the republic of Zambia with intent to defraud Christine Chongo, did obtain K9,500,000=00 cash from her, by falsely pretending that he had a plot to sell when in fact it was false. When the case was originally called on 13th April, 2010, the charge was explained to the appellant. And the appellant denied the charge. The appellant on the same day, 13th April, 2010, applied for bail, and was admitted to cash bail in the sum of K300,000.00; supported by two credible sureties, who were to be Chipata residents, and were to be bound in the sum of K500,000.00 each. The trial commenced on 26th April, 2010.

The prosecution called three witnesses. The first prosecution witness was the complainant; Christine Chongo. I will continue to refer to her as PW1. PW1 recalled that on 9th November, 2010, she was at home, and was approached by a real estate agent by the name of Mwale. Mwale enquired from PW1 whether she was interested in buying a plot. PW1 exhibited interest in buying a plot. Mwale and PW1 then proceeded to Mthilansembe area to inspect the plot in question. After inspecting the plot, PW1 showed keen interest in the plot. Later, PW1 also showed her children the plot. The plot had been developed to window level.

After inspecting the plot, PW1 was taken to Andine Ali Tembo. I will continue to refer to Andine Ali Tembo as the accused. The accused confirmed that the plot was his. And was available for sell. In fact, the accused is said to have stated that the plot has been available for the last twelve years. The accused informed PW1 that the purchase price for the plot was K15 million. However, the accused was willing to reduce the purchase price to K13 million. PW1 agreed to buy the plot at K13 million. PW1 requested the accused to show her documentary evidence confirming that he was the owner of the property. The accused informed PW1 that the Chairman of the area was aware about the ownership. PW1 and the accused then went to the Council where they were given some documents to facilitate the transaction. PW1 and the accused were also referred to a surveyor, to assist them survey the plot.

Later, PW1 went to her bank, and withdrew the sum of K9.5 million. And gave it to the accused in the presence of his agent; Mwale, and one Sakala. After receipt of the K9.5 million, the accused authorized PW1 to continue with the development of the property. Thus PW1 employed some workers, and began developing the property. In due course, PW1 constructed the house up to roof level.

During the course of the construction, one of PW1's workers was instructed by a Mr. Kanema from Mfuwe to stop the construction. PW1 eventually met Mr. Kanema who claimed he was the owner of the plot, and showed PW1 documentary evidence to that effect.

PW1 then decided to report the matter to the Police. At the Police Station, PW1 was informed by the Police officers that the accused is a thief. Upon receipt of that information from the Police officers, PW1 contacted the accused so that she could pay him the balance of the purchase price at her bank. In the meantime, PW1 arranged for a Police officer to be present at the bank.

When the accused arrived at the bank, he was arrested and taken to the Police Station. At the Police Station, the accused claimed that the plot in issue was given to him by his uncle; Mr. Kanema. When the Police contacted Mr. Kanema, he confirmed that the accused was his nephew. However, he informed the Police officer that he had not authorized him to sell the plot. The accused was arrested and detained by the Police for three days. He was later released, because Mr. Kanema failed to attend to the matter with the Police officers.

The second prosecution witness was Abraham Sakala. I will continue to refer to Abraham Sakala as PW2. PW2 recalls that on 9th November, 2009, he was at home. And his children came home and informed him that PW1 was calling him. PW1 informed PW2 that she had found a plot at Mthilansembe area.

PW2 decided to inspect the plot in the presence of one Mr. Mwale, his wife's brother-in-law. At the plot, PW2 observed that the plot was partially developed. It was developed up to window level. After inspecting the property, PW2 decided together with PW1, to approach the owner of the property. PW2 testified that the owner; the accused, initially demanded the sum of K18 million. After negotiations, the price was reduced to K13 million. PW2 testified that the accused informed them that he had not yet formalized ownership of the plot. And that he needed some money to do so. PW2 testified that the following day, the Council formalized ownership of the plot in favour of the accused. And the Council assigned a surveyor to survey the plot.

After formalizing the ownership of the plot in favour of the accused, PW1 withdrew the sum of K9.5 million, and paid it over to the accused. After receipt of the money, the accused authorized PW1 to continue developing the property. PW1 developed the property to roof level, when she was approached through one of her workers by a Mr. Kanema. Mr. Kanema claimed that the property in question was his. PW2 advised PW1 to apprehend the accused. After the accused was apprehended, PW2 testified that the accused admitted selling the plot to PW1. And that there was an outstanding balance in the sum of K3.5 million.PW2 also testified that in due course, Mr. Kanema confirmed that the accused was a distant nephew. And that he had not authorized him to sell the plot. Mr. Kanema, PW2 testified, expressed willingness to refund the money that was spent by PW1 on constructing the property.

The third prosecution witness was Detective Chief Inspector Libanga Lutangu. I will continue to refer to Detective Chief Inspector Libanga Lutangu as PW3. PW3 recalls that on 25th March, 2010, he was on duty and was handed over a docket of obtaining money by false pretences. The complainant in the matter was PW1. Acting on the complaint by PW1, PW3 with the assistance of members of the public

apprehended the accused on 8th April, 2010. The accused was taken to the Police Station. At the Police Station, the accused was identified by PW1. The accused accepted having received the sum of K9.5 million from PW1. Thus on 9th April, 2010, PW3 made up his mind to charge the accused of the offence of obtaining money by false pretences.

After the prosecution witnesses adduced their evidence, the accused was found with a case to answer, and was put on his defence. The accused elected to give his evidence on oath. The accused recalled that on 3rd October, 2009, he was approached by PW1, PW2, and Mr. Mwale. On the material date, PW1 enquired from the accused whether or not he was selling the plot in question. The accused responded in the affirmative. The accused also informed the trio that the purchase price for the plot was K20 million. After negotiations, the accused reduced the purchase price to K18 million. Further, the accused testified that he had no certificate of title to the property. Furthermore, the accused testified that PW1 was ready to pay the sum of K15 million for the plot. And thereafter formalize the ownership of the plot with Chipata Municipal Council.

In due course, PW1 and the accused went to the Council to formalize ownership of the plot. At the Council, PW1 paid a Mr. Tembo the sum of K300,000.00 in order for him to prepare a site plan for the plot. After formalizing the transaction at the Council, PW1 and the accused went to Mthilansembe to inspect the plot.

The accused testified that on 7th October, 2009, PW1 paid the accused the sum of K3.7 million. At that juncture PW1 is said to have promised the accused that the balance would be paid in two weeks time. After two weeks, PW1 paid the accused a second installment in the sum of K5.5 million. After receipt of the sum of K5.5 million, a receipt was issued to PW1, and an agreement executed showing that the accused had received a total sum of K9.5 million.

The accused confirmed that on 8th November, 2009, he received a complaint from PW1 that a Mr. Kanema from Mfuwe had stopped PW1, from continuing with the construction on the plot. The accused also confirmed that when a Police officer contacted Mr. Kanema, he said that he had nothing to do with the sell of the plot to PW1. Mr. Kanema urged the Police officer to advise PW1 to obtain a refund from the accused. The accused confirmed in his testimony that the plot in question was originally owned by his uncle Mr. Kanema. And he later offered it orally to him on 3rd September, 2009. The accused testified that the plot was given to him because he had just completed serving a prison sentence; for causing death by dangerous driving. Thereafter, the accused sold the plot to PW1.

The accused also testified that after PW1 complained to the Police, an agreement was reached with PW1 to refund her the money. The deadline for the refund was 30th May, 2010. However, before the deadline lapsed, the accused was called to the Criminal Investigating Department (CID) by PW3. PW3 informed the accused that he had received information that the accused had obtained money from PW1 by false pretences. The accused denied the charge in question. Notwithstanding the denial, the accused was detained. And later released on Police Bond to enable him source money to refund PW1. The accused testified that he was unable to refund the money because he was in custody. The accused has to date not refunded PW1.

In a judgment delivered on 6th September, 2010, the Court below made the following findings:

(a) The property in question was at the material time the property of Mr. Kanema;

(b) Mr. Kanema did not authorize the sell of the property to anyone; and

(c) PW1 paid the sum of K9.5 million towards the purchase of the property.

After reaching these findings, the Court below observed that the conduct of the accused amounts to obtaining money by false pretences contrary to section 309 of the Penal Code. Section 309, is in the following terms:

"Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor, and is liable to imprisonment for three years."

The Court below observed that resolution of the matter was not complex, because the accused conceded that the property belonged to Mr. Kanema. Further, the Court below after evaluating the evidence, came to the conclusion that at the time the accused purported to sell the property in issue to PW1, Mr. Kanema was the lawful owner. In sum, the Court below held that although the accused obtained the sum of K9.5 million from PW1, the accused in fact did not own the property. And had no legal capacity to sell the property to PW1.

Ultimately, the Court below convicted the accused of the offence of obtaining money by false pretences, contrary to section 309 of the Penal Code, and sentenced the accused to two years imprisonment with hard labour with effect from 9th April, 2010.

Dissatisfied with the judgment of the Court below, the accused on 23rd September, 2010, filed a Notice of Appeal. The grounds of appeal were stated as follows:

1. the trial Court misdirected itself when it failed to address its mind to the defence of claim of right which was clearly raised by the accused (now the appellant) in his defence in the Court below;

2. the trial Court misdirected itself both in law and in fact when it took into account hearsay evidence when convicting the appellant;

3. the trial Court misdirected itself in law and in fact when it convicted the appellant on the basis of facts which cannot be supported by the record; and

4. the sentence imposed on the appellant by the trial Court is excessive, considering that the appellant is a first offender.

In this appeal, I invited counsel to file written submissions in support of their respective positions. On 9th February, 2011, Mr. Phiri filed written submissions on behalf of the appellant. In relation to the first ground, Mr. Phiri submitted that the appellant testified in the Court below that the piece of land which he sold to the complainant was orally given to him by his uncle. Mr. Phiri argued that the assertion by the appellant that the property in question was given to him by his uncle discloses a defence of claim of right. And therefore, the failure by the Court below to address its mind to this defence is a misdirection on a point of law and fact.

Mr. Phiri drew my attention to section 8 of the Penal Code. Section 8 of the Penal Code enacts that:

"A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right, and without intention to defraud."

Mr. Phiri, in pressing for the defence of bona fide claim of right, relied on the case of Mwachilama v The People (9) , where it was said held that:

"The essence of the defence is honesty of purpose in respect of other people's property."

Mr. Phiri, submitted that on the basis of the Mwachilama case (supra) it is not necessary for the claim to be valid, or for it to be reasonable. All that is required is for the belief in the validity of the claim to be honestly held. Further, Mr. Phiri drew my attention to the case of The People v Sailas (12), where the holding in R v Bernnard (17) was followed. Namely, that; "....a person has a claim of right if he is honestly asserting what he believes to be lawful right even though it may not be founded in fact or law."

On the basis of the decisions referred to above, Mr. Phiri argued that although it may appear to have been wrong or improper at law, and in fact for the appellant to sell a piece of land over which he did not have a certificate of title, he was nonetheless exercising a bona fide claim of right when he sold the property to PW1. Mr. Phiri pressed that what is cardinal is that the appellant was honestly asserting what he believed to be a lawful right, because he believed that the property was his at the material time. And that in any case the right to sell is incidental to ownership of property. Furthermore, Mr. Phiri contends that it is immaterial whether the property belonged to another person at the time of sell or not. What is paramount on the basis of the authorities referred to above, Mr. Phiri argued, is that the appellant believed that he had the right to deal with the property in the manner he did at the time he was selling the property.

Mr. Phiri also argued that the Court below misdirected itself when it made a finding that Mr. Kanema did not authorize the accused to sell the property on his behalf. Mr. Phiri argued that the question of authority or consent to sell is irrelevant or immaterial to the defence of bona fide claim of a right, in light of the provisions of section 8 of the Penal Code, referred to above. Mr. Phiri contends that it is sufficient that the accused is able to demonstrate that he was honestly asserting a claim of right regardless of its veracity or otherwise at law or in fact.

Under the second ground of appeal, Mr. Phiri, impeached the finding by the lower Court that:

"After considering the evidence, I have found as a fact that the plot in question was the property of Mr. Kanema at the material time."

Mr. Phiri contends that the preceding finding amounts to inadmissible hearsay evidence. Mr. Phiri contends that Mr. Kanema was not called to testify before the Court below. Mr. Phiri maintained

that the prosecution evidence was simply to the effect that Mr. Kanema was in Mfuwe at the time of the arrest of the appellant. And later PW3, the arresting officer, spoke to Mr. Kanema on phone when the latter is said to have indicated that he had papers for the property, and that he had not authorized the appellant to sell the property. Mr. Phiri maintains that there was no documentary evidence produced before the Court below to show that Mr. Kanema was the owner of the plot in question.

Mr. Phiri drew my attention to the case of, Mutambo and Others v The People (6), where it is said to have been held that:

"Evidence of a statement made to a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statements. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

Mr. Phiri argued that clearly the object of the prosecution evidence was to establish the truth of what Mr. Kanema is alleged to have said to the arresting officer on the telephone. Mr. Phiri contends that it was a misdirection for the trial Court to have held eventually that the prosecution had proved the case against the appellant beyond all reasonable doubt, because the material evidence amounted to inadmissible hearsay evidence.

Under the third ground of appeal, Mr. Phiri argued that the Court below grossly misdirected itself when it convicted the appellant on grounds that are not supported with facts. To augment this particular ground of appeal, Mr. Phiri referred to the following portions of the judgment in the Court below at pages J3 (paragraph 8); and J4 (paragraph 7), as follows:

"On the other hand, the accused stated that he had sold Mr. Kanema's plot to PW1"

Mr. Phiri went on:

"Under XXN [Cross-examination] the accused stated that the plot was the property of Mr. Kanema his uncle."

Furthermore, Mr. Phiri referred to the following holdings:

"As already found as a fact, it is quite evident that the plot was the property of Mr. Kanema, at the time the accused offered and sold it to the complainant."

Mr. Phiri, submitted that the findings referred to above, cannot be reasonably supported by the evidence on the record. Thus Mr. Phiri, argued that the Court below in arriving at the findings under discussion, was in essence importing facts into the evidence of the appellant. Furthermore, Mr. Phiri argued that the appellant in the Court below as the record indicates testified to the effect that the plot in question initially belonged to Mr. Kanema. And Mr. Kanema gave the plot to him on 3rd September, 2008. Mr. Phiri further argued that at the time PW1 bought the plot, the appellant was still the owner. Mr. Phiri went on to argue that Mr. Kanema later repossessed the plot after it was sold. At the time the plot was repossessed, Mr. Phiri submitted the matter was in the Court below. Mr. Phiri concluded his arguments under this ground of appeal by referring me to the case of Phiri and Others v The People (14),

where it was held that an appellate Court not having the advantage of seeing and hearing the witnesses will not interfere with findings of facts of the trial Court, unless the finding is one which cannot be reasonably be entertained on the evidence.

Under the last ground of appeal, Mr. Phiri, argued in the alternative. The alternative argument is that the sentence imposed on the appellant is excessive, and should come to this Court with a sense of shock. Mr. Phiri submitted that the offence of obtaining goods or money by false pretences attracts a minimum sentence of three years. Mr. Phiri submitted that the appellant is a first offender, and that he is entitled to leniency as was rightly observed in the Court below. In this regard, Mr. Phiri drew my attention to the case of Willard v The People (16), where it was observed that:

"An appellate Court should not lightly interfere with the discretion of the trial Court on question of sentence, but that for the appellate Court to decide to interfere with the sentence it must come to it with a sense of shock."

In the instant case, Mr. Phiri argued that a sentence of two years imprisonment with hard labour for a first offender should come to the Court with a sense of shock.

Ultimately, Mr. Phiri submitted that I should quash the conviction, and set the appellant free. In the alternative, Mr. Phiri, invited me to interfere with the sentence and substitute it with a lesser sentence.

Ms Soko filed the respondent's heads of arguments on 14th February, 2011. In relation to the first ground of appeal, Ms Soko submitted that the record of proceedings in the Court below show that:

(a) the appellant solicited for the sell of a piece of land with a partial construction to PW1;

(b) the appellant represented to PW1 that the property was his, and that there are no documentary evidence to prove title to the property;

(c) that the property was not on title. However, the appellant withheld information that the plot was for a Mr. Kanema, until this action arose; and

(d) that PW1 acting on the representation made by the appellant, paid the appellant a sum of K9.5 million, and proceeded to develop the property.

Ms Soko submitted that the defence of bona fide claim of right set out in section 8 of the Penal Code is predicted on the offence of theft, or an offence in which theft is an essential element. In support of this proposition, Ms Soko referred me to the case of the People v Sailas (12), where it was observed as follows:

"...a claim of right which is a defence to a charge of theft or one in respect of which proof of theft is an essential ingredient such as in robbery, aggravated robbery, etc."

In the same Sailas case (supra), Ms Soko submitted that in defining the essence of the defence of bona fide claim of right, Silungwe, J, referred to the dictum of Chomba, J, in the unreported case of Mambwe v The People (15) as follows:

"...It is a well established principle in criminal law that any offence of which theft is an essential

ingredient cannot be sustained if it is established that the accused had at the time of taking the article, the subject matter of the offence, a claim of right made in good faith. Before the introduction of the Theft Act 1968, in England the expression claim of right made in good faith was an integral part of the definition of larceny. See Section 1 of the Larceny Act 1916."

Ms Soko argued that in terms of section 264 of the Penal Code, realty or a house is not capable of being stolen. Section 264 of the Penal Code defines what is capable of being stolen when it enacts as follows:

(1) every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen;

(2) every inanimate thing which is the property of any person, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it;

(3) every tame animal, whether tame by nature or wild by nature and tamed, which is the property of any person, is capable of being stolen;

(4) animals wild by nature, of a kind which is not ordinarily found in a condition of natural liberty in Zambia, which are the property of any person, and which are usually kept in a state of confinement, are capable of being stolen, whether they are actually in confinement or have escaped from confinement;

(5) animals wild by nature, of a kind which is ordinarily found in a condition of natural liberty in Zambia, which are the property of any person, are capable of being stolen while they are in confinement and while they are being actually pursued after escaping from confinement, but not at any other time;

(6) an animal wild by nature is deemed to be in a state of confinement so long as it is in a den, cage, sty, tank, or other small enclosure, or is otherwise so placed that it cannot escape, and that its owner can take possession of it at pleasure;

(7) wild animals in the enjoyment of their natural liberty are not capable of being stolen, but their dead bodies are capable of being stolen; and

(8) everything produced by or forming part of the body of an animal capable of being stolen, is capable of being stolen.

In view of the foregoing, Ms Soko finds it difficult on the facts of this case to categorize the offence of obtaining money by false pretences, as one of theft or in which theft is an essential element. Further, Ms Soko argued that it is clear from the proceedings in which bona fide claim of right arises as a defence, that such a claim is made against the complainant. And the complainant is the owner of the property in issue.

In the instant case, Ms Soko submitted that PW1 is not the owner of the property, and the appellant cannot therefore advance such claim as against her action. Ms Soko argued, that this case does not fall within the parameters in which the defence of bona fide claim of right can arise. Ms Soko concluded that it goes without saying that the fact that the appellant honestly believed his property to be his is immaterial. Ms Soko urged that the Court below did not misdirect itself in law when it did not direct its mind to the defence of bona fide claim of right.

As regards the second ground of appeal, Ms Soko conceded that on the authority of the Mutambo case (supra), evidence of a statement made to a witness by any person not himself called a witness may be rightly considered as hearsay. However, Ms Soko argued that it is hearsay and inadmissible when its main object is to prove the veracity of the statement in evidence. And not merely the fact the statement was made. If the issue is only to establish as a fact that the statement was made, then such statement is admissible.

Ms Soko argued that in the instant case, Mr. Kanema was not called as a witness. However, it is clear from PW1's evidence that she was stopped from continuing with the construction by Mr. Kanema, who not only purported to be the owner of the property, but also met PW1 personally, and showed her the documents proving that he was the owner. In any event, Ms Soko argued it is the meeting with Mr. Kanema that prompted PW1 to report the matter to the Police. Furthermore, Ms Soko argued that the evidence of PW3 shows that he confirmed the report made to him by PW1, by contacting Mr. Kanema on phone.In view of the foregoing, Ms Soko submitted that the Court below properly arrived at the conclusion that at the time of the sell of the property to PW1, the property belonged to Mr. Kanema.

In relation to the third ground of appeal, Ms Soko agreed with the submission by Mr. Phiri, that it was held in the Emmanuel Phiri case (14), that an appellate Court rarely interferes with the findings of fact of a trial Court because it does not have the advantage or opportunity to observe witnesses, unless such finding of fact is one which cannot reasonably be entertained on the evidence. In this regard, Ms Soko argued that it is not plausible that Mr. Kanema assigned the property to the appellant orally; the appellant thereafter sold the property to PW1; and Mr. Kanema later repossessed the property when this case arose.

Ms Soko also drew my attention to section 308 of the Penal Code. Section 308 enacts that:

"Any representation made by words, writing or conduct, of a matter of fact or of law, either past or present, including a representation as to the present intentions of the person making the representation or of any other person, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

In light of section 308 of the Penal Code, Ms Soko argued that the appellant made a verbal representation to PW1 that he had a property for sell and acted consistently with such representation when he knew that the true owner of the property was his uncle, Mr. Kanema. Further, Ms Soko argued that when the appellant sold the property to PW1, he knew that he had made a false representation, or did not believe his representation to be true. Ms Soko argued that that is the reason why he immediately knew the identity of the person who stopped PW1 from proceeding with the construction. Thus on the facts of this case, Ms Soko contends that the conviction of the lower Court should be upheld.

On 15th February, 2011, Mr. Phiri filed into Court a reply. Mr. Phiri submitted in the reply that the defence of bona fide claim of right as stated in section 8 of the Penal Code is couched in broad terms. Mr. Phiri argued that it is not limited to theft or akin offences. Mr. Phiri argued that it applies to all crimes relating to property. Further, Mr. Phiri contends that the Sailas case(supra) has been

misinterpreted by Ms Soko. Mr. Phiri argued that the Sailas (supra)case does not hold that the defence under discussion is limited to the offence of theft. Mr. Phiri submitted that the Sailas case(supra) lays down that when an offence (in this case theft) relating to property has been committed, and a defence of bona fide claim of right has been mounted, it is not necessary to obtain the consent of the person who purports to be the owner of the property in question when mounting the defence. Mr. Phiri submitted further that the Sailas case(12) lays down that the defence of bona fide claim of right need not be founded in law or in fact. It suffices if it is shown that it was honestly held at the material time. Mr. Phiri also argued that it matters not whether a complainant was the owner of the property in question or not.

In relation to the second ground, Mr. Phiri submitted in reply that Ms Soko conceded that all the evidence that was adduced in the Court below relating to the ownership of the property in issue was inadmissible hearsay. Mr. Phiri also contends that contrary to the Mutambo(supra), case, the Court below took the statements attributable to Mr. Kanema as the truth of the statement.

In relation to the third ground of appeal, Mr. Phiri contends that the testimony by the appellant in the Court below that the property in question was his at the material time, was not shaken in cross examination. Furthermore, Mr. Phiri argued that the Court below did not make any adverse finding as to the credit of the appellants' testimony. In this respect, Mr. Phiri drew my attention to the case of Chizonde v The People (13), where it was held as follows:

(a) An adverse finding as to credit is a finding that the witness is not to be believed, such a finding is in turn one of the factors which will influence the Court in its decision as to which of two conflicting versions of an affair it will accept;

(b) It is not valid to hold a witness to be untruthful for no other reason than the existence of the very conflict which the Court is called upon to resolve; such an approach would be purposeless and circular;

(c) An adverse finding as to credit may be based for instance on discrepancies in the witnesses evidence or on a previous inconsistent statement or on proved bad character or an evasive demeanor and so on; and

(d) If a finding as to credit is based on demeanor, such finding cannot be supported in the absence of evidence on record.

Mr. Phiri contends that the prosecution evidence in the Court below was to the effect that the property in question belonged to Mr. Kanema at the material time. Conversely, the appellant in the Court below testified that the property was his at the material time. Mr. Phiri maintains that in the absence of any adverse finding as to credit, it was a grave misdirection for the Court below to arrive at the findings of fact it arrived at. Further, Mr. Phiri contends that the findings of the Court below are not supported by the evidence on record. In sum, Mr. Phiri maintained that the appellant honestly believed that the property was his when he sold it to PW1. Mr. Phiri pressed that what is crucial is the state of mind of the appellant at the material time, and not whether or not the property belonged to someone else at some prior point or indeed at a later stage.

I am indebted to counsel for their spirited submissions and arguments in this matter. After carefully reviewing the record of the case, I endorse the following findings of fact that were arrived at by the Court below. That on 9th November, 2010, PW1 was approached by Mwale who was selling a plot on behalf of the accused. PW1 showed interest in purchasing the plot in question. Eventually, PW1 paid the accused the sum of K9.5 million. After PW1 paid for the property in question, PW1 was authorized by the accused to continue developing the property. In the course of developing the property, PW1 was stopped from proceeding with the construction by Mr. Kanema. At that juncture, PW1 decided to report the matter to the Police, and the accused was subsequently arrested and charged of the offence of obtaining money by false pretences.

The issues or questions that fall to be determined in this appeal in my opinion may be formulated as follows:

(1) is the appellant entitled to the defence of bona fide claim of right;

(2) did the Court below rely on hearsay evidence in arriving at its decision;

(3) did the Court below base its decision on reasons which are not supported by evidence on record; and

(4) is the sentence imposed by the Court below excessive.

A starting point in dealing with the first ground of appeal is section 8 of the Penal Code. To recapitulate, section 8 enacts that:

"A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."

A leading case on this subject is the case of Mwachilama v The People (9) The facts of the case are as follows. The appellant was convicted in the trial Court of stock theft, the particulars of the offence alleging that on the 24th May, 1971, he stole one ox and five cows of a total value of K372. The appellant's defence was that the cattle in question had strayed on to his farm and had eaten his maize. He said in evidence that he knew that the cattle were not his, that he did not know the owner but that he had the right to keep or to sell them because they ate his maize. The trial judge held that the accused had no bona fide claim that the cattle had become his property, and on the authority of the decision of Choombe v The People (11), convicted him.

However, in the Mwachilama case(supra), in a judgment of the Court of Appeal delivered by Baron J.P., observed that the trial judge appears to have overlooked an essential difference between the Choombe case, and the Mwachilama case. Namely, that in the Choombe case (supra), the appellant did not in evidence suggest that he had the right to slaughter the cattle, and he admitted that he knew that the cattle were not his.

Baron J.P. went on to observe that the defence of bona fide claim of right is not confined to those cases where an accused person believes the property in question was his or has become his; it is applicable also in those cases where the accused has a bona fide belief that he has the right to keep or

to deal with somebody else's property.

In the Mwachilama case(supra), Baron J.P. also referred to the case of R v Malamula (5), where Cram J. reviewed the authorities in depth, and held on the corresponding section in the Penal Code of Nyasaland that it was sufficient to establish the defence if the Crown did not negative that the accused honestly believed he had a jus in personam against the owner of the bicycle, or that he had an honest belief that he had a right to take the bicycle against the will of the owner as a means of security or enforcing payment.

In the course of his judgment, Cram J. referred to R v Hemmings (1)where it was said:

"The essence of the defence is honesty of purpose in respect of the other person's property."

And then proceeded to comment as follows:

"that is there may be an honest belief, although wrong in civil law, that the taker believed he had a right to the property or he may have an honest belief that they had a claim of right against another and honestly believed he had a right to enforce his claim against that person's property."

Baron J.P. observed in the Mwachilama case(supra) that:

"It is not necessary for the claim to be valid or indeed as the authorities, make It clear, is it necessary for it to be reasonable. All that is required is that the belief in the validity of the claim be honestly held. But of course if the alleged claim is unreasonable this may well be a factor to be taken into account by the Court in deciding whether it was honestly held."

The cardinal issue as I see it in relation to the first ground of appeal is whether the accused in this matter honestly believed at the time of the sell of the property to PW1, that he had a valid claim of right to the property. Firstly, it is significant to note that at the time of selling the property, the accused did not disclose the root of title (the history of the property) to the property. Namely, that he acquired the property in question from Mr. Kanema. Secondly, if the accused was truly given the property by Mr. Kanema, he should have called Mr. Kanema to confirm that fact, or alternatively, Mr. Kanema should have volunteered to testify in defence of his claim. In the premises, I do not accept the assertion by the accused that the property in question was ever transferred to him by Mr. Kanema. Thus the accused is not entitled to the defence of bona fide claim of right.

In any event, if the accused had disclosed to PW1 at the time he was selling the property to PW1, that the property was given to him by Mr. Kanema orally, PW1 would have obviously been put on notice and inquiry. The accused was not in my opinion, honest in his dealing with PW1. Yet the defence of bona fide claim of right is predicated on honesty of purpose in dealing with property of others.

There is another aspect of this ground of appeal that requires my comment. Ms Soko argued strenuously that the defence of bona fide claim of right only applies to theft or to offences where theft is an essential element. In aid of this submission, Ms Soko relied on the dictum of Silungwe, J., in the Sailas case(supra), where he observed that:

"What it all boils down to is that the accused is in effect pleading a claim of right which is a defence to a charge of theft or one in respect of which proof of theft is an essential ingredient such as in robbery, aggravated robbery, etc."

In his reply, Mr. Phiri argued that section 8 of the Penal Code is couched in very broad terms. And argued that the defence is not limited to the offence of theft or other offences such as robbery, aggravated robbery etc, as posited by Silungwe J., in the Sailas case(supra).

First, I would like to state at once that the Sialas case(supra), was decided in the High Court. And therefore I am not bound by the decision; it is only of persuasive value. And I must say that I have not been persuaded by the restrictive interpretation of the defence of bona fide claim of right as postulated by Silungwe, J. Second, paradoxically, Silungwe J, in the Sailas case referred to the case of Chishimba v The People (10), in which the Court of Appeal for Zambia is said to have observed as follows:

"The defence was a bona fide claim of right. This defence is applicable not only in cases where an accused person believes the property in question is his or has become his, but also where an accused person honestly believes he has a right to keep or deal with someone's property."

In my opinion one of the operative words in the defence of bona fide claim of right is the word property. Property in my opinion includes both movable and immovable property or personal or real property. I am reinforced in this view by the definition of the word "property" as proffered by Stroud's Judicial Dictionary of Words and Phrases, volume 3;P-Z (London Sweet and Maxwell, 2006,) where it is stated that:

"Property is the generic term for all that a person has dominion over, and its two main divisions are real and personal."

Third, there is nothing in section 8 of the Penal Code which suggests that any property which is the subject of the defence of bona fide claim of right should be capable of being stolen as defined in section 264 of the Penal Code referred to above.

Lastly, on the facts of this case it is instructive to note that the accused was charged and convicted under s. 309 of the Penal Code primarily because he obtained MONEY (K9.5 million) by false pretences. The accused was not charged and convicted because he sold the plot in question to PW1. In any case, immovable property is not capable of being stolen both in terms of sections 264 and 309 of the Penal Code.

In light of what I have stated above, I do not therefore accept the suggestion by Ms Soko that the defence of bona fide claim of right is restricted to the offence of theft or offences where theft is an essential ingredient. The defence can be relied on in relation to movable or immovable property.

The issue in the second ground of appeal is whether or not the Court below relied on hearsay evidence in arriving at its decision. The learned authors of Phipson on Evidence, Seventeenth Edition, (Sweet and Maxwell, 2010), state in paragraph 20-01 at page 855 that:

"It is a fundamental common law rule that a statement made outside the Court room regardless of its relevance cannot be adduced in evidence for a hearsay purpose."

The learned authors go on to state in paragraph 28-02 at page 856 that:

"The word (hearsay) implies that a witness is prevented from reporting a communication heard outside the Courtroom but this is not the case. Hearsay is not defined by the nature of the evidence (an out of Court statement) but by the use to which it is put. To be excluded as hearsay the out of Court statement, must be relied upon to prove the matter stated."

The preceding position is affirmed by the case of Mutambo and others v The People (6). In the Mutambo case (supra), it was stated that a statement is hearsay and therefore inadmissible if the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay, and is admissible when by the statement it is not intended to establish the truth, but merely to establish the fact that a statement was made.

Mr. Phiri was therefore on a firm ground in arguing that the statement made by Mr. Kanema to PW3 on phone is hearsay, and inadmissible. Be that as it may, Mr. Kanema personally met PW1. And showed her documents proving that he was the owner of the property in question. In any event, this is what prompted PW1 to report the matter to the Police. Thus PW3 merely confirmed the report made by PW1 by contacting Mr. Kanema on phone. In view of the foregoing, I do not accept the argument by Mr. Phiri that the Court below premised its decision on hearsay. The Court below premised its decision, on, inter alia; the testimony of PW1. This ground of appeal is therefore dismissed.

Under the third ground of appeal, the question that falls to be considered is whether the Court below based its decision on reasons which are not supported by evidence on record. The approach to be taken or adopted by an appellate Court when dealing with questions of fact, was lucidly articulated by Pickett J, in Enotiades v The People (8) at page 146, as follows:

"The approach which should be adopted by an appellate Court when it is dealing with an appeal or questions of fact from a decision of a judge sitting without a jury has been the subject of considerable number of decisions. The only quotation I shall make in this judgment is from the judgment of Tredgold C.J. in Chiteta v R 1960 R and N 169, at page 204, where he quoted with approval a passage from the judgment of the Master of Rolls in Coghlan v Cumberland (1898) 1 Ch 704, which reads as follows:

"The case was not tried with a jury and the appeal from the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where in this case the appeal turns on a question of fact the Court of appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the materials before the judge with such other materials as it may decide to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it; if on full consideration the Court comes to the conclusion that the judgment is wrong.

When as often happens much turns on the relative credibility of witnesses who have been

examined and cross examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them, it is often very difficult to estimate correctly the relative credibility of the witnesses from written dispositions; and when the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is and must be guided by the impression made on the judge who saw the witnesses who stole. But there may obviously be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not and these circumstances may warrant the Court in differing from the judge when on question of fact turning on the credibility of witnesses whom the Court had not seen."

The critical factual issue in this appeal is whether or not it is credible that the property in question was first transferred to the accused orally; second, in the intervening period sold to PW1; and lastly repossessed, when the complaint giving rise to this appeal emerged. I find that this account is not only an afterthought on the part of the accused, but is also incredible. The Court below cannot therefore be faulted when it reached the conclusion that at the time of the property was sold to PW1 it belonged to Mr. Kanema.

The last ground of appeal is that the sentence imposed by the Court below is excessive. I must state from the outset that in deciding the appropriate sentence, the Court should be guided by certain considerations. The first and foremost is the public interest. The Criminal law is publicly enforced not only with the object of punishing crime, but also in the hope of preventing it. (See R v Ball (3) at 165.

Furthermore, Blagden C.J. in Jutronich and Others v The People (7), observed at page 12 as follows:

"In dealing with an appeal against sentence, the appellate Court should I think ask itself three questions:

(1) Is the sentence wrong in principle;

(2) Is it manifestly excessive so that it induces a sense of shock; and

(3) Are there any exceptional circumstances that would render it an injustice if a sentence were not reduced."

In the instant case, the sentence of two years imprisonment is not wrong in principle; does not come to me with a sense of shock; and there are no exceptional circumstances on the facts of this case that would render it an injustice if the sentence was not reduced. In my opinion the sentence was richly deserved. This ground of appeal is also dismissed.

The appeal against conviction and sentence is therefore dismissed.

Appeal dismissed.