

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE KITWE DISTRICT REGISTRY**  
**HOLDEN AT KITWE**  
**(CRIMINAL JURISDICTION)**

**HKSA/23/2012**

**B E T W E E N:**

**BARRE FUMPA  
PEACE FUMPA**

**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT**

**AND**

**THE PEOPLE**

**RESPONDENTS**

**Before Honourable Mrs. Justice Judy Z. Mulongoti in Open Court  
on the 1<sup>ST</sup> day of October, 2012**

**For the Appellants : Mr. N. Mukaya**

**For the People : Mr. M.C. Hamachila, State Advocate**

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## ***J U D G M E N T***

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### **CASES REFERRED TO:**

1. *THE PEOPLE VS. MUKANGA & OTHERS [1967] ZR 59*

### **LEGISLATION REFERRED TO:**

1. *Zambia Wildlife Authority (ZAWA), Act No. 12 of 1998*

The appellants, were convicted on two counts of unlawful possession of government trophy contrary to section 100 (1) and section 135 of the Zambia Wildlife Authority (ZAWA), Act No. 12 of 1998.

The particulars of offence were that, on 7<sup>th</sup> March, 2012, the appellants, jointly and whilst acting together with another person, still at large, did

hunt game animals in Lunga Luswishi Game Management areas of Kasempa, without a licence.

The appellants pled guilty and were fined Two Million Kwacha and Three Million Kwacha in respect of both counts. In default, they were to serve eighteen months and twenty four months simple imprisonment, respectively.

The learned Magistrate also ruled that the motor vehicle, Toyota Noah Registration No. ACP 5591, be forfeited to the State without compensation. This was after an application by the State, which was made pursuant to section 139 (1) of the ZAWA Act.

A Mr. Chansa Godfrey opposed the application. He contended that the vehicle belonged to him and not the appellants. He had lent it to the second appellant, to drive to Kasempa to visit a sick relative. The second appellant had assured him that he would drive to Kasempa in the morning and drive back to Solwezi, the same day.

According to Mr. Chansa, the second appellant failed to return that day and only called his wife three days later to say the vehicle had been impounded. He requested him to appear in court with documents to prove ownership of the vehicle.

In his ruling, the Magistrate reasoned that it was obvious to him that the appellants and Mr. Chansa had *“planned the hunting expedition together and one would be justified to infer that the applicant was to be a beneficiary of the proceeds of the illegal business”*. Further that *“any ordinary’ or reasonable person would not release the motor vehicle*

*under the circumstances that the applicant (Chansa) did without providing means of checking for its use. The correct inference to be drawn is that the applicant knew exactly what the motor vehicle was being used for”.*

He concluded that the vehicle be forfeited to the State without compensation as applied by the State.

It is this ruling that the appellants have appealed against. There are four grounds of appeal namely:

- 1. The learned Honourable Magistrate misdirected himself both in law and in fact in ordering forfeiture of motor vehicle Noah Registration No. ACP 5591 used in committing the offence and ferrying of Government trophy in the face of evidence that the owner of the said motor vehicle merely lent it to the convicts.*
- 2. The learned Honourable Magistrate erred both in law and in fact when it found that the appellant with the accused had planned the hunting expedition together and consequently inferred that the appellant would be a beneficiary of the proceeds of the illegal business from the mines in Solwezi which raised the presumption that the illegal business is lucrative in Lumwana and Kansanshi in the absence of evidence to that effect.*
- 3. The learned Honourable Magistrate erred both in law and fact in ordering for forfeiture of motor vehicle Noah Registration No. ACP 5591 when the owner of the said motor vehicle was not charged, tried and convicted for this offence.*

4. *The learned Honourable Magistrate misdirected himself both in law and in fact in ordering for forfeiture of the fire arm giving the owner a right to be heard before the order was made.*

At the hearing of the appeal, Mr. Mukaya for the appellants, simply relied on the grounds of appeal and the heads of arguments.

On behalf of the State, Mr. Hamachila, stated that the State had difficulty in supporting the ruling of the lower court, regarding forfeiture of the motor vehicle. He argued that the lower court did not properly address itself to the evidence of Mr. Chansa Godfrey. Thus, the State was not supporting the ruling.

I have perused section 139 of the ZAWA Act upon which the application for forfeiture of the motor vehicle was made. It is also noteworthy that the State Advocate does not support the order of forfeiture of the motor vehicle.

In the case of **THE PEOPLE VS. MUKANGA & OTHERS [1]**, the Court ordered the forfeiture of three guns which had been used by the convicts in the course of their illegal hunting. The three guns belonged to others who were not the accused.

On appeal, the High Court per Whelan J, observed that the court was not empowered to forfeit any property in which any person other than the one punished, has any legal right or ownership. I am mindful that this is a High Court decision and thus of persuasive value only.

In casu, Mr. Chisanga objected to the application for forfeiture of his motor vehicle. He explained to the court below how the second appellant came to be in possession. Going by the Mukanga & Others case supra, I am inclined to find that the learned Magistrate fell into grave error when he made the order of forfeiture. Further the Magistrate also misdirected himself when he held that Chisanga was working with the accused and would share in the proceeds. These findings were made in the absence of evidence to support them.

Accordingly, the appeal is successful and the order of forfeiture is set aside. Leave to appeal to the Supreme Court is granted.

Delivered at Kitwe this **1<sup>st</sup>** day of **October** 2012

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**Judy Z. Mulongoti**  
**HIGH COURT JUDGE**