

(CRIMINAL JURISDICTION)

BETWEEN:

THE PEOPLE  
AND  
NICHOLAS NKAKA  
KELLIES MULENGA

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 24<sup>th</sup> day of April,  
2013

For the State: Mr. R.L. Masempela – State Advocate

For the Accused: Mr. I. Chongwe – Senior Legal Aid Counsel

---

JUDGMENT

---

**Legislation referred to;**

1. Bwalya v. The People (1975) Z.R. 125
2. Nzala v. The People (1976) Z.R. 221
3. Shamwana and Others v. The People (1985) Z.R. 47

The two Accused persons were jointly charged with one count of vandalism contrary to section 341 D (1) (2) (a) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence were that the two, on the 18<sup>th</sup> September, 2012 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together, wilfully and unlawfully did vandalise an electrical cable valued at K18, 195,738 the property of ZAMBIA ELECTRICITY SUPPLY CORPORATION which is essential for or incidental to the distribution of a necessary service.

Both Accused persons denied the charge.

I have, throughout the trial and indeed at the time of writing this judgment borne in mind that the burden of proving the charge against the Accused persons lies from beginning to end on the prosecution, and that they must prove every element of the offence beyond reasonable doubt. If at the end I harbor any doubt as to the guilt of the Accused person or either of them, I am obligated to acquit that person. There is no burden whatsoever upon an Accused person to prove his innocence.

The ingredients of the offence of vandalism are to be found in the charging section itself which reads;

***“ (1) Any person who for any purpose vandalises any public or private property essential for or incidental to the provision of a necessary service commits a felony.***

***(2). Where the property referred to in subsection (1) is –***

***(a). a cable, overhead line, power line, electricity pole, pylon, transformer, pole mounted substation, substation, generating station or other property essential for or incidental to the connection, installation, generation, supply or distribution or other use of electricity, notwithstanding the Electricity Act or any other written law, the offender is liable, on conviction-***

- (i) to imprisonment for a term of not less than ten years and not exceeding twenty-five years; or***
- (ii) where the vandalism causes the death of any person, to imprisonment for life.”***

Section 341 A defines “**necessary service**” as including

***“(a) any service relating to the generation, supply or distribution of electricity”.***

And **“vandalise”** means **“wilfully or maliciously destroying, damaging defacing, disabling, or in any way disrupting the functioning of or impairing public or private property .....**”

The summary of the prosecution’s case was that in the early hours of 18<sup>th</sup> September, 2012, DENNIS NKOSHA (PW1), from ZESCO’s Security, was on foot patrolling in the Ndeke Natwange area of Kitwe with Constable MWANZA (PW4) from the State Police. They were patrolling ZESCO’s installations. Between 01:00 and 02:00 hours they came across two young men who were tampering with ZESCO electrical cable. This was near a boundary wall of a house by the road. PW1 said they first spotted those young men some 20 metres away. He said they were able to see the young men because there was light from the electrical lights from the nearby houses. These lights were estimated to be 10m from the point where the young men were spotted. As PW1 and PW4 approached the scene the two young men took to their heels. The witnesses pursued them and managed to apprehend one of them some 30 m from the scene. The other young men escaped.

The suspect the witnesses apprehended was taken back to the scene where PW1 observed that the suspects had unhinged the cable from the top of the electricity pole and had cut it at the bottom. It was just hanging but otherwise severed. PW1 estimated the vandalized cable to be 20m long. They also found one big cutter, a knife, pair of black shoes and sneakers, and a bag. The suspect, whom PW1 later came to know as NICHOLAS NKAKA (Accused 1), was later taken to Wusakile Police Station to await further process. At the trial, PW1 identified the vandalized electrical cable as well as the items the witnesses recovered from the scene.

Under cross examination, PW1 said he and PW4 had started the shift on 17<sup>th</sup> September, 2012 before midnight, but the apprehension of Accused 1 took place on 18<sup>th</sup> September, 2012. Before spotting the two suspected vandals the witnesses had not come upon any other persons walking about in the area. He said he did not even see any vehicle thereabouts. He said that although it was a dark night he was still able to

spot the suspects before they scampered. He said Accused 1 was caught a short distance from the scene after he fell down. He said Accused 1 was also found with a cell phone which had been on the SILENT mode but which had registered a lot of missed calls.

The evidence of PW4, Constable JIMMY MWANZA, was in most material respects similar to that of PW1, and I do not propose to go into it in detail. He said among other things that the cable that had been vandalized used to supply electricity to the nearby houses in the area. When the two suspects sensed the presence of the witnesses they started running away. PW4 fired a warning shot from the firearm he had and pursued one suspect whom he caught by the heap of concrete blocks at some uncompleted house some 40 to 6m from the scene. He also identified Accused 1 as the suspect they caught that day. He also identified the cutter, knife, and shoes they recovered from the scene, and described the electrical cable which they said had been vandalized.

PW2 was STEPHEN CHISHA, an Electrical Technician from ZESCO, said that on 18<sup>th</sup> September, 2012 he received instructions from his supervisor to visit the scene where a ZESCO electrical cable had been vandalized at MUKUBA NATWANGE near NDEKE VILLAGE, Kitwe. When he arrived at the scene in the company of other personnel, he found that the cable had been disconnected at the top of the 9m high wooden pole and that it had been cut at the bottom where it came from the nearby transformer. He described the cable as a 185 mm<sup>2</sup> x 4 core XLP MV Medium Voltage, about 30 to 40 m long, and that it was used to feed about 30 houses in the area with electricity. He said on that day those houses did not have power. However, ZESCO personnel later managed to restore power to the affected area from another line.

Ms. MULENGA CHILESHE SICHONE (PW3) was the area Stores Officer from ZESCO who took measurement of the electrical cable in issue and found it to be 43m long and who gave it's value as K18,195,000.

And PW5 was Detective Constable CHRISTOPHER CHIBOZU who investigated the case of vandalism and later charged and arrested the two Accused persons jointly with the subject offence. He said that in the course of his investigations he interviewed Accused 2 in the commission of the offence. He said in the course of interviewing the two together they started accusing each other to have master minded the offence. However under warn and caution both Accused persons denied the charge. PW5 identified the electrical cable, cutter, knife, bag and shoes which were recovered. These were produced and admitted in evidence as part of the prosecution's case.

At the close of the case for the prosecution, I found that the prosecution, I found that the prosecution had adduced sufficient evidence to require the Accused persons to make a defence. I found both Accused persons with a case to answer and I put them on their defence interms of section 207 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia. After their rights were explained to them, they both elected to give sworn evidence and said they had no witnesses to call.

In his defence, Accused 1 said that on the night in question around midnight he was asleep at his girlfriend's home in the Ndeke Nwatwange area of Kitwe. He gave the girlfriend's name in Court as CATHERINE MWANGALA. He said he was awakened by a phone call from his older brother, Accused 2, who told him he had arrived from Chingola and was at Accused 1's home at No. M30 Chamboli Township, Kitwe. Accused 1 asked his brother why he had arrived so late, to which Accused 2 said he had a problem because he had been evicted from the house he had been renting in Chingola. Accused 1 told Accused 2 where he was and agreed to start off for Chamboli. He picked up his bag and threw in some personal items and left his girlfriend's home for Chamboli.

As he was walking to his home but whilst still in Ndeke Township, he saw some six people ahead walking towards him. As he was getting near those people, his cellphone rang. It was from Accused 2. As he was answering the phone one of the six men grabbed the phone from him and ordered Accused 1 to lie on the ground. The six men

asked him whom he was calling and he told them he was speaking to his older brother and that he was on his way home to meet him. He said the men rejected his story because they suspected he was one of the people they had seen escape in a vehicle. Accused 1 told them he did not know those people who had escaped. He offered to take them to his girlfriend's home where he had just come from. But they rejected his suggestion. He suggested that they go with him to his home in Chamboli to see the person who had been calling him. Those people accepted to do so but when they reached where those men had parked their vehicle, in Ndeke, they put Accused 1 in the vehicle and drove him to Wusakile Police Station where he was detained for the rest of the night.

At about 10:00 hours the following day Accused 1 was taken from Wusakile Police Station by ZESCO Security Personnel to the ZESCO Town Office in Kitwe where he was asked to tell them the people who had been calling him the previous night. He repeated the story of his older brother which those people still rejected. However, they later phoned Accused 2's number and arranged to meet him. They took Accused 1 to Wusakile where Accused 2 was eventually located, picked and taken to the ZESCO Town Office for interrogation. Accused 2 was questioned about the people he had escaped with in Ndeke the previous night, but Accused 2 denied having been in Ndeke at all. Later the Police went with Accused to Chingola for further investigations.

Accused 1 further testified that among the people who had apprehended that night he had seen PW1 and PW4. These were among the six men who had stopped him. He said that apart from the bag, those people also took the pair of black shoes he had been wearing at the time he was apprehended. He said on his way to Chamboli he had not gone anywhere near an electricity transformer.

Under cross examination, Accused 1 admitted that on that night he had been in the Mukuba Natwange area of Kitwe. He said on the night in question he had communicated with Accused 2 more than once and that there had been some missed calls from Accused 2 on Accused 1's phone. All those were after midnight. Accused 1

said that he had not told those people who apprehended him his girlfriend's name or her actual residential house number. He said he did not know if CATHERINE MWANGALA was still alive at the time of the trial; neither did he know her whereabouts.

He testified further that there was no moonlight that night and there was no light coming from the nearby houses. He denied having been taken to the scene of the vandalism that night after having been apprehended. He said when he was taken to the vehicle he did not see the yellow cutter or yellow knife. He only saw the yellow cutter at the ZESCO Town Office and the yellow knife only in Court. He said the shoes that were exhibited in Court were his and were removed from him when he was apprehended. He also identified the bag which was brought to the Court by the prosecution witnesses as his bag which he had at the time.

As for Accused 2, his evidence was that he used to live in Chingola at the time. On the material day he left Chingola rather late with his wife for Kitwe after having been evicted from his home by the landlord. They arrived at Accused 1's home in Chamboli around midnight. They did not find Accused 1 at home. Accused 2 then phoned Accused 1 to inform Accused 1 that they were waiting for Accused 1 outside his home. After midnight when Accused 1 had still not arrived, Accused 2 called him again. The two spoke briefly before the line was cut. Accused 2 tried six more times to call Accused 1 but he was not going through. Accused 2 and his wife spent the rest of that night in Accused 1's neighbour's house.

Around 09:00 hours the following day Accused 2 got a phone call from Accused 1's number. The caller did not identify himself to Accused 2. However, Accused 2 told the caller that the number the caller was phoning from was for Accused 1. The caller told Accused 2 that he would give Accused 2 the phone later that day. Consequently, arrangements were made where by the caller met Accused 2 near Wusakile market where Accused 2 had been waiting. The caller arrived with two other men who turned out to be police officers. They were with Accused 1 at the time Accused 2 was apprehended and taken to the ZESCO Town Office.

Accused 2 was asked if he had been among the people who had been stealing cables in Ndeke Township the previous night. Accused 2 denied the allegation. After interrogations Accused 1 and Accused 2 were taken to the scene of the vandalism in Ndeke Township.

Under cross examination, Accused 2 said that he had left Chingola around 22:00 hours to go to Kitwe and arrived in Chamboli after 23:00 hours. He said he first phoned Accused 1 before midnight while the second call was after midnight. He called the third time after midnight when the two spoke very briefly before the line got cut. He called six times thereafter without getting any answer from Accused 1. Accused 2 said that when Accused 1 had answered the phone he had told Accused 2 that he was at Accused 2's sister-in-laws home, but that Accused 1 did not mention the name of CATHERINE MWANGALA. He said from the locations, it was possible for one to walk from Accused 1's home in Chamboli to the scene of the vandalism within 30 minutes. He denied that the communication that had taken place between Accused 2 and Accused 1 was for Accused 2 to join his brother at the place where Accused 1 was that night.

At the close of the case for the defence, I invited Counsel to file written submissions and adjourned the case for judgment. I received submissions from the prosecuting Counsel which I have taken into account in arriving at my decision.

After considering all the evidence before me I find that it is not in dispute that on the date in question some unauthorized persons damaged an electrical cable belonging to ZESCO in Ndeke Township – Kitwe. They did so by cutting one end of it and disconnecting the other end. This was at a substation and had the effect of disrupting the supply of electricity to some houses in the area. This is particularly as per the evidence of PW1, PW2 and PW4. PW3 valued the cable at K18,195,000. There can be no doubt, and I find, that the supply of electricity is an essential service and the disruption of the supply can and does have an adverse effect on the community. The evidence clearly establishes an act of vandalism as defined under section 341 D (1) (2) (a) of the Penal Code.



As Mr. Waluzimba, prosecuting Counsel, submitted, the only question to determine is who vandalized that cable?

According to PW1 and PW4 who were on foot patrol in the area that night the incident took place around midnight. As they were walking along the road they observed some two young men near a substation. The two witnesses said they spotted the two men from a distance of about 20m. They said they were able to see them with the help of security lights from the nearby houses on one side of the road, some 10m from the spot where the two youngmen were. The two youngmen were tampering with the electrical cable. As PW1 and PW4 approached the scene, the two youngmen saw them and started running away. The two witnesses gave chase and managed to apprehend one of them who came to be identified as Accused 1.

From the evidence of those two witnesses, I am satisfied and I find as a fact that Accused 1 was one of the two men who had been tampering with the cable. He had not run very far before he was apprehended. The witnesses had not even lost sight of him in the process of pursuing him.

Accused 1 simply denied that he was not one of the people who had cut the cable. He claimed to have been innocently walking in the area from his girlfriend's house to his home in Chamboli. The odd coincidence is that he was apprehended in the same area where the witnesses said they had seen two youngmen tampering with the cable. Further, and coincidentally, it was around midnight. PW1 and PW4 said they recovered among other items, a pair of black shoes when they took Accused 1 back to the scene of the crime. Accused 1 admitted that the black shoes the two witnesses said they recovered at the scene of crime were his. Another item recovered at the scene was a bag, which Accused 1 also admitted was his. Accused 1 did not satisfy me as to how the two items were taken from him if indeed he was an innocent passerby. I find no reason why PW1 and PW4 could lump those items on to Accused 1 if indeed they were not found at the scene.

I do not think, as Accused 1 appeared to suggest in his testimony that Accused 1 had an alibi. This is because he was no longer at his girlfriend's home when the offence was being committed. The defence of alibi does not fit the circumstances of this case considering particularly the time the offence took place, when and where Accused 1 was apprehended.

In any case, and as Mr. Waluzimba rightly submitted, Accused 1 admitted under cross examination that he did not tell any of the officers who apprehended him of his whereabouts at the material time. He only claimed that he was coming from his girlfriend's house. He did not mention the girlfriend's name or her actual address to place a burden on the officers to investigate the alibi.

As the Supreme Court said in the case of BWALYA v. THE PEOPLE (1975) Z.R. 125;

***“The law relating to the onus of proof of an alibi is that once evidence thereof fit to be left to a jury has been adduced the onus is on the prosecution to negative the alibi.....simply to say “I was in Kabwe at the time” does not place a duty on the police to investigate; this is tantamount to saying that every time an accused says “I was not there” he puts forward an alibi which it is the duty of the police to investigate. If the Appellant had given the names and addresses of the people in Kabwe in whose company he alleged to have been on the day in question it would have been the duty of the police to investigate, but the appellant not having done so there was no dereliction of duty on the part of the police”.***

Similarly in the case of NZALA v. THE PEOPLE (1976) Z.R. 221 the Supreme Court held, inter alia, that;

***“where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi it is the duty of the police to investigate it”.***

On the facts of this case, Accused 1 cannot be availed the defence of an alibi.

The evidence of PW1 and PW4 was that there were two youngmen they saw at the scene, one of whom managed to escape. According to the evidence of PW5, when Accused 2 was taken into custody and on being interviewed in the presence of Accused 1, the two accused persons started accusing each other of having master minded the crime. Mr. Waluzimba argued that there was therefore evidence of Accused 1 implicating Accused 2 implicating the latter in the commission of the offence. However, I take a different view because the statements of both accused persons implicating each other in the crime were not under warn and caution. The present scenario is distinguishable from the case of SHAMWANA AND OTHERS v. THE PEOPLE (1985) Z.R. 47. According to that case and other authorities cited therein,

***“...although an out-of-Court statement made in the absence of the defendant by one of his co-defendants cannot be evidence against the former, unless he expressly or by implication adopts the statement as his own, if a Co-defendant goes into the witness box and gives evidence in the course of a joint trial, the, what he says becomes evidence for all the purposes of the case, including the purpose of being evidence against his co-defendants.”***

As already noted Accused 1's and Accused 2's statements before PW5 were not at the trial and were not under warn and caution. I cannot, therefore, accept that Accused 2 was sufficiently implicated in the crime by such counter-accusations from Accused 1.

The other angle argued by Mr. Waluzimba was with regard to what he termed “incessant calls” from Accused 2's phone to Accused 1's phone around midnight when the offence was committed. Counsel submitted that those phone calls were for the purpose of the two accused purpose linking up to commit the offence.

I am afraid I do not agree with that submission. In my view those phone calls do not advance to prosecution's case any further as against Accused 2. On the contrary, I think that Accused 2's defence is strengthened by the fact that he had told the investigating officers where he had been when they apprehended Accused 1 at the scene of the crime. Accused 2 had told them he was at Accused 1's house in Chamboli Township

with his wife. He also told them that he and the wife ended up spending the night in Accused 1's neighbour's house. On the authorities I have already cited, that, in my view, constituted an alibi which the police ought to have investigated. In the circumstances of this case I do not find anything constituting a connection of Accused 2 to the offence.

The result is that I am satisfied that the prosecution have proved the case against Accused 1 beyond reasonable doubt. As such I find Accused 1 guilty as charged and I convict him of the offence charged.

As for Accused 2 I harbor some doubts as to his part in the crime. As such I find him not guilty of the subject offence and I acquit him accordingly.

Delivered at Kitwe in Open Court this 24<sup>th</sup> day April, 2013

-----  
I.C.T. Chali  
**JUDGE**