

**IN THE HIGH COURT OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
*(Criminal Jurisdiction)*

**HPA/61/2013**

**BETWEEN:**

**CEPHAS ZULU**

**Versus**

**THE PEOPLE**

***Before the Hon. Mr. Justice Justin Chashi in Open Court on the 10<sup>th</sup> day of March, 2014.***

*For the Appellant: M. Mulele, Messrs AKM Legal Practitioners.*  
*For the Respondent: C. Bako, Senior State Advocate.*

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

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**Cases referred to:**

1. Mutambo & 5 Others v The People (1965) ZR 15
2. Robertson Kalonga v The People (1888-89) ZR 90

**Legislation Referred to:**

3. The Penal Code, Chapter 87 of the Laws of Zambia

The **Appellant Cephas Zulu** was on the 30<sup>th</sup> day of September 2013 convicted by the Subordinate Court of the first class sitting at Lusaka on One Count for Malicious damage to property Contrary of **Section 335 (1) of The Penal Code**<sup>3</sup> and One Count of assault **Contrary to Section 248 of The Penal Code**<sup>3</sup>. He was sentenced to 8 months and 4 months simple imprisonment respectively with effect from the 8<sup>th</sup> day of September 2013 to run concurrently.

It is against the aforestated convictions that the Appellant now appeals vide the Notice of Appeal dated the 3rd day of October 2013.

When the matter came up for hearing on the 20<sup>th</sup> day of December 2013, the Appellant's Advocates indicated that they would file the Appellants Head of Arguments by way of submissions by the 10<sup>th</sup> day of January 2014, whilst the State would respond by the 7<sup>th</sup> day of February 2014. However by the time of writing this Judgment, none of the parties had done so.

I therefore decided to proceed and determine the appeal based on the Notice of Appeal and the grounds of appeal contained therein

There are two grounds of appeal namely:

- 1. That the trial Magistrate erred in law and fact when she convicted the Appellant when the complainant admitted that the Appellant is not the one who beat him but his employees.**
- 2. That the Police did not carry out thorough investigations to ascertain if the finger prints found on the scene were the Appellants or not.**

I have had the occasion to carefully peruse the record and in particular the proceedings and the Judgement from the Court below.

Let me start with the first ground of appeal which is solely premised on the evidence of the Complainant, PW1. The relevant evidence of PW1 as regards the Appellant was that on the date in issue, he was confronted by three people and he recognized the Appellant as one of them as he had seen him before.

The Appellant called him and he walked up to him. That he had known the Appellant since December 2011 as he owns an adjacent farm. The Appellant Accused PW1 of encroaching on his farm and demanded to know why he had ploughed maize on his land. That the Appellant refused the explanation

which was offered by PW1 and started insulting him and directed two of his workers to beat up PW1 who were later joined by a fourth worker in stoning him and his house when he ran into the house.

PW1 further testified that it was the Appellant who instructed his workers to stone PW1 to death and was infact the one who cast and threw the first stone which hit him and was in front when they chased PW1 towards his house.

In cross examination by the Appellant, PW1 asserted that a stone which was thrown by the Appellant hit him.

In the Judgment, this is what the Magistrate had to say on the issue which also encompassed the second ground of appeal on **page J3**"

*"Further in his defence the Accused emphasized on whether his DNA and finger prints were on the damaged property or the stones and bottles used to damage the property. Clearly no such examinations were carried out by the Investigation Officers. By this defence, the Accused appears to be suggesting that someone else damaged the property and not him. As has been established the accused and his employees where the only other people at the scene of the crime so in essence, he is suggesting that his employees could have damaged the property and not him. However even if the Accused did not actually throw a stone or a bottle, the fact is that he was at the scene with his subordinates and obviously encouraged them to act the way they did. Those are or were his employees and he was capable of stopping them from destroying another property".*

The trial Magistrate then went on to refer to **Section 21 (1)(b) of The Penal Code<sup>3</sup>** which states as follows:

**"when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to**

**be guilty of the offence and may be charged with actually committing it, that is to say: every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence”.**

According to the trial Magistrate, employees went ahead to throw stones and bottles in the Accused’s presence entails that either he did it and they emulated him or he simply watched them as they did without saying a word thereby encouraging them to soldier on.

In my view, the trial Magistrate was on firm ground on her finding and I cannot agree more with her and neither can she be faltered.

In fact, looking at the facts of this case, in addition to Section 21 (1)(b) or in the alternative **Section 22 of The Penal Code**<sup>3</sup> is also applicable. Section 22 states as follows:

***“when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”.***

It should be noted that evidence to show that the Appellant had a common purpose or intent need not only be direct evidence but can also be inferred. The case of **Mutambo & 5 Others v The People**<sup>1</sup> is one of the cases in which the issue of common intention was exhaustively dealt with. This was a case of Murder. **Charles, J** in interpreting the Section under the then Penal Code which is exactly as the current Section 22 said that to bring the Appellant within the Section as being guilty of an offence, the following facts must have been proved against him beyond all reasonable doubt.

1. *That two or more persons of whom the Appellant was one, each formed an intention to prosecute a common purpose in conjunction with the other or others;*
2. *That the common purpose was unlawful;*
3. *That the parties or some of them including the Appellant commenced or joined in the prosecution of the common purpose;*
4. *That in the cause of prosecuting the common purpose one or more of the participants murdered a person;*
5. *That the commission of the murder was a probable consequence of the prosecution of the common purpose. It would seem that the probable is that which a person of average competence and knowledge might be expected to foresee as likely to follow upon the prosecution of the particular purpose although the consequence was not foreseen by the Appellant”.*

The Learned Judge went further and said that two (2) points affecting the application of this Section need to be noted.

1. *The formation of the common purpose does not have to be by express agreement or otherwise premeditated. It is sufficient if two or more persons join together in the prosecution of a purpose which is common to him and the other or others and each does so with the intention of participating in that prosecution with the other or others.*
2. *It is the offence which was actually committed in the course of prosecuting the common purpose which must be a probable, consequence of the prosecution of the common purpose.*

The case in **Casu** is a straight forward case of malicious damage to property and assault. There is evidence on the record that the Appellant led his workers on PW1's farm and accosted him allegedly over the encroachment on his farm and as to why he had grown maize on the Appellant's farm.

There is also evidence that as the argument raged on, the Appellant cast and threw a stone which hit PW1. That when PW1 ran towards his house, in an effort to seek refuge, the Appellant was in the fore front in chasing him and issuing instructions.

In my view, the Appellant was the master mind and can safely be said to have been in the fore front in the commission of the two offences. The facts entail a clear formation of the common purpose with his workers with whom he jointly acted, which common purpose was unlawful. It is also clear that by throwing stones, the Appellant and his workers intended to assault and injure PW1 and also cause damage to his property although there was no evidence of premeditation nor express agreement adduced by the prosecution.

That can be inferred by the actions of the Appellant and his workers.

In my view, the Appellant and his workers though they could not be traced and prosecuted all fell under the ambit of **Section 22 of The Penal Code**<sup>3</sup> and I therefore dismiss the first ground of appeal.

Coming to the second ground of appeal, the trial Magistrate noted that no finger prints were uplifted from the scene of the crime.

The Supreme Court indeed in the case of **Robertson Kalonga v The People**<sup>2</sup> had this to say:

***“Failure to lift finger prints is a dereliction of duty by the Police which raised a presumption that such finger prints as there were did not belong to the accused. The presumption is rebuttable by overwhelming evidence of identification”.***

In this case, the identity of the Appellant was not at issue. The Appellant was well known to PW1, as he owned an adjacent farm and he had known him for about two years. Therefore there is overwhelming evidence of the Appellant having been on the scene of the crime and committing the offence.

This ground of appeal equally fails.

The sum total being that the appeal lacks merit and is therefore dismissed in its entirety.

The Appellant is to serve the sentences as were pronounced by the Court below.

**Delivered at Lusaka this 10<sup>th</sup> day of March 2014.**

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**JUSTIN CHASHI  
HIGH COURT JUDGE**