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**IN THE HIGH COURT FOR ZAMBIA** **HPA/50/2014**
**AT THE PRINCIPAL REGISTRY**
**HOLDEN AT LUSAKA**
**(Criminal Jurisdiction)**



**BETWEEN:**

**GRACE KAPUMPA** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

**Before the Honourable Mrs. Justice J.Z. Mulongoti**

**in Open Court on 26th November, 2014**

***For the Appellant:*** ***Mr. K. Muzenga – Chief Legal Aid Counsel***

***For the Respondent:*** ***Mrs. M.M. Bah Matandala – Senior State Advocate***

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# J U D G M E N T

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**Legislation referred to:**

1. *The Penal Code, Chapter 87 of the Laws of Zambia, ss. 272, 278 and 265(1)*

**Cases cited:**

1. *David Zulu v The People (1977) ZR 151*
2. *Dorothy Mutale & Another v. The People (1997) S.J. 51*
3. *Simango v The People (1974) ZR 198*
4. *Phiri and others v The People (1973) ZR 47*
5. *Saluwema v The People (1965) ZR 4*

The appellant, Grace Kapumpa was convicted by the Lusaka Subordinate Court of the first class for the offence of **theft by servant** contrary to sections 272 and 278 of the Penal Code. The particulars of the offence were that the appellant on 10th April,

2014 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with one Sydney Masuka being servants to Mable Madela as sales lady and sales man, did steal K20,115.00 cash the property of the said employer.

The appellant's co-accused, Sydney Masuka A1 (in the court below), was acquitted while she was convicted and sentenced to nine (9) months simple imprisonment. The appellant appealed against conviction as follows:

The learned trial court misdirected himself in law and fact in convicting the appellant on circumstancial evidence when the inference of guilt was not the only reasonable inference which could be drawn from the facts.

The appellant's counsel has argued that the evidence against the appellant is circumstantial and is mainly given by PW1 whose evidence is at pages 3 to 7 of the record and that given by the appellant at pages 17to 20 of the record. That the gist of the evidence is mainly to the effect that the appellant omitted to put monies amounting to about K20,000 in the safe, secured. She left the money in the drawer and did not inform the co-worker, who was accused number 1 (A1) in the court below, who equally had access to the office premises. The following day, the money went missing. The first accused person (A1) was the last person to leave the office and was the first one to arrive the following morning. He claimed he checked the drawers upon arrival and found the cash box was not there and he thought the appellant,

who in the court below was the second accused person (A2), had put it in the safe. This is mainly the evidence against the appellant.

It was argued that clearly, there is no direct evidence to the effect that the appellant stole the money in issue. Therefore the only way a guilty finding can be made is by way of inference from the circumstances of the case. Counsel contended that this Honourable Court will note from the record that the learned trial court did not direct its mind to the fact that the evidence herein was circumstantial, because had it done so, the result would have been different.

The case of **David Zulu v. The People (1977) Z.R. 151(1)** was cited that:

i. It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of fact in issue may be drawn.

ii. It is incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such degree of cogency which can permit only an inference of guilt.

iii. The appellant's explanation was a logical one and was not rebutted, and it was an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue.

It was contended that in the case at hand, a guilty verdict can only be by inference. Clearly, the appellant through negligence, recklessness or stupidity omitted to put money in the safe but left the same in the drawer. She was not the only person who had access to the office premises and the drawer. Her co-worker equally had access and in fact he was the custodian of the keys. He was the last to leave the office and the first to come to the office. It is therefore, possible that when he found the money in the drawer, coupled with the fact that the appellant did not tell him that she had left the money there, he helped himself with the money and removed one burglar bar in order for it to appear like there was a break in. It was submitted that the circumstances of this case cannot certainly permit only an inference of guilt.

The case of **Dorothy Mutale and Another v. The People (1997) S.J. 51 (2)** was cited where the Supreme Court held inter alia that:

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

Accordingly, it is possible the money was stolen from the drawer by the co-worker (A1) who took advantage of the appellant's omission and staged an ill-fated beak in. And that it is also possible, remotely though, that the appellant stole the money. In any event that an inference more favourable to the accused must be adopted as there is nothing on the record that could effectively hinder such an inference being made.

Learned counsel agreed with the learned trial court's finding at page J6 in lines 14 to 16 to the effect that the investigator did not do his job well as he should have extended the investigation or search to the second accused person's home and bank accounts. That had the investigator done his thorough investigations, extending the search to both accused persons, that would have provided the missing part in the evidence so as to provide cogent evidence which could have created solid evidence sufficiently enough to warrant only an inference of guilt. It is counsel's submission that the failure to conduct thorough investigation amounts to a dereliction of duty, which dereliction must be resolved in the favour of the appellant.

That responsibility of negligence alone cannot be a basis for convicting a person of a criminal offence of theft in the absence of any other evidence.

It is the appellant's prayer that this Honourable Court allows the appeal, quash the conviction, set aside the sentence and set the Appellant at liberty.

I am grateful to learned counsel for his submissions. I note that the state have not filed any as earlier indicated.

After analysing the evidence before him, the trial magistrate made the following findings of fact:

1. A1 and A2 were both employed by the complainant.

2. A1's duties included locking up and opening the shop, loading feed, deliveries and serving customers when the cashier was unavailable.
3. A2 was the cashier whose duties included making sales to customers, collecting money, making orders and securing all the money collected.
4. On 10th April, 2014 A2 deviated from her duty to secure the money by leaving the money in a drawer rather than the safe as she was supposed to do.
5. A2 did not inform A1 that she had left money in the drawer.
6. A1 locked up the shop on 10th April, 2014 and opened it the next morning.
7. There was no break-in as the doors and window were intact.

The trial magistrate relied on the case of **Simango v The People (3)** where the Supreme Court held that the offence of theft by servant consists of two ingredients: there must be actual theft of money and the money must be stolen from the employer. Section 265(1) of the Penal Code was also relied upon which provides that:

> *"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."*

In acquitting A1 the trial magistrate found that the investigator did not do his job well by failing to extend his search to the accused person's homes and their bank accounts in addition to the fact that A1 was actually not aware of the money in the drawer. He cited the case of **Phiri and others v The People (4)** that:

> *"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction the courts have no alternative but to acquit the accused, and when such an acquittal takes place because*

*evidence which could and should have been presented to the court was not in fact presented, a guilty man has been allowed to go free not by the courts but by the investigating officer."*

Accordingly, accused one was found not guilty and acquitted forthwith.

Regarding the appellant who was A2, the magistrate found that she was the sole custodian of all monies in the shop and that on the material day she left the money unsecured. The magistrate reasoned that by not securing the money as she was supposed to, the appellant fraudulently converted it from secure to unsecure with the intention of permanently depriving her employer and she was accordingly found guilty and convicted of theft by servant.

I have carefully considered the evidence on record in relation to the grounds of appeal advanced by the appellant.

I have scrutinised the evidence on record and I find that in convicting the appellant, the court below relied on circumstantial evidence although he did not state so. I am therefore not persuaded by the appellant's counsel's argument that the magistrate, did not direct his mind to this fact. It is trite that circumstantial evidence is indirect evidence which can permit an inference of the accused person's guilt and which amounts to corroboration. In casu, the magistrate found as a fact that A2 was employed as a cashier and she was in charge of securing the money. And as the record shows, in her defence, the appellant testified that she had the sum of K20,115.00 the day before the

theft was discovered and she left the shop around 17:00 hours leaving A1 who was in charge of locking and opening the shop. On the material day, she said she found A1 already at the shop. She testified that it was her duty to leave the money in the safe but that on that particular day, she had forgotten to secure the money. Her explanation for not securing the money was to allow A1 to access the money if her employer asked for it in her absence. However, under cross examination by the state, the appellant stated that she had not told A1 that she had left the money in the cash box on that day.

Sydney Masuka (A1) testified that he was the custodian of the keys to the shop and that even though he was not a sales man he had access to the money when the cashier was out. He also testified that on the material day, he reported earlier than the appellant and found a customer at the shop. He stated that he arrived at 08:00 hours while the appellant arrived at 09:00 hours. He testified that he noticed that the cashbox was missing when he made the first sale on that day but explained that he thought that the appellant had secured it in the safe.

It is not in dispute that the appellant had the stolen money in her possession which she claimed to have left in the shop the day before it was stolen.

I note that the circumstantial evidence was so strong that the case was taken out of the realm of conjecture so as to attain the degree of cogency which can only permit an inference of guilt as

elucidated in the case of **David Zulu v The People.** I also note the odd coincidences which strongly support the guilt of the appellant. I note that only she knew where the money was. She did not tell A1 where she had left the money. She reported one hour later after A1 and did not immediately check for the money which she left unsecured and did not inform the employer and the Police after it was discovered missing.

I find that the prosecution proved that the appellant was an employee of PW1. PW1, the appellant and A1 all confirmed that the K20,115.00 was at the shop on the material day and this was proved beyond reasonable doubt. The three actually corroborated each other in that regard. PW1 confirmed only she knew where she had put the K20,115.00. She, therefore, had an opportunity to take the money and as aforestated the circumstantial evidence was such that only an inference of guilt could be made. I find that the prosecution proved the ingredients of theft by servant as the K20,115.00 was capable of being stolen and to which the appellant had no claim of right. The money was never recovered and thus it was with the intention of depriving the owner permanently. In the circumstances of this case, I therefore disagree with the trial magistrate that failure to search the accused person's homes and bank accounts was fatal to the prosecution's case or a dereliction of duty as argued by the appellant's counsel.

I am alive to the Supreme Court decision in the case of **Saluwema v The People** that where the explanation by an accused is reasonably possible though not plausible, the court

must acquit. I find the explanation by the appellant not reasonably possible in light of the strong circumstantial evidence highlighted. The prosecution proved its case beyond reasonable doubt. It is trite law that proof beyond reasonable doubt does not mean beyond a shadow of doubt. Accordingly, the conviction is upheld the appeal is therefore unsuccessful.

The appellant did not appeal against sentence so 9 months simple imprisonment imposed by the magistrate is to be served with effect from today since she was on bail.

Delivered at Lusaka this 26th day of November, 2014.

**J.Z. MULONGOTI**
**HIGH COURT JUDGE**