

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

HPA/63/2013

BETWEEN:

THE PEOPLE

Versus

MALIZANI TEMBO

Before the Hon. Mr. Justice Justin Chashi in Open Court on the 10th day of March, 2014.

For the State: C. Bako, Senior State Advocate
For the Respondent: K. Mweemba, Legal Aid Board

J U D G M E N T

Cases referred to:

1. Day v Regina (1958) R & N 731
2. The People v Winter Makowela and Robby Tatabanya (1979) ZR 290
3. Henry v Regina (1958) R & N 393
4. The People v Japau (1967) ZR 95
5. The People v Kombe Joseph Champako (2010) ZR 25 Vol 1
6. Shamwana v The People (1985) ZR 41
7. The People v The Principal Resident Magistrate, Ex Parte Faustin Kabwe and Aaron Chungu (2009) ZR 170
8. Mutale and Richard Phiri v The People (1997) ZR 51

Legislation Referred to:

9. The Anti Corruption Commission Act No. 38 of 2010 of The Laws of Zambia
10. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

The Respondent herein **Malizani Tembo** was charged with the **Offence of Corrupt Practices by Public Officer** Contrary to **Section 19 (1) and 40 of The Anti-Corruption Act**⁹.

The particulars of the Offence being that the Respondent on the 24th day of January 2011 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia being a Public Officer namely Senior Investigations Officer in the Drug Enforcement Commission did corruptly solicit for and did receive K2,000,000 from Rachael Chileshe as an inducement for him to release Ignatius Malwa Chafwa a person who had been detained for alleged possession of prohibited drugs from Police custody, a matter or transaction which concerned the Drug Enforcement Commission, a public body.

After the evidence of the Prosecution, in which the State produced seven witnesses, the Respondent was found with a no case to answer by the Subordinate Court of the first class sitting at Lusaka and was acquitted forthwith.

It is against the said acquittal that the State now appeals. The State filed two grounds of appeal as follows:

- 1. That the trial Court erred in law when it held that the prosecution evidence on record could not establish a prima facie case against the Respondent;**
- 2. That the trial Magistrate erred in law when it made a final assessment as to witnesses credibility as to their truthfulness at no case to answer stage.**

At the hearing of the appeal on the 20th day of December 2013 at the instance of both Counsels, I directed that the State files its Heads of Arguments by the 20th day of January 2014 and the Respondent by the 7th day of February 2014. At the time of writing this Judgment only the State had done so.

As regards the first ground of appeal, it is the States argument that a prima facie case was made out and the holding of the Learned Magistrate to the contrary was erroneous. In that respect Counsel on behalf of the State relied on the interpretations of **Section 206 and 207 of The Criminal Procedure Code**¹⁰ and submitted that a prima facie case can be defined as the sum total of evidence at the close of the prosecutions case sufficient to warrant the putting of an accused person on his defence. That it is evidence that will at law justify a request to the accused for his word on the offence leveled against him. It is not evidence that would justify a conviction of the accused.

In giving meaning to the words in **Section 206 of The Criminal Procedure Code**¹⁰, Counsel drew the attention of the Court to the case of **Day v Regina**¹ a case which was cited with approval by **Muwo, J** in the case of **The People v Winter Makowela and Robby Tatabanya**² at page 291.

In the earlier case **Spencer Wilkinson, CJ** stated that:

“The words a case made out sufficiently to require him (ie the accused) to make a defence cannot be

equated with a case sufficient to warrant a conviction.....and if the crown has made out a prima facie case the Court is entitled to call for the accused to make a defence”.

That the aforesaid statement was echoed in the case of **Henry v Regina**³ (High Court of Nyasaland). Counsel further went on to cite the familiar case of **The People v Japau**⁴.

Further attention of the Court was drawn to the case of **The People v Champako Joseph**⁵ where it was held that a prima facie case does not mean proving each and every ingredient of the offence charged. If there is evidence to prove one element then there is a prima facie case. That sufficiently to require him to make a defence does not mean to prove beyond a reasonable doubt.

Counsel for the State then went on to consider the essential elements of the offence in **Section 29 (1) of The Anti-Corruption Commission Act**⁹ as it related to the evidence adduced by the seven prosecution witnesses and concluded that the evidence on record is sound at law for establishing a prima facie case.

On the second ground of the Appeal, Counsel cited the case of **Shamwana v The People**⁶ where the Court had this to say:

“Finality of assessment as to a witness’s credibility especially as to his truthfulness should be reserved

until the final Judgment stage after both sides have been heard. It was wrong to make final assessment in the ruling on a no case to answer submissions”.

I have had the opportunity to carefully peruse the record and in particular the proceedings from the Court below, the grounds of appeal, the Heads of Arguments and the list of authorities filed by the State and I shall address the two grounds of appeal in one breath as they are co-related.

I am indebted to Counsel for the State for the authorities cited on the subject of a no case to answer which authorities clearly lays down the basis for making a finding on a no case to answer.

Indeed Section 206 of The Criminal Procedure Code provides as follows:

“If at the close of the evidence in support of the charge it appears to the Court that a case is not made out against the Accused person sufficiently to require him to make a defence, the Court shall dismiss the case forthwith and acquit him”.

In the case of **The People v Japau**⁴ which has already been cited by the State, the Supreme Court had this to say:

“There is a case to answer if the prosecution evidence is such that a reasonable tribunal might convict upon it if no explanation were offered by the defence.

A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved or when the prosecution evidence has been so discredited by cross examination or is so manifestly unreliable, that no reasonable tribunal can safely convict on it”.

Having noted the aforestated authorities, justice would not be done to this appeal if I do not refer to the recent Supreme Court Judgment on the subject matter in the case of **The People v The Principal Resident Magistrate, Ex Parte Faustin Kabwe and Aaron Chungu**⁷ where it was held inter alia as follows:

- “1. There is no requirement under Section 206 of the Criminal Procedure Code that the Court must give reasons for acquitting an Accused person: That it must merely appear to the Court. The converse therefore must also be true that where the Court finds an Accused with a case to answer it must merely appear to the Court that a case has been made out.**
- 2. A finding of a no case to answer is based on the Courts feelings or impressions and appearance of evidence”.**

I have had recourse to the Ruling from the Court below. A recapitulation of the same shows that after citing the relevant laws and authorities on a no case to answer, the trial Magistrate

further went on to evaluate the evidence of the witnesses and at the end of the day, concluded by making findings of fact.

In my view, the trial Magistrate departed from the principles relating to a finding on a no case to answer and treated the matter as if he had come to the end of the trial after taking into consideration both the Prosecutions and the Defence's case. I am fortified in taking that view because of the manner in which the trial Magistrate concluded his Ruling by citing the case of **Mutale and Richard Phiri v The People**⁸ where it was held that:

“the case rested on the drawing of inferences and that where two or more inferences are possible it has always been a cardinal principle of the Criminal law that the Court will adopt the one which is more favourable to an Accused if there is nothing in the case to exclude it”.

Such considerations can only be made at the end of the trial and not on a no case to answer stage. In fact, the fact that there were such inferences is the more reason why the Accused must have been put on his defence.

Having perused the evidence of the witnesses and the Ruling, I must state that I am alarmed if not shocked at the trial Magistrates finding of facts and I should say they come to me with a sense of shock.

In the view I have taken, the Accused should have been put on his defence at that stage.

Both grounds of appeal by the State have merits and are therefore upheld. This is a proper case for Ordering of a re trial of the matter before a different Magistrate sitting at Lusaka and I so Order.

Delivered at Lusaka this 10th day of March 2014.

**JUSTIN CHASHI
HIGH COURT JUDGE**