

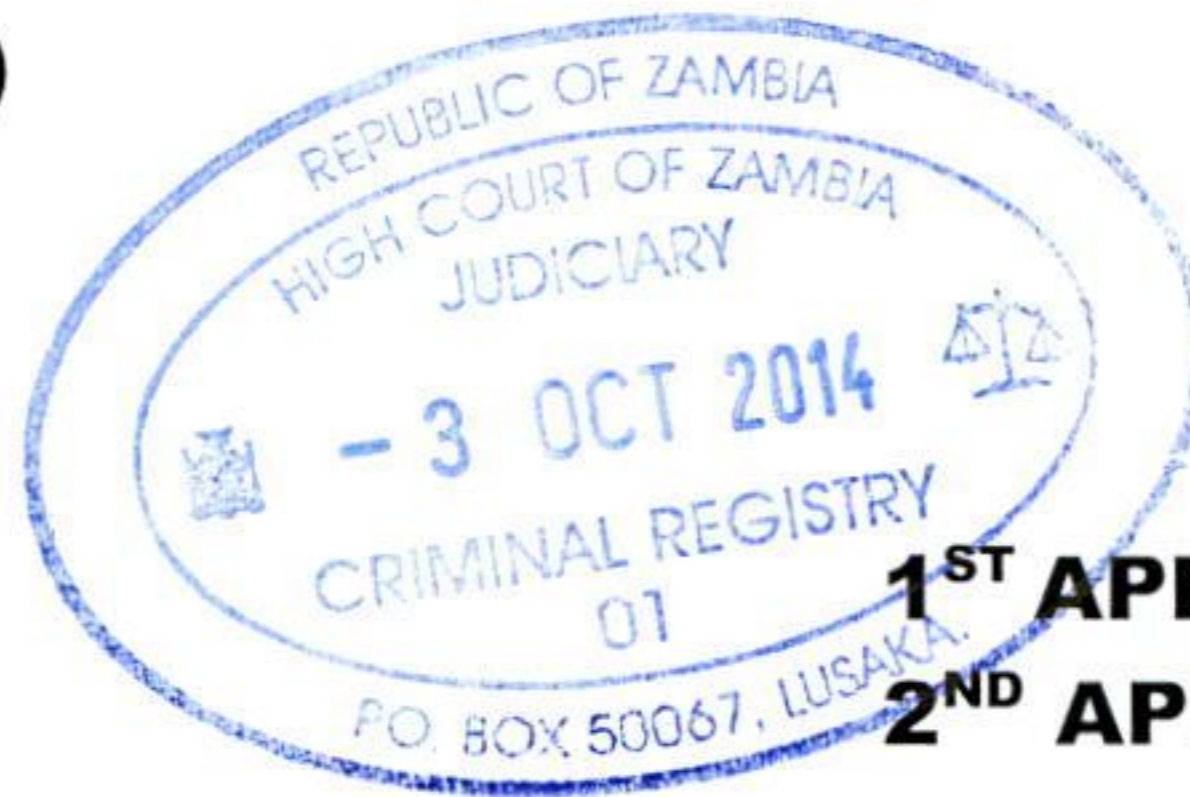
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**IN THE HIGH COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(CRIMINAL JURISDICTION)**

**HPA/35/2014**

**BETWEEN:**

**ENOCK BWALYA  
CLIFFORD CHALOMBA  
VS  
THE PEOPLE**



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

**RESPONDENT**

**Before Hon. Mrs. Justice M.S. Mulenga on 3<sup>rd</sup> day of October 2014.**

For the Appellant : Messrs Lungu Simwanza and Company  
For the Responds : Mr. R.L. Masempela, State Advocate – National  
Prosecution Authority

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

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This is an appeal against conviction by both Appellants. Each advanced two grounds of appeal as follows:

**1<sup>st</sup> Appellant**

- 1. The learned trial Magistrate erred in law and fact by holding that there was theft by public servant on the part of the Applicant.*
- 2. The learned trial Magistrate erred in law and in fact by convicting the Appellant against the weight of evidence.*

**2<sup>nd</sup> Appellant**

- 1. The learned trial Magistrate erred in law and fact by holding that there was false pretence on the part of the Appellant.*
- 2. The learned trial Magistrate erred in law and fact by convicting the Appellant against the weight of evidence.*

The brief facts of the case are that the 1<sup>st</sup> Appellant was jointly charged with thirteen (13) other persons with 48 counts of making false documents contrary to sections 344 and 347 of the Penal Code namely physical disability benefit forms and certificate of medical examination forms, uttering false documents contrary to section 352 of the Penal Code and obtaining money by false pretences contrary to section 309 of the Penal Code. The 2<sup>nd</sup> Appellant was individually charged with eleven (11) counts of theft by public servant contrary to sections 272 and 277 of the Penal Code. The total number of counts in this case was 74.

The prosecution called fifteen (15) witnesses and the Appellants gave evidence in defence. In the trial court's Judgment dated 7<sup>th</sup> October 2013, the thirteen (13) accused persons, namely A3 to A15 were found not guilty and were acquitted. The 1<sup>st</sup> Appellant as A1 was convicted of 11 counts theft by public servant outlined as counts 54,56,58,60,64,66,68,70,72 and 74 and the 2<sup>nd</sup> Appellant as A2 was convicted of 11 counts of obtaining money by false pretences namely counts 53,55,57,59,61,63,65,67,69,71 and 73.

At the hearing of this appeal the parties were given the opportunity to file submissions but did not do so. I have considered the record and the Judgment and cannot fault the findings of fact by the trial court in relation to all the counts including those affecting the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. As regards the grounds of appeal for both Appellants, I find that they have some merit. In particular, I note that the counts with respect to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were interchanged at the point of conviction. This is outlined in the Judgment on pages 230 to 234 of the record of appeal or pages 29 to 33 of the Judgment. The offence of obtaining money by false pretenses concerned the 1<sup>st</sup> Appellant and that

of theft by public servant related to the 2<sup>nd</sup> Appellant. This is clear from the charge sheet and the evidence adduced as well as the trial court's analysis in the Judgment.

The two grounds of appeal by each of the Appellants therefore succeed and the respective convictions of theft by public servant in relation to the 1<sup>st</sup> Appellant and obtaining money by false pretences with regard to the 2<sup>nd</sup> Appellant are hereby set aside. However, in light of the evidence against the two Appellants it is clear and I so find that the prosecution had proved its case against the two Appellants beyond reasonable doubt from the adduced evidence and the analysis and findings by the trial court. I accordingly substitute the convictions with the correct ones namely that the 1<sup>st</sup> Appellant is guilty and convicted of the offence of obtaining money by false pretences contrary to section 309 on counts 53, 55,57,59,61,63,65,67,69,71 and 73 and the 2<sup>nd</sup> Appellant is guilty and convict him of the offence of theft by servant contrary to sections 272 and 277 on counts 54,56,58,60,62,64,66,68,70,72 and 74.

These convictions do not affect the sentences passed as against each of the two Appellants.

The Appellants are to serve their sentences.

IRA

***Delivered this 3<sup>rd</sup> day of October 2014.***

  
**M.S. MULENGA**  
**HIGH COURT JUDGE**

**IN THE HIGH COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
[Criminal Jurisdiction]**

HPA /35/2014



**BETWEEN:**

**ENOCK BWALYA**

**AND**

**THE PEOPLE**

**TO: All Police Stations  
Lusaka Central Police Station**

**TO: Officer – In – Charge Prisons, (LUSAKA)**

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**BENCH WARRANT TO ARREST ACCUSED**

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**WHEREAS** by an order of this Court dated 3<sup>rd</sup> October, 2014 **It is ordered** that **ENOCK BWALYA**, be apprehended and be brought before this Court.

You are therefore, commanded in the name of the President to apprehend and bring the said, **ENOCK BWALYA** forthwith on 6<sup>th</sup> October 2014 on at 09:00 hours.

You are therefore required to lodge the said **ENOCK BWALYA** in the **CENTRAL PRISON** at **LUSAKA** together with this warrant in order for which this shall be a sufficient warrant to all whom it may concern.

**Dated this 3<sup>rd</sup> day of October 2014.**

  
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**HIGH COURT JUDGE**

**IN THE HIGH COURT FOR ZAMBIA**

**High Court Criminal Appeal Case No. HPA/31/2014**

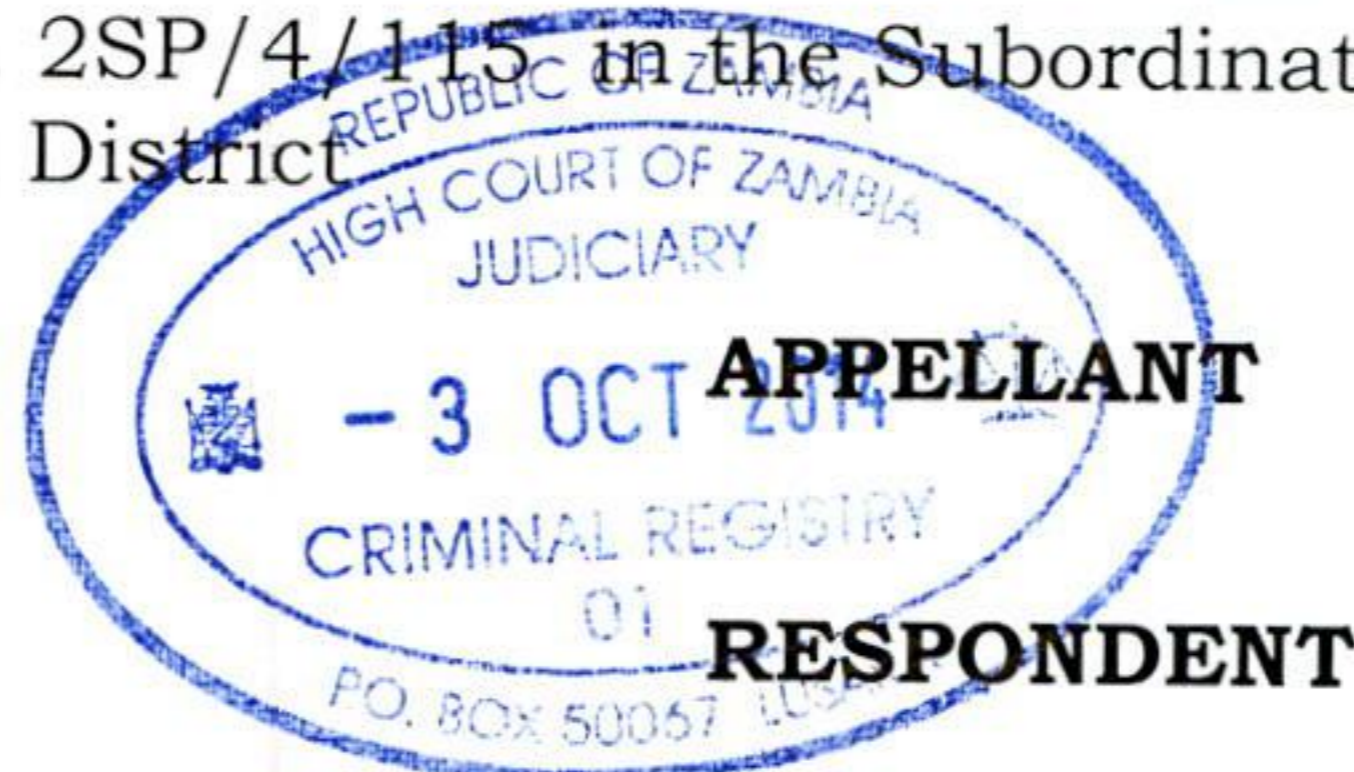
Original Criminal Case No. 2SP/4/115 in the Subordinate Court of the  
First Class for the Lusaka District

Holden at Lusaka

**THE PEOPLE**

**AND**

**ENOCK BWALYA**



**CERTIFICATE OF APPEAL**

**WHEREAS ENOCK BWALYA** was charged and convicted by the Subordinate Court of the First Class for the Lusaka District, Holden at Lusaka on the 7<sup>th</sup> day of October, 2013 with eleven (11) counts of theft by public servant contrary to sections 272 and 277 of the Penal Code and was sentenced to 18 months imprisonment with hard labour on each count.

All to run concurrently with effect from 7<sup>th</sup> October 2013

**WHEREAS ENOCK BWALYA** has appealed to the High Court against conviction **MADAM JUSTICE M.S MULENGA** has set aside the conviction of theft by public servant and substituted it with that of eleven (11) counts obtaining money by false pretences contrary to section 309 of the Penal code. The sentence imposed of 18 months imprisonment with hard labour has been upheld.

**NOW THEREFORE** the decision and order of the High Court are hereby certified to the court below in accordance with section 301 of the Criminal Procedure Code.

**Dated at Lusaka this 3<sup>rd</sup> October, 2014.**

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**M.S MULENGA**  
**HIGH COURT JUDGE**