

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

APPEAL NO. HPA/34/2015

BETWEEN:

SIMON MTONGA

VS

THE PEOPLE



APPELLANT

RESPONDENT

**Before the Hon. Mrs. Justice J.Z. Mulongoti
in Open Court on the 5th day of February, 2016**

For the Appellant:

Mr.W. Mushanga of AKM Legal Practitioners

For the Respondents:

Ms. M. Chanda State Advocate, N.P.A

J U D G M E N T

Cases cited:

1. Simango v The People (1974) ZR 198 (SC) 1997
2. Dorothy Mutale, and Phiri v. The People (1995) ZR 277
2. Peter Kasanda v. The People (1978) ZR 190 (SC)
4. Gerrison Zulu v Zambia Electricity Supply Corporation (2005) ZR 39 (SC)
5. Bienga v The People (1978) ZR 32 (HC)
6. Liswaniso Sitali and Others v. Mopani Copper Mines Plc (2004) ZR 176 (SC)

This is an appeal against the judgement of the lower court that found the appellant guilty of theft by persons in public office contrary to sections 272 and 277 of the Penal Code,

Chapter 87 of the Laws of Zambia. The particulars of offence alleged that on the 12th day of July, 2011, the appellant, at Mongu in the Western Province of the Republic of Zambia, being a person employed as a driver at Bank of Zambia stole 50.26 litres of diesel valued at K400.00, which came into his possession by virtue of his employment. The diesel was the property of Bank of Zambia.

To prove its case the prosecution led evidence from nine witnesses. Below is a brief summary of the evidence. PW1, the Director of Procurement at Bank of Zambia testified that in July 2011, he received reports about abuse of the Bank's fuel account by drivers. He alerted the Bank's security. He was later shown a report which revealed transactions in the month of July 2011 with regard to a bullion truck registration No. ABL 7249. The truck had two drawings of fuel from total filling station in Mongu on 12th July, 2011. 50 litres was drawn at 14:35hours and 165 litres at 17:15hrs. PW1 testified that on that day the truck was in the custody of the appellant. And he had the tom card which is inserted into the total system, then input a secret code for the tom card as well as the mileage the

motor vehicle has covered, at the point that there is a request to put fuel. PW2, a driver with Bank of Zambia testified on how he was assigned to travel to Mongu with the appellant and another driver. This was in the month of July 2011. It was his testimony that they refuelled once while in Mongu. And that the appellant was driving the bullion truck. It was his testimony that when fuelling the card is given to the attendant, who inserts it into the machine and then asks for a pin code. In cross examination he testified that they arrived in Mongu around 13 to 14hours. The operation at the bank ended at 17:00hours. After that they went for refuelling at the filling station.

PW3, a security officer at Bank of Zambia testified that he was in charge of security of the Mongu delegation on 12th July, 2011. He testified like PW2 that they refuelled once in Mongu after 17:00hrs. PW4, a fuel attendant at Total Mongu, testified that on 12th July, 2011 he attended to a customer who was driving a grey Toyota Corolla. The driver opened the boot, where he saw three 20 litre containers. The driver had a passenger and they told him they wanted fuel. He filled the containers and the driver

produced a tom card which he inserted in the machine and the pin code was entered. Then he went inside to get a slip, when he returned he found the driver had driven off.

PW5, the Bank of Zambia acting chief security officer's testimony was mainly based on the report on how the appellant and others travelled to Mongu. And how the bullion truck fuelled at 14:00hrs and 17:00hrs.

PW6 and PW7 testified on procedures on use of tom cards at Total (Z) Ltd. PW8, a security officer at Bank of Zambia informed the court that he is the custodian of the Bank's tom cards. He testified how he was given the tom card No. 00005324 which was with the accused, by PW5 on 11th March, 2013. He produced the card 'P1' in court.

PW9, the arresting officer narrated how PW5 reported to the police that the Bank of Zambia's diesel had been stolen from its account by the appellant. He carried out investigations and interviewed the prosecution witnesses. He also interviewed the appellant and charged him with the subject offence.

When called upon to defend himself, the appellant testified and called three witnesses. He testified that on 12th July, 2011 he was part of the team that travelled to Mongu. He was tasked to drive a bullion truck registration No. ABL 7249. They arrived in Mongu between 14:10 and 14:25hours. After the assignment, around 17:00hrs they refuelled at total filling station in Mongu using the tom cards. And that this was in the presence of the security officers who were part of the delegation. The following day they left for Lusaka around 06:00hrs. He said he was surprised when on 7th May, 2013, he was summoned to the security manager's office. He found a number of his colleagues there. They were informed that there would be an identification parade. He attended the identification parade and a fuel attendant (PW4) from Mongu was called to identify the person he dealt with but he was unable to. He was later arrested for theft by a person in public service.

It was his testimony that the whole case started when in 2013 he heard the Acting Director Bank of Zambia tell the security officer Noah Zulu that he (appellant) should be charged with an offence and made to dance to their tune.

In cross examination, he admitted that on 12th July, 2011 he had custody of the tom card 'P1' and that he used it at 17:00hours. When referred to 'P2' he admitted that the tom card No. 00005324 was used at 14:32hours for vehicle No. ABL 7249 and that he did not know about that transaction. He only knew of the transaction at 17:00hours.

DW1 was Constable Steven Kalaba who was part of the security team that accompanied the appellant and others to Mongu on 12th July, 2011. It was his testimony that they fuelled once in Mongu around 16:00hrs.

DW2 Joseph Zulu testified that he was in charge of drivers at Bank of Zambia. And that drivers were issued with tom cards through his office. It was his testimony that the Bank kept a register showing transactions of the tom cards. He informed the court that 'D1' was a copy of the register as the original could not be released by the Bank. Following an objection by the prosecution on the grounds that the copy 'D1' could not be produced because it was not certified, the court agreed and the document 'D1' was not admitted in evidence.

In cross examination, DW2 testified that he would not know what transpired in Mongu because he was not part of the delegation to Mongu.

DW3, the assistant transport manager for Bank of Zambia testified how he prepared the team to travel to Mongu. It was his testimony that his transport officers got invoices from total which are forwarded to him. He scrutinises them, after which he recommends payment through his supervisor. This is done by a covering memo to the supervisor. He disclosed that the transaction of 12th July, 2011 had no irregularities and he passed the invoices for approval of payment. He identified the memo 'DD1'. DW3 testified that the invoices had errors in some transactions.

DW3 produced the invoices and also the tom card book 'DD4'. However, the invoices were not admitted in evidence by the Court, without an objection from the prosecution, because the witness had stated that he is waiting for feed back from his immediate supervisor.

During the testimony of DW3, the defence counsel had applied to subpoena the Deputy Bank Governor one Dr.

Kankasa Mabula. However, at the next hearing date the court made an order that the Deputy Bank Governor could not be summoned by subpoena because after perusal of the record he found nowhere in the evidence that the purported witness was mentioned. That it is not in the spirit of the court to issue subpoena unless there were compelling reasons to do so. The court urged the defence to call a person who is directly connected to the issuance of fuel documentation.

The defence then closed its case and the matter was adjourned for judgment.

After analysing the evidence, the trial magistrate found as a fact that on 12th July, 2011 Bank of Zambia officials, including three drivers travelled to Mongu to deliver a consignment at Zanaco. That all three drivers were each issued with a tom card. They arrived in Mongu at 14hours. At 14:32hours, 50.26 litres of diesel was drawn for vehicle ABL 7249, using a tom card. The same tom card was used for the same vehicle at 17:15hours.

The court found that the tom card in issue was issued to the accused (appellant). And that the evidence provided by the witnesses was clear that the accused had custody of the tom card.

The case of **Simango v The People (1)** was relied upon in which it was held that "*theft by servant has two ingredients; actual theft of money and money must be stolen from the employer*". The trial magistrate reasoned that theft by public servant also has two ingredients. The court found that Bank of Zambia where the appellant worked was controlled by Government which had the majority shares. He further found that the diesel was property of Bank of Zambia and not Total. He found the appellant guilty of the offence of theft by public servant and convicted him.

The appellant being dissatisfied with the Judgment has appealed and raised thirteen grounds of Appeal as follows:

1. The trial magistrate erred and misdirected himself both at law and fact when he, on his own motion, revoked the Police Bond issued to the accused when the accused first appeared before him without any application from the prosecution.

2. The Learned trial magistrate erred in law and fact when he convicted the accused for the offence of Theft by Public Servant without any supporting evidence on record to warrant such a conviction and against all the evidence on record that showed that the accused was not the one that committed the crime.
3. The Learned trial magistrate misdirected himself both in law and fact when he disregarded vital evidence, including evidence of identification on record and chose to selectively analyse the evidence, resulting in unbalanced evaluation of evidence thereby resulting in miscarriage of justice.
4. The trial magistrate erred in law and fact when he based his conviction of the accused by drawing inferences when in fact there was direct evidence to show that the accused was not the one that committed the crime and against the evidence on record which showed that there could have been more than one reasonable inference to be drawn therefrom.
5. The Learned trial magistrate fell in grave error when he embarked on drawing inferences holding that the property stolen belonged to the complainant, against direct evidence on record from the prosecution witnesses who stated to the contrary, that the property alleged to have been stolen at the time never belonged to the complainant.
6. The trial magistrate erred and misdirected himself both at law and fact during trial when he stated at one point that he could not proceed with his sitting to hear a defence witness on the basis that there was absence in court of a representative from the complainant, who was also a prosecution witness (PW5), as the words were calculated to undermine the independence, integrity and fairness of the Court.
7. The Learned trial magistrate erred and misdirected himself both at law and fact when he took over the cross examination of a defence witness "DW2" during trial beyond normal clarifications by the Court, resulting in unfair trial.

8. The trial magistrate misdirected himself at law and fact when he disregarded and declined to admit vital documentary evidence by the defence marked "D1" on the basis that it was not certified, without any law requiring such certification and despite the witness who produced it having laid the necessary foundation as to why secondary evidence was being produced, thereby resulting in miscarriage of justice.
9. The trial magistrate misdirected himself at law and fact when he, on his own motion, disregarded and declined to admit vital documentary evidence by the defence marked "D3" when in fact it had not been objected to by the prosecution for its production and admission, resulting in miscarriage of justice.
10. The trial magistrate erred and misdirected himself both at law and fact when he attached different conditions applicable to calling (defence) witnesses as opposed to those conditions obtaining with the prosecution, against the provisions of the Constitution of Zambia Act, Chapter 1 of the Laws of Zambia and further, when he, on his own motion, revoked subpoena summons duly and legally issued by the court to two (02) defence witnesses despite the court having prior notice thereof of their issuance.
11. The trial magistrate erred and misdirected himself both at law and fact when he again declined an application by the defence to order the summoning by subpoena of a critical witness of the defence, and when he forced the accused to close his defence prematurely and involuntarily, which prejudiced the accused and the interest of justice.
12. The trial magistrate was unfair to the accused when he declined to hear his counsel in chambers and instead admonished his counsel in open court regarding an article that appeared in an online media, the *Zambian Watchdog*.
13. That the entire proceedings were marred with irregularities from inception of the trial and thereby resulting in a total

mistrial and injustice to the accused as elaborated by the other grounds herein.

Learned counsel for the defence also filed the heads of arguments. In relation to ground one it was argued that the court of its own motion revoked the appellant's police bond and remanded him in custody. He was only released after fresh bail conditions were met. That the reason for revoking the bond was because the surety was from Lusaka and a local surety was required. That there was no law which required sureties to be locals. It was illegal for the court to cancel the police bond. This was a misdirection at law from inception of the trial and prejudiced the appellant.

Regarding grounds two and three counsel submitted that the evidence on identification was suppressed by the prosecution witnesses and the trial magistrate also did not analyse it in his judgment. That PW4 the identifying witness delinked the appellant from the offence as he failed to identify him. And that the trial magistrate misdirected himself when he disregarded vital evidence and selectively chose to analyse the evidence. That the case emerged two years after the allegation arose, though the court found

that tom card used by the appellant was used to draw fuel twice the same day. Further that the trial magistrate was not even sure as to what time the transaction occurred. At page J3 it is indicated 14:30hours, J4 14:35, J5 15:15hours and J10 14:32hours. That the appellant denied ever transacting with the tom card at that time. And first, to prove that a tomcard transaction occurred, any of the duplicate receipts that were issued at the time of the transaction ought to have been produced. The evidence of PW4 and PW6 at page J12 of the judgment shows that there were two receipts issued upon the transaction being done. This was not done. Alternatively, the invoice that was sent by TOTAL and checked and verified by the Bank up to the Deputy Governor level for fuel consumed in that month, ought to have been produced in evidence. PW6 at page J12 and 13 indicated that an invoice was generated and paid for. That equally was not produced in evidence. Instead, a completely different and new computer generated statement was produced which the prosecution relied on. This statement was questionable because none of the Bank of Zambia staff checked it or verified its entries. In fact it was misleading in the judgment at page J11 and J12 to indicate that PW6 is the one that printed

the statement when in fact it was PW7 as indicated at page 29 of the Record of Appeal. In fact PW7 was cross examined although the record shows otherwise. She even indicated in cross examination that she has no single qualification in Information Technology (IT).”

That the court made a dangerous and wrong inference that because the appellant had custody of the tom card and knew its pin code, he is the one who drew the 50.26 litres of diesel in containers.

Learned counsel further submitted that the court was wrong in its analysis of property rights of the fuel. And that PW1 and PW9 clearly stated and conceded in their testimonies that the purported or alleged stolen fuel was not the property of the Bank of Zambia.

Further that the trial magistrate declined to admit further documentary evidence to show how the errors on the invoices occurred, even when the prosecution did not object to its production, as shown on page 49 of the Record of Appeal. The court also declined to admit the document ‘D3’ appearing at pages 28 to 41 of the Supplementary

Record of Appeal. This was an invoice that clearly showed how each entry on an invoice is verified. That the findings by the court flew in the teeth of the evidence before it and this court should interfere with them.

In relation to grounds four and five, counsel submitted that it is trite that where there is direct evidence the court should not embark on inferences. And that where the court is allowed to embark on inference, there should be only one possible inference to be drawn there from. The case of **Dorothy Mutale and Phiri v. The People (2)** was relied upon. It was argued that the evidence presented by the prosecution was direct and not circumstantial, it was directly in line with the charge alleging the appellant to be the only one to have committed the offence. It was also the appellant's counsel's submission that the diesel was not the property of Bank of Zambia at the time it was stolen as testified by PW1, PW6 and PW9. The case of **Peter Kasanda v. The People (3)** was relied upon where it was held that the accused could not have stolen the money in his employer's account because it belonged to the bank. And that the accused could have been charged with theft of a cheque.

Similarly, in casu that the Bank of Zambia did not own the fuel at the filling station, but a mere right to access the fuel on credit. Thus, the trial court by assumption and speculation at page J28, held that the product alleged to have been stolen would be deemed to belong to Bank of Zambia and deemed to have been stolen. That based on the Kasanda case, even assuming what was stolen was the tom card, in absence of any other evidence, then the accused could only be charged with theft of a tom card but that was not the case.

In grounds six and seven, it was submitted that for a court to have declined to proceed to hear a defence witness because of the absence of a representative of the complainant, it cast doubt on its independence. In addition that the court in cross examining a defence witness referred to as DW1 in the record of appeal, went beyond the call of clarifying issues. The case of **Gerrison Zulu v Zambia Electricity Supply Corporation (4)** was cited in authority where the supreme court held that “2. *although a trial Judge has the Judicial discretion to ask questions during the trial, he should not use his discretion to*

insert himself into the substantive questioning during the trial. The trial Judge should ask questions only to clear a point. The learned Judge in this case went beyond the normal intervention.

3. The discretion to ask questions must be enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with calmness of mind, freedom from partiality, not swayed by sympathy, nor warped by prejudice nor moved by any kind of influence, save alone the overwhelming passion to do what is just.

4. The Judge's part when evidence is being given is to listen to it; asking question only when it is necessary to clear a point, to see to it that advocates behave themselves; and keep to the rules laid down by law to exclude irrelevancies and discourage repetitions; to make sure by wise intervention that he follows the points made by the advocates; and assess their worth and at the end make up his mind where the truth lies."

With regard to grounds eight and nine, it was submitted that trial magistrate misdirected himself for declining to admit documentary evidence, on ground that it was not certified. According to counsel, no such law exists in a

criminal matter. That the court was duty bound to admit evidence that would tend to work in the accused's favour.

Counsel relied on the provisions of sections 4(1) (a), 5, 9 and 3 (2) (b) of the Evidence Act Chapter 43 of the Laws of Zambia. And the case of **Bienga v The People (5)**, that "(i) The secondary evidence of the original document is admissible provided it can be established that the original is lost or cannot be in the form of a copy of the original or by oral evidence."

And **Liswaniso Sitali and Others v. Mopani Copper Mines Plc (6)**, that "1. *The rule governing the admissibility of illegally or unfairly obtained evidence in civil cases, is the same as that in criminal cases. Namely, the relevant evidence is admissible regardless of the manner in which it is obtained.*

2. *In terms of admissibility of evidence, there is no difference in principle between a civil and a criminal case. In a criminal case, the Judge always has a discretion to disallow evidence, if the strict rules of admissibility would operate unfairly against an accused.*"

Accordingly, the discretion by the court to disallow evidence is only to be exercised if the evidence will operate unfairly against an accused and not the prosecution.

That in casu, the court actually declined to admit the document "D3" through DW2, when the prosecution had not objected to its production. Thus taking away his right of defence and a misdirection.

Regarding grounds ten and eleven it was submitted that the trial magistrate erred and misdirected himself, when he revoked the subpoena summons that the appellant issued to two witnesses. The trial court argued that the said summons could only be issued at the hand of a magistrate and not a clerk of court. However, this was not reflected in the record of appeal including the summons.

According to counsel he issued the subpoena on 19th February, 2014 as exhibited on pages 23 to 24 of the record of appeal. The same were directed to one Raphael Phiri, a Deputy Director at Bank of Zambia and one Dr. Kankasa Mabula a Deputy Governor Administration at Bank of Zambia. And that these summonses were duly

issued at the hand of the clerk of court and duly served on those summoned.

However, they both did not turn up on the return date of 5th March, 2014. When the matter was called that day, the appellant counsel informed the Court he would proceed to call the witnesses though he could not see them before court. The Court interjected and asked who had issued the summons. When told it was the clerk of court in accordance with section 34 of the Subordinate Court Act and section 143 as read with sections 117, 65, 190, 92(1) and (2) of the Criminal Procedure Code, the Court stated that they were irregularly issued and that there was no application by the defence, to issue them neither did the Court issue an order under its hand to summon the witnesses. And the summonses were accordingly revoked for contravening section 143 of the Criminal Procedure Code.

According to counsel section 143 of the Criminal Procedure Code provides, "*143. If it is made to appear that material evidence can be given by, or is in the possession of, any person, it shall be lawful for a court having cognizance of*

any criminal cause or matter to issue a summons to such person requiring his attendance before such court, or requiring him to bring and produce to such court, for the purpose of evidence, all documents and writings in his possession or power, which may be specified or otherwise sufficiently described in the summons." And section 28 of the Subordinate Courts Act provides "The clerk of court attached to a Subordinate Court shall perform such duties in execution of the powers and authorities of the Court, as may be assigned to him by the rules of court, or subject thereto, by any special order of the Court." And section 35 of the same Act that "35. Subject to any Rules of Court or special orders for the Court, every clerk of the court shall issue all summonses, warrants and writs of execution, and shall register all orders and judgments, and shall keep a record of all proceedings of the Subordinate Court to which he is attached, and shall have custody and keep an account of all fees and fines payable or paid into court, and of all moneys paid into or out of court, and shall keep proper accounts thereof, and shall from time to time, submit his accounts to be audited, and shall pay over to the Government the amount of fines and fees in his custody, as and when

directed by any rules of court, or as specially directed by the court.”

It was counsel's submission that the trial magistrate fell into grave error to have held that only the magistrate could issue subpoena summons. And to have revoked them. And further that even if the summonses were irregularly issued the witnesses should have come to court and perhaps an objection raised by the prosecution, rather than the court itself.

Additionally, that infact the magistrate was aware of the intended issuance of the summonses as the application was first made viva voce in open court. And he later made his ruling of 10th March, 2014, appearing on page 27 of the Supplementary Record of Appeal, in which he said the witness was not relevant.

Counsel submits that the ruling/order was shocking and a sham of a trial. Counsel wondered why the Court should know in advance what evidence is being solicited from a witness. And that in fact there was evidence, at the time of the ruling, that the witness being summoned was involved

in the tomcard transaction as revealed on page J22. That the Deputy Governor needed to come and testify while the Deputy Director needed to tender documents. According to counsel it was shocking and he wondered how the court can be the one to urge the defence which witness to call and not to call. And how did the magistrate have requisite knowledge of the duties of the Deputy Governor and even knew the duties of the witness who was supposed to be called before she was heard? And that she was not connected to issuance of fuel documentation.

Further, that it is not the duty of the Court to select which witnesses are capable of testifying, as the trial magistrate did. That what the Court did flew in the provisions of Article 18(1) of the Constitution on fundamental human rights to a fair trial. And Article 18(2) on the right of the presumption of innocence. That the appellant was denied a fair trial, and accordingly the conviction be quashed.

Regarding ground twelve, it was submitted that under Article 18(2)(d) of the Constitution, it is the duty of counsel to represent a client when instructed. That it was unfair for the trial magistrate to decline to hear the appellant's

counsel in chambers and instead admonished him in open court regarding an article on the Zambian watchdog, an online media. The said article is on page 42 to 44 of the Supplementary Record of Appeal.

Finally, in ground thirteen, counsel submitted that the accused was forced to close his case contrary to what is stated on page 53 of the Record of Appeal. That there were irregularities during the proceedings which took away the accused's right to a fair trial. That the conviction be accordingly quashed.

The learned state advocate filed the prosecution's response to the heads of arguments and submissions. She conceded to the extent that there were anomalies in the trial conducted in the court below in that the record is incomplete as it does not portray a true picture of events as they occurred in the court below. That the trial court being a court of record ought to have recorded events as they transpired without additions or subtractions, in order for this Court to come to an informed decision upon hearing the appeal. Further, that the Constitution in particular Article 18, accords the defendant a free and fair trial and

the right to defend himself against all allegations. He has the right to call witnesses, produce documents etc. Thus, it is not the duty of the trial court to decide which witnesses ought to be called.

It is counsel's humble view that under the circumstances the appeal can neither be quashed nor upheld as the evidence before Court does not paint a clear picture as to what transpired in the lower court. Thus, in the interest of justice, this Court should order a retrial before a different magistrate. That this is in line with the supreme court decision in *Sikota Wina and Princess Nakatindi Wina v. The People* SCZ judgment No. 8 of 1996 that "*a retrial could be ordered if the first trial was flawed on a technical defect or if there were good reasons for subjecting the accused to a second trial in the interest of justice*".

It was her further submission that there are good reasons for subjecting the appellant to a retrial. First, that the state had established the necessary ingredients of the offence. And there was circumstantial evidence against the accused which is so overwhelming that it takes the case out of the realm of conjecture. It was her prayer that the

Court orders that the matter be sent back for a retrial before another magistrate.

I have perused the grounds of appeal and the submissions by both counsel.

I will consider grounds one, six, seven, eight, nine, ten, eleven, twelve and thirteen first.

I am of the considered view that ground one is frivolous. The appellant should have appealed there and then. He was able to meet the bail conditions and attended to his case until the close of trial. Judgment was delivered and he was convicted. The issue of the police bond has nothing to do with the Judgment. The appellant's counsel should have appealed against that order then and not wait till after judgment, when the issue has been overtaken by events. Ground one is unsuccessful and is dismissed.

With regards to grounds six to thirteen, I am inclined to concur with the submissions by both counsel.

I am in total agreement with the state advocate that the conduct of the trial magistrate in the way he handled the matter, justifies a retrial. It is clear that the record does not reflect a full picture of what transpired as the trial court did not record everything. However, from what is reflected on the record, it is clear that the court revoked the subpoena to Dr. Kankasa Mabula. And he ordered that the defence should call a witness who is connected to the issue at hand. I concur with Mr. Muhanga, that the court misdirected itself as it is not the duty of the Court to suggest which witnesses the parties should call. It was a misdirection also to revoke the subpoena which were duly issued by the clerk of court. The record also clearly shows that the application to subpoena the Deputy Bank Governor was first made viva voce before the trial magistrate. I have also perused the record regarding the admission of documents by the defence, which the trial magistrate declined and the reasons advanced. And I agree with the submissions by Mr. Muhanga on this score. I note that the record on the invoices 'D3' was not reflected that it was marked as such, D3 only first appears in the court order. All in all, I agree that the appellant did not have a fair trial thus contravening Article 18 of the Constitution.

The conviction is therefore quashed. And I order that the matter be sent back for re-trial before another magistrate. I am fortified by the Supreme Court decision in the Sikota Wina case.

Accordingly, I will not consider grounds two to five.

Delivered at Lusaka this 5th day of February, 2016.



J.Z. MULONGOTI
HIGH COURT JUDGE