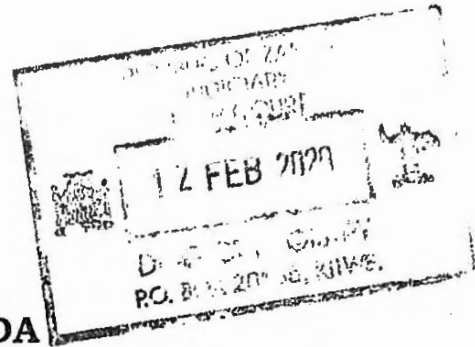


**IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(Criminal Jurisdiction)**

HKA/19/2019

BETWEEN:

JACK NSENDA



V.

THE PEOPLE

**Before the Hon. Mr. Justice E. Pengele in Open Court on 12th
February, 2020.**

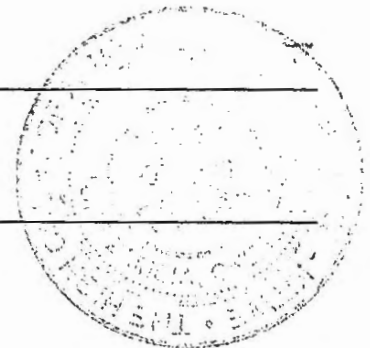
For the People: Mr. B. Siafwa- State Advocate, National
Prosecution Authority.

For the Convict: Mr. P. Chavula, Senior Legal Aid Counsel,
Legal Aid Board.

J U D G M E N T

Cases referred to:

- 1. Mwewa Murono V. The People (2004) ZR 207;**
- 2. Ilunga Kabala and John Masefu V. The People (1981) ZR 102;**
- 3. Lajabu V. The People (1973) ZR 74;**
- 4. Peter Yotam Haamenda V. The People (1976) ZR;**
- 5. John Mkandawire V. The People (1978) ZR 46;**



6. Kateka V. The People (1977) ZR 35; and

7. Nachitumbi and Another V. The People (1975) ZR 285.

This Judgment follows an appeal by the Appellant against the Judgment of the trial Court which found him guilty and convicted him for one count of Cheating contrary to Section **311 of the Penal Code, Chapter 87 of the Laws of Zambia.**

The particulars of the offence were that, the Appellant and Peter Kaseba, on a date unknown but between 17th January, 2018, and 31st January, 2018, at Chingola in the Chingola District of the Copperbelt Province of the Republic of Zambia, jointly and whilst acting together by means of fraudulent trick did obtain K80, 500.00 from KELVIN KABASO.

The case for the Prosecution can be stated briefly as follows. According to Kelvin Kabaso (PW1), who was the Complainant in this matter, in February, 2018, he received a phone call from a person, who identified himself as a Mr. Musonda, who claimed to have known PW1 since he was a child. PW1 told the Court that Mr. Musonda proposed to work with PW1 in the business of supplying Petroleum Chloride to Indeni. It was PW1's testimony that Mr. Musonda told him that the supplier of that Petroleum Chloride, by the name of Alfred Kaiwe, would call PW1. It was PW1's further testimony that he later came to know that the real name of that Alfred Kaiwu was Jack Nsenda (the Appellant).

The further testimony of PW1 was that, the following day, the Appellant called him and informed him that he would send someone by the name of Prince to take to PW1 a sample of the Petroleum Chloride at K1, 500.00. PW1 disclosed that indeed Prince took the sample to PW1 and the two concluded the transaction at PW1's home. He stated that he paid K1, 500.00 to Prince in the presence of PW1's cousin, Danny Mwansa, who he had asked to witness the transaction.

PW1 went on to testify that the same day, around 18:00 hours, he received a phone call from a man who introduced himself as Mr. Cloudy. He stated that Mr. Cloudy asked that they meet at Kasumbalesa for him to buy the sample. PW1 told the Lower Court that the said Mr. Cloudy indicated that he had been called by Mr. Musonda and told about the sample. PW1 informed the Court that he went with his cousin to Kasumbalesa where Mr. Cloudy bought the sample at K2, 000.00. He disclosed that he later sent talk time amounting to K100.00 to Mr. Musonda who then informed him that Cloudy wanted more of that Petroleum Chloride after he had tested the sample.

The additional testimony of PW1 was that after a few days, Mr. Cloudy phoned him and informed him that he had tested the sample and that it was okay. Further that Mr. Cloudy told him that he needed 100 sachets of that product.

PW1's additional testimony was that he called the Appellant and the two met at Puma Filling Station. He added that he went with his cousin to meet the Appellant. He told the Court that the Appellant went with 27 sachets for which PW1 paid him K40, 500.00.

The further evidence of PW1 was that the buyer refused to buy 27 sachets and indicated that he could accept to purchase at least 60 sachets. He told the Court that he then withdrew his saving of K40, 600.00 and called the Appellant for more sachets but that the Appellant indicated that he did not have any. That PW1 then called Mr. Musonda who told him that the Appellant would connect him to another supplier called Zulu. That later, Zulu called PW1 and subsequently sent Prince to deliver 27 sachets for which PW1 paid K40,000.00 in the presence of his cousin.

PW1 proceeded to testify that he then called Mr. Musonda who told him to wait for a phone call from the buyer, but that the buyer did not call. He testified that when he tried to call Mr. Musonda, Prince, Cloudy, the Appellant and Zulu, he found that their phones were off. That he then googled the product and discovered that it did not exist. His evidence was that this was when he realized that he had been swindled.

It was PW1's testimony that he had been told that the product was used to colour fuel.

The other witness for the Prosecution was PW1's cousin, Danny Mwansa (PW2). This witness confirmed that he was present when

PW1 and Prince transacted on the sample of the product in question. He also confirmed that he escorted PW1 to Kasumbalesa where PW1 handed over the sample sachet to some huge man in exchange for K2,000.00. He told the trial Court that after some days, he witnessed the transaction between PW1 and the Appellant. Further, that he also witnessed the transaction between the Appellant and Bruce.

PW2 told the Court that he was later called by the Police to identify the suspects and that he identified the Appellant.

PW3, Detective Inspector John Nalumbwe, told the Court that he conducted an identification parade at which Danny Mwansa (PW2) identified the Appellant.

Detective Sergeant Boyd Ngoma (PW4) stated that he took pictures for the identification parade where PW2 identified the Appellant.

PW5, Choonga Hamoonga was a witness from First National Bank who simply confirmed that PW1 withdrew K40, 600.00 from his account.

The last witness was Detective Chief Inspector Esau Nyirenda (PW6), who investigated this matter. This witness testified that he recovered 54 sachets of alleged petroleum products from Kelvin Kabaso (PW1) and took them to Indeni Oil Refinery in Ndola. According to PW6, the people at Indeni Oil Refinery refused to test

the alleged Petroleum Chloride on the ground that it was not their product and that they do not use Petroleum Chloride to colour fuel.

PW6 went on to testify that, he later launched a manhunt which led to the apprehension of the Appellant and Peter Kaseba. He disclosed that an identification parade was held at which the Appellant was identified.

PW6 explained to the Court that the sachets he recovered were labeled "Petroleum Product".

In cross-examination, PW6 stated that Cloudy is the one who could have told the Court if the product was different from the sample he bought from PW1. He conceded that although he took the product to Indeni Petroleum Refinery for testing, he had no Analyst Report. He also accepted that although he did a search with Airtel, the results were not given out.

The Lower Court found that the Prosecution had failed to establish a *prima facie* case against Peter Kaseba. The Court, accordingly, acquitted him.

The gist of the Appellant's testimony in defence was that he was out of the Country from 6th January, 2018 to 5th March, 2018. He testified that when he was apprehended, the Police got his phone and he gave them his phone number.

It was the Appellant's further testimony that an identification parade was conducted where the witness passed him twice without identifying him. He told the Court that the said witness only identified him after the Police allowed him to ask for the names of the persons on the parade.

Delivering its Judgment, the Lower Court stated that it had examined the so called Petroleum Chloride and that it had discovered that they were sachets of the powder that is used to colour water to make it look like a drink. According to the Lower Court, all the Appellant did was print on the outer cover and write Petroleum Chloride. The Court expressed the opinion that this act was so conspicuous that the Court wondered how the Complainant was deceived into believing otherwise. In the Court's view, no rocket science was needed to see that the product was not genuine.

The Court noted that the evidence that PW1 identified the Appellant remained unchallenged. The Court stated that PW1 met the Appellant under very favourable circumstances of a supposed business transaction and, therefore, that PW1 had a conducive atmosphere to observe the Appellant. In the Court's opinion, the Appellant could not have received the K40,500.00 without counting through it. The Court, therefore, found that this also gave PW1 ample time to observe the Appellant as he counted through the K40,500.00.

The Court also found that the Accused had sachets which the Complainant counted before getting thereby providing more time for the Complainant to further observe the Appellant. The Court concluded that the observation of the Appellant by PW1 was so favourable that the possibility of an honest mistake was ruled out.

The Court, accordingly, found that the Prosecution had proved its case beyond reasonable doubt and she convicted the Appellant.

It is against that decision of the Lower Court that the Appellant has appealed to this Court advancing three grounds of appeal, namely-

- 1. that the learned trial Magistrate erred and misdirected herself both in law and fact when she convicted the Appellant in the absence of any evidence proving the ingredients of the offence of cheating;**
- 2. that, in the alternative to the first ground of appeal, the learned trial Magistrate erred both in law and fact when she made findings of fact which were not supported by the evidence on the record; and**
- 3. that the learned trial Magistrate erred and misdirected herself both in law and fact when she convicted the Appellant in the face of unsatisfactory and unreliable evidence of identification.**

In support of the above grounds of appeal, on 17th September, 2019, Counsel for the Appellant filed written heads of argument.

The gist of the submissions in support of the first ground of appeal is that there is no evidence on the record of appeal as to whether the product, which was said to have been Petroleum Chloride, was fake or genuine. Counsel argued that this is because PW1's customer from Kasumbalesa, named Cloudy, was not called as a witness to confirm whether the product was genuine or fake. Further, that there was no Analyst Report from any expert to confirm whether the product was genuine or not.

In Counsel's view, it was, therefore, a misdirection for the Lower Court to classify the product as being fake in the absence of any expert evidence. In Counsel's view, there was no evidence that the trial Court even knew how the genuine product that PW1 ought to have bought looked like.

Counsel contended that the record of appeal shows that the Arresting Officer took the product to Indeni Petroleum Refinery for testing but that he still told the Lower Court that he had no Analyst Report. Counsel disclosed that the matter was adjourned on a number of times pending appearance of an Expert from Indeni Petroleum Refinery who never appeared until the Prosecution closed its case. Counsel, therefore, expressed the view that the Prosecution did not discharge its burden of proof. To reinforce the above arguments, Counsel referred me to the case of Mwewa Murono V. The People¹.

Counsel maintained that the evidence on record does not establish the elements of Cheating within the provisions of Section **311 of the Penal Code**. In Counsel's view, this is because the said section specifically deals with the use of a fraudulent device or trick. According to Counsel, there was nothing fraudulent or trickery in the manner PW1 bought and resold his products.

On the second ground of appeal, the kernel of Counsel's submissions is that the trial Court made several findings of fact at page 44 of the record which were not supported by any evidence. Counsel contended that there was no evidence to support the trial Court's findings that PW1 had ample time to observe the Appellant as he counted the money and that PW1 also spent some time counting through the sachets before getting them. Counsel insisted that the Prosecution did not adduce any evidence to show how long it took PW1 and the alleged seller to exchange the money and the products.

The Defence went on to submit that there was evidence that PW1 and the alleged seller were meeting for the first time. That, therefore, there was need to conduct an identification parade in respect of PW1 for him to point out the person he dealt with. To buttress the foregoing, Counsel relied on the case of **Ilunga Kabala and John Masefu V. The People**².

In addition to the above submissions, Defence Counsel averred that the Lower Court misdirected itself when it stated that the identification of the Appellant by PW1 remained unchallenged. That this was because PW1 did not give a physical description of the person he met at Puma Filling Station and how much time he spent with that person. Counsel cited the case of **Lajabu V. The People**³ in support of the above contentions.

Counsel went on to aver that the Police did not avail to the Lower Court any evidence relating to the phone communications that PW1 had with the alleged seller. In Counsel's view, this amounted to dereliction of duty. Counsel cited the case of **Peter Yotam Haamenda V. The People**⁴ to augment their averments.

Coming to the third ground of appeal, Counsel contended that there was no satisfactory and reliable evidence of identification. In Counsel's view, the learned trial Magistrate did not address her mind to the dangers of an honest mistake in cases of a single identifying witness. In support of the foregoing, Counsel placed reliance on the cases of **John Mkandawire V. The People**⁵; **Kateka V. The People**⁶ and **Nachitumbi and Another V. The People**⁷.

The Respondent did not file any written heads of argument.

I have carefully considered the evidence on the record of appeal, the Judgment of the trial Court as well as the heads of argument filed

on behalf of the Appellant. I will deal with the grounds of appeal in the order in which they have been raised and argued on behalf of the Appellant.

The question for my decision, on the first ground of appeal, is whether or not the Prosecution proved the ingredients of the offence of Cheating. For the purpose of clarity, I have reproduced section **311 of the Penal Code** under which the Appellant was charged. It states as follows:

“311. Any person who, by means of any fraudulent trick or device, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanor and is liable to imprisonment for three years.”

In the instant case, I must determine whether the Prosecution proved that the Appellant used a fraudulent trick to obtain K80, 500.00 from PW1.

There is no dispute that PW1 paid a total of K80, 500.00 to some people in exchange for some sachets of what was described as

Petroleum Chloride. The only key question is whether PW1 was fraudulently tricked into paying that money.

The Authors of **Black's Law Dictionary, 8th Edition, Bryan A. Garner, (2004) West, a Thomson Business: St. Paul**, have defined "fraud", in so far as that term is relevant to this case, as follows:

"1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment...."

From the above definition, I am of the considered view that a fraudulent trick, envisaged in Section **311 of the Penal Code**, must involve a knowing misrepresentation of the truth or a concealment of a material fact which is aimed at inducing another person to act to his or her detriment.

The question that follows invariably then is whether the Appellant made a knowing misrepresentation of some truth about the Petroleum Chloride, which misrepresentation was aimed at inducing PW1 to part away with the K80, 500.00. From the evidence of PW1, it is clear that when he realized that the phones of Mr. Musonda, Prince, Cloudy, Kaiwu and Zulu were off, he became suspicious. He then went to Google and searched for Petroleum Chloride and, according to him, the search revealed that Petroleum Chloride does not exist. That was how he realized that he had been

swindled and subsequently he proceeded to report the matter to the Police.

Having attentively reviewed the evidence on the record of appeal, I have failed to accept that the Prosecution discharged its burden of proof in establishing beyond reasonable doubt that there was a fraudulent trick in this case, even assuming, for now, that it was the Appellant who supplied PW1 with the alleged Petroleum Chloride. To start with, the evidence on record clearly shows that it was a Mr. Musonda who originally introduced the idea of him and PW1 working together in the business of buying and reselling Petroleum Chloride. The evidence of PW1 shows that the Appellant later sent Prince to deliver a sample of Petroleum Chloride for which PW1 paid K1, 500.00. PW1 proceeded to resale that sample to Mr. Cloudy at K2, 000.00. According to PW1, Mr. Cloudy later phoned him and informed him that the sample of the Petroleum Chloride had been tested and that it had been found to be okay.

From the foregoing, it is clear that the Petroleum Chloride was ascertained to have been a genuine product, according to Mr. Cloudy. The question, therefore, is whether there is any evidence to prove that in fact that product was not genuine as claimed by Mr. Cloudy, but was used as a mere fraudulent trick to obtain the K80,500.00 from PW1.

A cursory look at the record of appeal establishes that there is absolutely no evidence to prove that the Petroleum Chloride that was sold to PW1 was not a genuine product. The only evidence available on the record of appeal is the testimony of PW1 that his Google search revealed that Petroleum Chloride did not exist.

I have no hesitation in holding that a search from Google cannot be used as a scientific or other reliable proof beyond reasonable doubt that indeed the Petroleum Chloride was not genuine.

The testimony of the Arresting Officer (PW6) is that he took the 54 sachets of Petroleum Chloride to Indeni Petroleum Refinery in Ndola but that they refused to test it on the basis that it was not theirs and further that they do not use Petroleum Chloride to colour fuel. This evidence too, in my opinion, does not prove beyond reasonable doubt that the Petroleum Chloride in issue was not a genuine product.

In his evidence in cross-examination, PW6 conceded that he had no analyst report.

It is clear from the above, therefore, that there was completely no evidence before the Lower Court to prove that the Petroleum Chloride in dispute was a fake product.

The learned trial Magistrate stated in her Judgment that she had herself examined the Petroleum Chloride and she had discovered that it was not a genuine product. According to the Lower Court, the Petroleum Chloride in question were just sachets of powder that is used to colour water to make it look like a drink. The Lower Court proffered the opinion that all that had been done was to print on the outer cover of the sachets the words "Petroleum Chloride". I have found it difficult to accept that the Lower Court could have properly undertaken a scientific examination nor indeed any other expert examination of the contested product and arrived at a conclusion that it was a fake product. The Prosecution had clearly failed to adduce any scientific or other expert evidence to prove beyond reasonable doubt that the product in question was not genuine Petroleum Chloride. I do not think that it was proper for the Lower Court to fill up that gap in the evidence of the Prosecution by the Court itself conducting an examination of the product. It is clear from the evidence on the record that even the Arresting Officer, who investigated this matter, did not make such extensive contestation of the genuineness of the Petroleum Chloride as the learned trial Magistrate did. It is settled law that the legal burden of proving the elements of the offence lies on the Prosecution. To this effect, in the case of Mwewa Murono V. The People¹, the Supreme Court held that-

"In criminal case, the rule is that the legal burden of proving every element of the offence charged, and

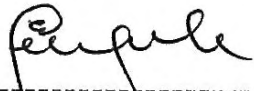
consequently the guilt of the accused lies from beginning to end on the Prosecution."

I am of the considered opinion that the Prosecution failed to prove that the Petroleum Chloride was not a genuine product. I, therefore, hold that the Prosecution did not prove that the Appellant sold the Petroleum Chloride to PW1 as a fraudulent trick to obtain the K80, 500.00 from him.

In view of the foregoing, I find it otiose to delve into the other two grounds of appeal advanced by the Appellant.

All in all, I hold that there is merit in this appeal. I find that the Prosecution failed to prove its case against the Appellant beyond reasonable doubt. I find that the Appellant is not guilty of the offence of Cheating and I acquit him, accordingly.

Delivered in Open Court at Kitwe this 12th day of February, 2020.



E. PENGELE
HIGH COURT JUDGE