IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 210/2003
HOLDEN AT KABWE
(CRIMINAL JURISIDICTION)

B E T W E E N:

935241 F/SGT MUMBA EZEKIEL JOHN · APPELLANT

AND

THE PEOPLE

CORAM: LEWANIKA, DCJ., CHIBESAKUNDA, CHITENGI, JJS
On 3rd November, 2004 and 4th April, 2006

For the Appellant: Dr. O. BANDA of Chifumu Banda & Associates
For the People: C.F.R. MUCHENGA, Chief State Advocate

JUDGMENT

LEWANIKA, DCJ delivered the judgment.

The Appellant and two others were charged in a court martial with four counts under the Defence Act.

The first count was committing a civil offence contrary to Section 73 of the Defence Act, that is to say fraudulent false accounting contrary to Section 326 (a) of the Penal Code in that they at Zambia Airforce Headquarters on dates unknown but between June 2002 and July 2002 raised unaudited pension papers in respect of discharged 935383 Corporal ZULU

discharged in 1994 who was given a fictitious rank of F/Sgt and discharged effective 1997. This action caused the Zambian Air Force to lose an amount of twenty two million and hundred and thirty five thousand three hundred and seventy eight Kwacha and six Ngwee (K22,135,378.06).

The second count was that of conniving at the stealing of service property contrary to Section 491(a) of the Defence Act in that they at Zambia Airforce Headquarters on dates unknown but between June 2002 and July 2002 connived at the stealing of Twenty-two million one hundred and thirty five thousand, three hundred and seventy eight Kwacha and six Ngwee (K22,135,378.00) public funds which funds were purportedly to serve one retired F/Sgt Julius ZULU National Registration Card No. 352454/52/1 who in actual fact was discharged in 1994 as corporal Julius ZULU No. 935383.

The third count was willfully damaging service property contrary to Section 49 (1)© of the Defence Act in that they at Zambian Airforce Headquarters on dates unknown but between April, 2002 and July 2002 destroyed the personal file and pay record of discharged 935383 Corporal Julius ZULU the said being properties of the Zambia Airforce.

On the fourth count the Appellant was charged with an act to the prejudice of good order, military discipline contrary to Section 72 of the Defence Act in that he at Lusaka on dates unknown but between May 2002 and July 2002 collected household goods from Sarang shop situated in Kamwala in the Lusaka District after cheques No. 00179 dated 18th July, 2002 in the sum of Twenty two million one hundred and thirty five thousand three hundred and seventy eight Kwacha six Ngwee (K22,135,378.06) and No. 00180 dated 18th July, 2002 in the sum of four million Kwacha (K4,000,000.00) were presented at the said Sarang shop for encashment knowing them to have been stolen.

After the trial the Appellant was convicted on the first, second and fourth counts and acquitted on the third count. He was sentenced to two years imprisonment with hard labour and ordered to be reduced in rank. He has appealed against both conviction and sentence.

Counsel for the Appellant has filed six grounds of appeal, namely:-

1 That the court martial was not properly constituted and amongst its members in the prosecution team was included Colonel M. PHIRI (910877) who was involved in and actually led the investigations of the allegations made against the Appellant and others in this case from start to finish;

2. That the inclusion of Mr. NCHITO in the prosecution team as one of the public prosecutors was unconstitutional and prejudicial to the case of the Appellant;

3. That PW 1 was a witness with a possible interest of his own to serve on the ground that PW 1 was picked up and detained with the three accused but for unexplained reasons, he was released and became a witness in these proceedings;

4. That the conviction and sentence of the Appellant was against the weight of evidence;

5. That the identification of the Appellant when he was in the dock was worthless;

6. That the sentence of two years imprisonment is harsh and unjust particularly that after six months of its confirmation by the ZAF Deputy Commander and Chief of Air staff, the Appellant will be discharged from the service.

In the view that we take of this appeal, we do not intend to recite the evidence, which in any case is on record. We shall also consider grounds one and two together as they are interrelated. At the hearing of the appeal, Counsel for the Appellant said that he was relying on the heads of argument filed herein and added that the court martial was not competent due to the inclusion of Colonel PHIRI and M. NCHITO as prosecutors.

Initially Mr. MCHENGA who appeared for the State said that he supported the conviction but later changed his mind and said that he did not support the conviction after listening to some observations made by the court.

The members of the Court martial which heard and determined this matter are listed on page one of the record and include Colonel M. PHIRI (910877) and Mr. M. NCHITO as prosecuting officers/ Counsel. Prior to the commencement of the court martial Counsel for the Appellant had raised a preliminary objection to the presence of Colonel PHIRI at the court martial on the ground that he was involved in the investigations. This objection was rejected by the court martial which relied on the provisions of Rule 31 of the Defence Force (Procedure) rules which provides that:-

> ***31. The accused shall have no right to object to a judge advocate, prosecutor or any officer under instruction.***

These Rules are made under the Defence Act, Cap 106 of the Laws of Zambia. The Appellant contends that Colonel PHIRI should not have been allowed to be a member of the court martial.

We have examined the evidence on record, particularly that of Lt. Colonel Andrew KABUKU, the Provost Marshall in the Zambia Air Force who investigated the case against the Appellant and others. Lt. Colonel KABUKU was PW 7 in the proceedings before the court martial and under cross-examination on page 247 of the record, this witness denies that Colonel PHIRI played any part in the investigations against the Appellant and others. Yet at page 249 of the record, the same witness admits that

Colonel PHIRI accompanied him during his investigations. We fail to understand what would be the purpose for Colonel PHIRI to accompany PW 7 if he was not part of the investigating team. Section 89(2) of the Defence Act provides as follows:-

> *89(2) An officer who, at any time between the date on which the accused was charged with the offence and the date of the trial, has been the commanding officer of the accused, and any other officer who has investigated the charge against the accused, or who under service law has held, or has acted as one of the persons holding an inquiry into matters relating to the subject matter of the charge against the accused, shall not be president or sit as a member of the court martial or act as judge advocate at such court martial.*

Rule 31 of the Defence Force (Procedure) Rules is subordinate to Section 89(2) of the Defence Act and if it can be shown that Colonel PHIRI took any part in the investigation of the allegations made against the accused especially that he held a superior rank to that of PW 7 then Colonel PHIRI should not have been a member of the court martial. We are satisfied on the evidence on record that Colonel PHIRI took part in investigating the allegations against the Appellant and others and that he should not have been allowed to serve as a member of the court martial.

We now turn to the question of the inclusion of Mr. M. NCHITO as one of the Prosecutors at the court martial. We take judicial notice of the

fact that Mr. M. NCHITO is a legal practitioner who has been appointed by the Director of Public Prosecutions as a public prosecutor. This appointment was made pursuant to Section 86 of the Criminal Procedure Code which provides as follows:-

> *86(1) The Director of Public Prosecutions may appoint generally, or in any case, or for any specified class of cases, in any district, one or more officers to be called public prosecutors*
>
> *(2)* .....
>
> *(3) every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions.*

The powers of the Director of Public Prosecutions to institute and undertake criminal proceedings are contained in Article 56(3) of the Constitution of Zambia which provides as follows:-

> *Art.56 The Director of Public Prosecutions*
>
> *(3) shall have power in any case in which he considers it desirable so to do-*
>
> *(a) to institute and undertake criminal proceedings against any person before any court, other than a court martial, in respect of any offence alleged to have been committed by that person (The underlining is ours).*

The Constitution of a court martial is contained in Section 88 of the Defence which provides, inter alia, that:-

88(2) An officer shall not be appointed to be the president or a member of a court martial unless:

(a) he belongs to the Defence Force, is subject to military law and has been an officer in the Defence Force for a continuous period not less than two years; or

(b) is an officer in the Defence Force, is subject to military law and has served in that force or in any other military naval or air force for periods amounting in the aggregate to not less than two years.

It will be obvious from the above that the court martial which tried the Appellant and others was not properly constituted in that the Director of Public Prosecutions has no locus standi in proceedings before a court martial and Mr. M. NCHITO did not qualify to be a member of a court martial pursuant to the provisions of Section 88 of the Defence Act. We are satisfied therefore, that the court martial which tried and convicted the Appellant was not properly constituted and that the proceedings before it were irregular and a nullity. We would therefore allow the appeal on the first and second grounds of appeal and set aside the conviction and sentence of the Appellant and order a retrial before a properly constituted court martial. In the circumstances, we find it unnecessary to deal with the other grounds of appeal.

D.M. Lewanika
DEPUTY CHIEF JUSTICE

L.P. Chibesakunda
SUPREME COURT JUDGE

P. Chitengi
SUPREME COURT JUDGE

SCZ NO. 24 OF 2006
APPEAL NO 97/2005

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

ASTAINS NKHOMA	Appellant
V	
THE PEOPLE	Respondent

Coram: Chirwa, Chibeskunda, JJS and Kabalata Ag JS on 6th June 2006.

For the Appellant: Mr M C Sikazwe, Deputy Director, Legal Aid
For the People: Mr C F R Mchenga, Director of Public Prosecutions

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JUDGEMENT

Chirwa, JS delivered judgment of the Court:-

The appellant, **ASTAINS NKHOMA**, was jointly charged with two others on one count of Aggravated Robbery, contrary to Section 294 (1) of the Penal Code, Cap. 87. The particulars of the offence alleged that the appellant together with **SAMUEL MHANGO** and **PETER MWANSA**, on 12th day of June 2000 at Kitwe in the Kitwe District of the Copperbelt of the Republic of Zambia, jointly and whilst acting together and being armed with a knife, did steal a motor vehicle, namely Toyota Corolla, registration number ACE 4296 and K42,000.00 cash altogether valued at K9,042,000.00 the property of **VASCO KASEBA** and at or immediately after or before the time of such stealing did use or threatened to use actual violence to the said VASCO KASEBA in order to obtain or retain or overcome resistance to its being stolen or retained.

The accused **SAMUEL MHANGO** was further charged with two other counts of Aggravated Robbery. They all pleaded not guilty to their respective charges.

At the close of prosecution case, the trial court found all the three accused with cases to answer on their respective counts and were put on their defences and they all elected to give evidence on oath and to call no witnesses. The matter was then adjourned for defence. At the date fixed for the hearing of the defence, the trial Court was told that co-accused SAMUEL MHANGO and PETER MWANSA had died whilst in custody and the Court recorded that the cases against these two accused abated. Only the appellant gave evidence in his defence.

After the appellant's evidence in his defence, the learned trial judge considered the evidence before him and convicted the appellant on the one count of aggravated robbery jointly charged with the deceased co-accused. The appellant was sentenced to 16 years imprisonment with hard labour with effect from the date of his arrest.

He appealed against both conviction and sentence. When his appeal came before us through his Counsel, the appellant indicated that he wished to abandon his appeal and this was allowed and the appeal was dismissed. When we dismissed the appellant's appeal, we did state that the learned trial judge should have indicated in his judgment the culpability of the deceased accused and it is on the point only that we wish to give guidance.

As we have stated above, after the trial Court was informed of the death of the two accused, the Court recorded: "**Cases against accused 1 and accused 3 have abated".** The cases could not have abated. To abate in the criminal legal sense, is to come to an end or abolish. The Court had found the accused persons with a case to answer and the Court must make its stand clear on the evidence before it. The Court should have proceeded with the matter as if, at the close of the prosecution case, the accused person elected to remain silent. The Court should have proceeded as if **Section 296** of the Criminal Procedure Code, Cap 88 had been complied with and the accused's culpability decided. Only appeals abate under **Section 335** of the Criminal Procedure Code because the appellants criminality had already been decided upon by a Court of competence jurisdiction.

In the present case, the evidence before the learned trial judge which he believed and accepted came from PWs 2, 3, and 6. All these witnesses implicated the deceased accused persons. The evidence was overwhelming against them and had the learned trial judge looked at the evidence as if they were still alive and having remained silent at their trial,

he would have convicted them. We do not wish to carry out an academic exercise of convicting the deceased in their death.

This exercise was for the guidance of the Courts in future, should a like situation arise.

D K Chirwa
JUDGE OF THE SUPREME COURT

L P Chibesakunda
JUDGE OF THE SUPREME COURT

T A Kabalata
Ag. JUDGE OF THE SUPREME COURT