

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

Appeal No. 159/2013

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

AND

RODGERS MUSONDA

RESPONDENT

Coram: PHIRI, MUYOVWE, JJS AND LENGALENGA, AG. JS
On 13th August, 2013 and 5TH November, 2013

For the Appellant: Ms. M. B. Nawa, Principal State
Advocates, National Prosecution Authority

For the Respondent: Mr. F.C.R. Nanguzgambo, Messrs F.B
Nanguzgambo & Associates

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

- 1. Charles Lukolongo and Others vs. The People (1986) Z.R. 115**
- 2. Murono vs. The People (2004) Z.R. 207**

Legislation referred to:

- 1. Local Government Act No. 22 of 1991, Chapter 281 of the laws of Zambia**
- 2. Criminal Procedure Code, Chapter 88 of the laws of Zambia**
- 3. The Penal Code, Chapter 87 of the laws of Zambia**

This is an appeal by the appellant against the acquittal of the respondent by the Court below. The respondent was charged with two counts of theft by public servant contrary to Section 277 and 272 of the Penal Code. In the first count, it was alleged that the respondent on the 5th February 2005 at Mkushi in the Mkushi District of the Central Province of the Republic of Zambia, being a public servant employed by the Ministry of Local Government and Housing did steal K32,400.00 belonging to Mkushi District Council.

Under count two, the particulars alleged that the respondent between the 10th and 12th March, 2006 at Mkushi in the Mkushi District of the Central Province of the Republic of Zambia, being a person employed in the Public Service as Council Secretary at Mkushi District Council under the Ministry of Local Government and Housing did steal 1500 blocks valued at K4,500.00 belonging to Mkushi District Council.

The brief background is that the respondent was on 27th May, 2008 convicted by the Subordinate Court at Mkushi of the offence of theft by public servant and was sentenced to nine (9) months imprisonment with hard labour and subsequently

appealed to the High Court. The High Court acquitted him on 11th December, 2008. The State then appealed to this Court against the acquittal of the respondent.

In the Court below, the prosecution called eight witnesses. PW1, who was the Acting Council Secretary, told the Court that there was a time he received an anonymous letter stating that the respondent had collected 1500 blocks from the Council workshop for his personal benefit. PW1 reported the matter to the police. The witness explained that according to the occurrence book, the blocks were taken on 10th October, 2006 around 13:20 hours and on 11th October, 2006 around 09:30 hours. According to PW1 the blocks were valued at K4,500.000.00 and the respondent had no authority to get the blocks.

PW2 and PW3's evidence related to the 1st Count on which the respondent was acquitted by the trial Court.

PW4, told the Court that on 10th March, 2006 whilst on duty he received a phone call from the Director of Works who advised him to expect a driver who would collect blocks to be taken to the respondent's plot. The driver indeed collected 540 blocks using a Council tipper truck and took them to the respondent's plot. The

witness explained that according to the occurrence book, again, two other loads of blocks were collected with the last one of 420 blocks being on 11th March, 2006 destined to the respondent's plot. The witness told the Court that he did not count the blocks properly and that a Mr. Makayi (the Council policeman) had to physically count the blocks at the respondent's plot. The witness explained that he did not sign for the blocks when handing over and he could not confirm whether the blocks were taken to the respondent's plot.

PW5's evidence was substantially the same as that of PW4 as he confirmed that he was the driver who collected the blocks on instruction from the Director of Works at the Council. That he indeed delivered the blocks to the respondent's plot.

PW6 was the Chief Security Officer at Mkushi Council who confirmed that on the dates aforementioned blocks belonging to the Council were ferried to the respondent's plot. However, the witness explained that the blocks were meant for construction of Council staff houses.

PW7's evidence was also substantially the same as that of PW1, PW4 and PW5 when he had interviewed them. He then

charged and arrested the respondent with the subject offence. Under warn and caution the respondent opted to remain silent. The witness explained that the blocks in question were not meant for the respondent's personal use. PW7 admitted that he did not visit the plot where the blocks were taken.

At the close of the prosecution case the learned Magistrate found the respondent with a case to answer and put him on his defence. The respondent elected to give evidence on oath and called no witnesses.

In his defence, the respondent stated that during the period in the question, he was in Siavonga adding that if at all any blocks were delivered to his plot he should have been made aware. He explained that according to the Memorandum from the Building Inspector addressed to him dated 17th February, 2006, the Council requested him to assist them with his personal blocks. The respondent stated that the Building Inspector also borrowed molding equipment from him because the Council had none. That at no time did he run short of blocks at the time he was building his house. That by 7th February, 2006 the time of his arrest, he still had 2500 blocks at his house and that he was still

in the business of molding and selling blocks. The respondent denied instructing the Director of Works or the driver to ferry blocks for the Council to his plot.

The trial Magistrate, upon considering this evidence convicted him on the 2nd count and sentenced him. Dissatisfied with the conviction, the respondent appealed to the High Court and argued inter alia that:-

- 1. The trial Magistrate erred in law and in procedure by proceeding to trial of the respondent contrary to the mandatory provisions of the Local Government Act. To that effect therefore, the proceedings in the court below were null and void**

- 2. The trial Court erred in fact in convicting the respondent when on the whole of the evidence before Court the prosecution had not discharged the burden of proof beyond all reasonable doubt.**

Before the lower Court, Captain Nanguzgambo submitted that the respondent was Mkushi District Council Secretary and, therefore, he was a Principal Officer. Counsel submitted that the procedure laid down for disciplinary proceedings against erring Principal officers are mandatory, which are contained in **Sections 28 and 29** of the **Local Government Act No. 22 of 1991** and

the Local Government Service Regulations 1996. That failure to comply with the laid down procedures rendered the proceedings in the Court below a nullity. Counsel, therefore, prayed that the proceedings in the Court below be nullified for want of jurisdiction.

On behalf of the State, Ms. Mwalusi argued that the procedure alluded to in the Local Government Act relates to civil and/or disciplinary proceedings by the local authority. She contended that, that procedure was totally unrelated to criminal proceedings relating to the theft in question. She submitted that the procedure in the Local Government Act was civil which had nothing to do with criminal procedure. She contended that the proceedings were, therefore, not null and void.

Further, Captain Nanguzgambo argued that PW7 the arresting officer admitted not having visited the plot where blocks were allegedly taken resulting in there being no exhibit to show the Court what was actually stolen. It was Counsel's submission that these observations went to the root of the charge and the prosecution could not be said to have discharged the burden of proof beyond all reasonable doubt. Counsel submitted that such

proof is mandatory in criminal law to warrant conviction, therefore, whatever doubts these contradictions and shoddy investigation created should have been resolved in the favour of the respondent.

In response, Ms. Mwalusi submitted that the prosecution discharged its burden beyond all reasonable doubt and on the evidence on record, it was clear that the elements of theft were proved beyond reasonable doubt and that the respondent did in fact have an intent to permanently deprive the local authority of its property.

In acquitting the respondent, the learned Judge in his Judgment, inter alia, stated thus:

“...Further there is no dispute as to the fact that the person who was acting in his position initiated criminal proceedings without council resolution as was supposed to be. Without such Council resolution it is my considered opinion that the person then acting in the appellants’ place did not have authority real or imagined to cause outside intervention by way of criminal proceedings consequently. I uphold the first ground of appeal as argued on behalf of the appellant herein. Having upheld the first ground, I do not think any analysis of the other grounds will serve any useful purpose, other than being academic and I will since the effect of upholding the first ground is that the Court finds the proceedings against the appellant to have been a nullity....”

Following the respondent's acquittal by the High Court the appellant appealed to this Court advancing one ground of appeal namely:-

that, the learned appeal Judge erred in law when he upheld the appeal on the ground that criminal proceedings against the respondent were a nullity, as Mkushi District Council did not follow the procedure in reporting the matter to the police.

In support of this ground, Ms. Nawa filed Heads of Argument which she relied upon. She submitted that the Court proceeded to acquit the respondent on a point of law. Counsel submitted that the procedure laid down in the Local Government Act is civil procedure for disciplinary issues of an erring employee and that it fits under the Employment or Labour Law. It was Counsel's submission that criminal procedure is laid down in the Criminal Procedure Code Chapter 88 of the Laws of Zambia.

Counsel further argued that any person can report a crime to the police. In that regard, Counsel cited **Section 3(1)** of the **Criminal Procedure Code** which states that:

“All offences under the Penal Code shall be inquired into, tried and otherwise dealt with in accordance to the provisions hereinafter contained”

Counsel contended that the Local Government Act does not create an offence of which an employee can be tried in the courts of law.

Further, she relied on **Section 26(a)** of the **Criminal Procedure Code** which provides that:

“Any police officer may, without an order from a magistrate and without a warrant, arrest any person whom he suspects to having committed a cognizable offence.”

It was submitted that the respondent was charged under **Section 278** of the Penal Code and going by **Section 3(1)** cited above, the provisions of the Criminal Procedure Code were applicable as opposed to the disciplinary proceedings of the Local Government Act. Counsel argued that the police had reasonable cause to arrest the respondent and charge him with a cognizable offence of theft by servant following the report from PW1. It was submitted that **Section 29** of the Local Government Act cannot oust the jurisdiction of the Criminal Procedure Code which allows an ordinary citizen to report a criminal offence committed by a

public servant in the course of his employment. That the trial was not a nullity and that the learned Magistrate was on firm ground when he convicted the respondent.

In response, Captain Nanguzgambo submitted that **Sections 29** and **32** of the Local Government Act are specifically dealing with a Principal Officer of the Council and not any officer in the public service. Counsel contended that the respondent was not a public officer but a Principal Officer. That the Penal Code, Criminal Procedure Code and the Local Government Act are all at par with each other both in their origins and application, thus, no one statute is superior to the other.

According to Counsel, the Local Government Act only allows the council to report the Principal Officer to the police after recommendations of either the Joint Establishment Committee or Finance Committee but that either Committee could exercise their option to take administrative action instead.

Counsel, conceded that misappropriation of Council funds by the Principal Officer may be dealt with administratively by the Council or reported to the police for prosecution. However, he argued that it was incorrect to state that the provisions of the

Local Government Act as read with S.I No. 115 of 1996 are purely a civil procedure for dealing with disciplinary issues of erring employees under Employment law. Counsel prayed that this Court should find and hold that the trial was a nullity for failure to comply with the provisions of the Local Government Act.

We have considered the evidence on record, the judgment of the trial Court together with that of the High Court and the submissions of learned Counsel.

This appeal is based only on one ground of appeal which relates to a point of law and in particular on the provisions of the Local Government Act and the Criminal Procedure Code. The gist of the argument by the State is that the lower Court should not have acquitted the respondent on the ground that the criminal proceedings against him were a nullity as the Council did not follow the procedure in reporting the matter to the police. On the other hand, Captain Nanguzgambo argued that the trial in the Subordinate Court was a nullity because the provisions of the Local Government Act only allow the council to report the Principal Officer to the police after recommendations of either the Joint Establishment Committee or the Finance Committee.

We have observed that the lower Court acquitted the respondent based on a technicality. We agree with the State that the procedure in the Local Government Act relates to disciplinary proceedings. In our view, the procedure in the Local Government Act is meant for administrative convenience as opposed to operating as a bar to criminal prosecution. Therefore, if the police decide to prosecute an offender, they cannot be stopped based on administrative procedures that may not have been complied with. This is because the provisions in the Local Government Act were not created to protect staff in the Council from criminal prosecution. In this instance, since it is a criminal offence in issue, relevance should be placed on what the Criminal Procedure Code provides and not the Local Government Act.

Further, **Section 4 of the Penal Code** defines that “person employed in the public service” as any person holding, inter alia, public office or is employed in a local authority. Going by the definition in Section 4 of the Penal Code, it is clear that the respondent being an employee of Mkushi District Council was not only a Principal Officer but was also a public officer. The respondent being a public officer was, therefore, with regard to

criminal conduct subject to the provisions of the Penal Code. We, therefore, reject the argument by Captain Nanguzgambo that the respondent was a Principal Officer and not a public officer and that his case should have been dealt with in accordance with the Local Government Act.

Considering that the offence of theft by servant which the respondent was charged with is provided for under the Penal Code, there was nothing wrong in reporting him to the police. We are satisfied that there is no conflict between the Local Government Act, the Criminal Procedure Code and the Penal Code.

We, therefore, find and hold that the Court below erred when it acquitted the respondent based on the provisions of the Local Government Act.

However, we are compelled to examine whether the conviction of the respondent in the Subordinate Court was proper in view of the evidence that was adduced. Unfortunately, in arguing the appeal, the learned State Advocate did not address the issue of conviction by the trial Court.

In the Court below, it was one of the respondents' grounds of appeal that he should not have been convicted as the prosecution had not proved the case beyond all reasonable doubt. There was evidence to the effect that the respondent borrowed the blocks and said he would return them. PW4 and PW6 in their evidence stated that they did not know about the blocks and what happened to them. In fact the witness' evidence was that the driver was directed by the Director of Works to take the blocks to the respondent's plot. At the time of delivery of the blocks the respondent was not in town. There was also evidence that the investigations officer PW7 did not visit the scene and did not subject the anonymous letter the Council received to a handwriting expert considering that the respondent disputed it.

Further, there were questions in this matter which raised doubts. The investigations left much to be desired as the investigations officers simply relied on the statements from the witnesses and failed to conduct thorough investigations. For example, the Director of Works who allegedly instructed the driver to collect the blocks was not called as a witness yet he was a key witness for the prosecution.

We now turn to address the issue of dereliction of duty by the police. In the case of **Charles Lukolongo and Others vs. The People**¹ the police failed to lift finger prints at the scene. The prosecution failed to adduce evidence as to whether the pattern of shoe prints found at the scene matched those of the shoes which the appellants wore when they were apprehended. This Court said at page 127 that:

“...To the extent that the prosecution did not give such evidence we hold that there was a dereliction of duty to adduce it. ...we must hold further that there is a resulting presumption from that failure that had the relevant evidence been given it might have been favorable to the appellants.”

As we have already observed, the police did not visit the scene where the blocks in issue were allegedly taken. There was conflicting evidence from the prosecution witnesses. This evidence was very cardinal in order to eliminate any inconsistencies in the evidence considering that there was evidence (P1) which showed that the blocks were taken to the market. Clearly, the police failed to undertake thorough investigations in this matter thereby resulting in dereliction of duty. The trial magistrate erred in that he did not take into

account the contradictions, inconsistencies and conflict in evidence laid before him. It is important for a trial Court to analyse the evidence before it and ensure that the case, in a criminal matter, is proved to the required standard which is proof beyond all reasonable doubt. **See the case of Murono vs. The People.**² In the absence of sufficient evidence this Court cannot speculate as to what happened to the blocks more so that PW4 and PW5 testified that they did not know what happened to the blocks. We, therefore, hold that, had the police undertaken thorough investigations, the evidence would have been favourable to the respondent.

For the reasons we have given, we find that the prosecution did not prove their case beyond all reasonable doubt as is required in criminal cases. In the circumstances, we uphold the acquittal of the respondent in the Court below.

The appeal is, therefore, dismissed.

.....
G.S. PHIRI
SUPREME COURT JUDGE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....
F.M. LENGALINGA
ACTING SUPREME COURT JUDGE