

**IN THE SUBORDINATE COURT OF THE FIRST CLASS**

**SSPA/029/2000**

**FOR THE LUSAKA DISTRICT**

**HOLDEN AT LUSAKA**

**(CRIMINAL JURISDICTION)**

**BETWEEN:**

**THE PEOPLE**

**VERSUS**

**MESTON MWENDENDE**

**1<sup>ST</sup> ACCUSED (A1)**

**DANIEL PHIRI**

**2<sup>ND</sup> ACCUSED (A2)**

**SYDNEY MUSENGE MULAUSI**

**4<sup>TH</sup> ACCUSED (A4)**

**CHRISANTIUS CHANGWELEZA**

**5<sup>TH</sup> ACCUSED (A5)**

**COURT:** Mr. Kenneth Mulife – Chief Resident Magistrate

**FOR THE PEOPLE:** Mr. Zulu and Mr. Kamtondole – Public Prosecutors –National Prosecutions Authority

**FOR A1:** In person

**FOR A2:** Mrs. Mwiinga Beenzu – Messrs Directorate of Legal Aid Board

**FOR A3:** In person

**FOR A4:** Mr. Simubala – Messrs



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## JUDGMENT

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### STATUTES REFERRED TO:

1. Penal Code, Chapter 87 of the Laws of Zambia

### CASES REFERRED TO

1. GIRAFFE BUS SERVICES LIMITED v ABEL LWITIKIKO MWANDEMWA (SCZ Judgment No. 4 of 2001)

Accused persons stand charged with one count of the offence of theft of motor vehicle contrary to section 281A(1) of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of this offence allege that A1 – A5, on an unknown date but between 11<sup>th</sup> and 13<sup>th</sup> February 2016, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together did steal an unregistered Toyota Sprinter (hereinafter called 'the sprinter') bearing chassis No. AE 110-0043998 and engine no. 5A-C091212 valued at K49, 880.00 the property of Tokyo Vehicles Limited.

The Accused pleaded not guilty to the charge. I warn myself at the outset that the onus is upon the prosecution to prove their allegation beyond all reasonable doubts. It is not for the accused to prove their innocence. Should there be any doubt left in my mind regarding the guilty of the accused after considering the entire evidence in this case, I shall rule such doubt in favour of the Accused.



In order to discharge the burden placed upon themselves, the prosecution must satisfy me upon each and every ingredient of the offence charged. The Penal Code, has not defined the offence of 'theft of motor vehicle'. The requisite provision, section 281A (quoting the relevant portions), only prescribes the penalty for this offence in the following terms:

(1) If the thing stolen is a motor vehicle, the offender is liable to imprisonment for a period- (a) in the case of a first offence, of not less than five years and not exceeding fifteen years; (b) in the case of a second or subsequent offence, of not less than seven years and not exceeding fifteen years.

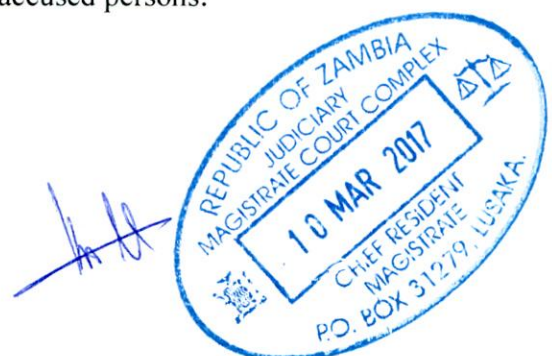
The definition of the offence is found in other provisions of the same statute. Thus, section 272 of the Penal Code provides that **"any person who steals anything capable of being stolen is guilty of the felony termed theft"**.

Section 265(1) of the Penal Code deems theft to have occurred **"if a person fraudulently and without claim of right takes anything capable of being stolen..."**

Crucial to this allegation, section 265(2) (a) of the same statute provides that a fraudulent intention would be established provided that when a person took such property, he did so with an intention permanently to deprive the owner thereof. Section 264(1) of the same statute stipulates that **"every inanimate thing...which is the property of any person, and which is movable, is capable of being stolen"**.

Furthermore, according to section 281 (2), the term **'motor vehicle'**, for purposes of the instant offence ( and quoting only the relevant portions) means a motor vehicle or trailer- **"(a) which is registered or registrable under the provisions of section sixty-six of the Roads and Road Traffic Act..."**

In this case therefore, the prosecution must prove that the accused persons:





1. Without claim of right, took the sprinter which must qualify to be a 'motor vehicle' within the meaning of section 281 A(2) of the Penal Code as read with section 66 of the Roads and Road Traffic Act;
2. With the intention permanently to deprive Tokyo Vehicles Limited, the owner thereof.

The above are the ingredients of the subject offence. All the accused persons pleaded not guilty to the charge. I shall now consider the evidence. The prosecution called 9 witnesses. **Tariq Mahood** (Pw1) is the General Manager for Ademo Investments a branch of Tokyo Vehicles Limited. He told the court that in January 2016, two men went to Ademo Investments and negotiated with the Sales Lady for the price of the sprinter which was on sale. The price of K49, 880.00 was finally agreed upon and the men informed the Sales Lady that they would return to buy the vehicle the same day in the afternoon. Later, Pw1 was phoned by one Musa confirming to Pw1 that Musa would be coming to buy the sprinter that same day. Musa further asked if it would be possible for Pw1 to release the sprinter if he is paid using a bank certified cheque. Pw1 accepted Musa's proposal. At 16:30 hrs, A1 approached Pw1 and gave him an Invest Trust Bank certified cheque, a purchase order bearing the names of Muchinga Trust Company and a photocopy of a national registration card (nrc) card no. 335743/10/1 bearing the names of Grant Martin Price purported to be the proprietor of Mchinga Trust Company. The cheque was marked exhibit p1 after it was identified by Pw1 and produced in evidence by Pw9. It bears an amount of K49, 800.00. The purchase order was marked exhibit p2 after it was identified by Pw1 and produced in evidence by pw9. The nrc was marked exhibit p3 after it was identified by Pw1 and produced in evidence by Pw9. However, the sprinter could only be released to Musa the following day (13<sup>th</sup> January 2016) since it was blocked by other motor vehicles which were also on sale in the parking yard. After the sprinter was moved from the parking yard, Pw1 phoned Musa informing him to send his agent to go to Ademo Investments in order to pick the sprinter and further asked Musa to advise his agent to carry his nrc. Musa's agent, A1, later approached Pw1 and gave his nrc bearing the names of Adamson Nyirongo and card no. 989636/11/1 (herein marked exhibit pw4 after it was identified by pw1 and produced in evidence by pw9). Pw1 released the sprinter to A1. He further gave him a letter of sale and other documents in order to enable Musa change ownership of the sprinter and eventually to register it in the names he

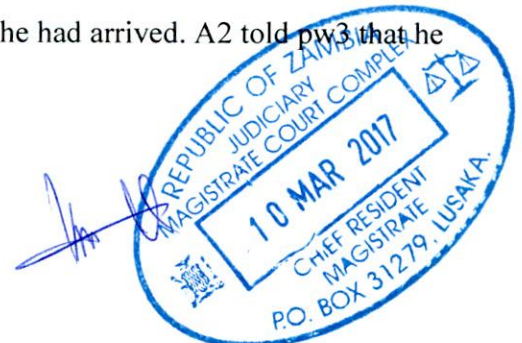




desired. A1 assured Pw1 that he knew and in fact worked for Mchinga Trust Company adding that he also knew Musa. The cheque could not be honoured for payment by the drawee bank, First Capital Bank, Main Branch. When phoned By Pw1 in order to inform him about this development, A1 reneged on his initial assurances by telling Pw1 that he neither knew Musa nor Mchinga Trust Company adding that he was just sent as a driver to collect the sprinter. Pw1 invited A1 to go and see him at his office but A1 never showed up despite promising to show-up. This prompted Pw1 to report the incident to the police at Lusaka Central Police Station who recovered the vehicle after about one month though in a deplorable state. Pw1 told the court that he never received payment for the sprinter and neither did he owe Musa or A1 any money.

**Japher Mwansa** (pw2) was initially the third accused in this matter. However, the prosecution withdrew the charge against him before trial commenced. He was subsequently turned into a witness for the prosecution. He told the court that on 11<sup>th</sup> January 2016, A1 phoned and informed him that he wanted to send him. Pw2 stated that he knew A2 through A2's friends who used to patronize pw2's bar. He told the court that the duo eventually met and proceeded to Thornpark whereat, A2 produced and executed a cheque (exhibit p1), a purchase order (exhibit p2) among other documents and put the documents in an envelope which he sealed and gave to Pw2. During that time, A2 was communicating with somebody by phone and giving that person some instructions. He later told pw2 to go to Zesco Bus Station where he would give the sealed envelope to someone who was driving a spacio motor vehicle. Pw2 did as instructed by A2. Thereafter, pw2 went his way but was amazed only to be arrested later in connection with the instant offence.

**Davy Katoshi** (Pw3) is a taxi driver. He told the court that he first met with A2 in January 2016 when A2 hired his taxi to go and collect shocks for motor vehicles from somebody driving a spacio motor vehicle at a place called Diamond Lusaka and to deliver them to A2 at premises belonging to Sable Transport. The driver of the spacio motor vehicle turned out to be A1. It would appear that A2 did not accompany pw3 to get the shocks. Instead, he just gave him contact details for the people he would get the shocks from. Pw3 collected the shocks and drove to Sable Transport whereat he phoned A2 informing him that he had arrived. A2 told pw3 that he



would send A1 to collect the shocks and he would be paid his taxi fare by the driver of the spacio. Events transpired as advised by A2. On the second occasion, A2 hired pw3 to go to Panganani road to collect boxes of oil from a shop situated along Panganani Road. A2 gave him an envelope to give to the people at that shop before they could give him the oil. Pw3 proceeded to the shop unaccompanied and was given the boxes of oil by the shop owners after they saw the cheque. Again, A2 had advised pw3 to deliver the boxes to someone at premises for Sable Transport. Whilst at Sable Transport, pw3 notified A2 by phone that the meeting place had been shifted to Jan-Japan where A1 again came to collect the boxes of oil and paid him the taxi fare.

After one week, A2 again asked pw3 to go and collect a motor vehicle from Diamond Lusaka which A2 had bought for his wife. Upon arrival at Diamonds Lusaka, pw3 was handed over the sprinter and accompanying documents by A1. Pw3 drove the sprinter to his area of operation whereat he phoned A2 informing him that he had arrived. A2 advised that he would send someone to collect the sprinter from pw3 which A2 did. Pw3 told the court that he did not know the person who was sent by A2 to collect the sprinter. Later, pw3 was apprehended by the police for having stolen the sprinter.

**Towela Lamazani** (Pw4) operated an entity called Tomwaka General Dealers. She told the court that in July 2015, a cheque book belonging to Tomwaka General Dealers was stolen from her husband's car in Lusaka. At the material time, the vehicle was being driven by her husband as she was in Kitwe. She was informed about the theft by her husband. The cheque book was marked exhibit p7 after it was identified by Pw4 and produced in evidence by pw 9. She reported the theft to the police at Kitwe where she was operating from and also instructed her bank, Invest Trust Bank to stop payments arising from that cheque book. Later she began receiving complaints from people that she had issued out cheques which bounced when presented for payment at the bank. Later, pw9 phoned her informing her that people who were issuing cheques from her stolen cheque book had been apprehended by the police. She told the court that Tomwaka General Dealers never had any transaction with Tokyo Motors Limited. She denied ever knowing the people who stole the cheque book.





**Damson Nyirongo (Pw5)** is a driver staying within Kamanga compound. He told the court that he is a holder of nrc no. 988636/11/1. This nrc was marked exhibit p8 after it was identified by Pw5 and produced in evidence by pw9. He stated that while operating as a driver, police officers phoned him on the pretext that they wanted to hire his motor vehicle. When he approached them, they apprehended him on allegations that he stole the sprinter. They showed him photocopies of an nrc (exhibit p4) and a driving licence bearing his names but the portrait of a strange person. Later the police summoned him in order for him to confirm whether or not he knew A1. Pw5 told the court that A1 used to be his sales man in the employment of his first employer, Stanley Bakery. Pw5 then recognised the portrait on the nrc and driving licence which the police had shown him when the apprehended him, to be the portrait for A1. Here, I must state that the court also saw for itself that the portrait on exhibit p4 is that for A1. Pw5 denied ever losing his nrc (exhibit p8) but told the court that during his tenure of office at Stanley Bakery, he used to be off-duty on Sundays and during the mentioned Sundays, it was A1 who used to drive the motor vehicle adding that Pw5 used to leave his nrc (exhibit p8) and his driving licence in the vehicle.

**Mukelabai Liywali (Pw6)** is an Inspector at PACRA. He told the court that Tomwaka General Dealers and Mchinga Trust Zambia Limited are registered at PACRA as evident from the print-outs (exhibits p11 and p12, respectively which he identified and produced in evidence). He told the court that the proprietor of Tomwaka General Dealers is Towela Kasukumya Lamazani whereas those for Mchinga Trust Company are Paul Mukuka and Oscar Chita.

**Joseph Kangwa (Pw7)** is an operations officer at Invest Trust Bank at Ndola Branch. He confirmed that the bank had received an instruction from its client (Pw4) to stop payments on the cheque book belonging to Tomwaka General Dealers which was stolen. He confirmed that the impugned cheque (exhibit p1) was part of the mentioned cheque book.

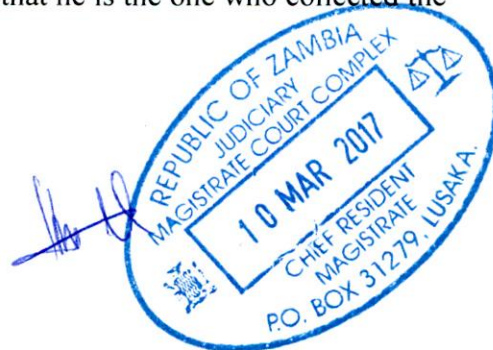
Under cross-examination by Counsel of A5, pw7 told the court that Mchinga Trust Company was the entity that was asking Invest Trust Bank for payment on exhibit p1. He however, stated that the cheque was improperly drawn because bankers' cheques are not executed in handwriting as is the case with exhibit p1.



**Grant Martin Price (Pw8)** told the court that in January 2016, his wallet containing his nrc was stolen from him whilst at work. He obtained a new nrc after lodging a complaint at Shimabala Police Station. The new nrc was marked exhibit p16 after it was identified by Pw8 and produced in evidence by pw9. Later, two officers showed him an nrc which has his portrait but had a different card number and the registration officer's signature from that which he obtained after the first one was stolen from him. It was marked exhibit p15 after it was identified by Pw8 and produced in evidence by pw9. The two police officers told him that they had recovered exhibit p15 from people who were using it to commit crimes.

Simunza Uyoya (Pw9) is the arresting officer in this matter. His testimony is similar to that for PW1-PW8 save to add as follows: he used exhibit p4 to trace A1 whom he apprehended in Masaiti Districts adding that when searched, A1 was found with a photocopy of exhibit p4 and that A1 told him that he was just sent by A2 to collect the sprinter. In the course of his investigations, he was led to the apprehension of A2 from a minibus at Marshlands bus station along the Great East Road in Lusaka and that A2 was identified by A1 and Daniel Kalikoshi (Pw3) to be the person who sent him to collect the sprinter. He added that A2 led him to recover the sprinter at his home situated in Chelstone Suburb. After searching A2's house an nrc in the names of Grant Martin Price (exhibit p15) was found. A2 told Pw9 that he was given the impugned cheque leaf (exhibit p1) by A4 and that exhibit p1 was written by A5. A2 led Pw9 to Msisi compound to apprehend A4. A4 confirmed that he gave A2 the cheque book and eventually led Pw9 to his house to recover the cheque book. This is the cheque book from whence exhibit p1 was obtained. Later, A5 was also apprehended but he denied having signed or possessed exhibit p1. Pw9 stated that he subjected the signatures of the accused persons to analysis by a handwriting expert (pw10) who told him that exhibit p1 was signed by A5. Pw10 told the court that exhibit p1 was signed by A5.

The above is evidence tendered on behalf of the prosecution. As regards the defence, A1-A5 gave sworn statements. None of them called a witness. They are perfectly entitled to adopt this course. A1 told the court that he is a taxi driver. He admitted that he is the one who collected the





sprinter from pw1 but maintained that he was only sent by A2. This he said, was not the first time A2 haired him as a taxi driver referring to transactions outlined by Pw3.

Turning to A2, he admitted that the sprinter was recovered from his residence in Chelstone suburb by police officers. However, he told the court that it was parked there by his friend, one Innocent Mweemba who had was out of the country. According to A2, Innocent had requested to park the sprinter at A2's residence seeing that A2's residence had a wall fence hence more secure whereas Innocent's house has no wall fence. A2 stated that he informed the police about this position but they chose to ignore him. He also told the court that he knows nothing about the impugned cheque (exhibit p1) because he neither had possession of it nor signed it as alleged by Pw2. He denied having any dealings with A1 and A4 prior to this incidence or at all. He further denied ever leading the police to apprehend A4.

A4 admitted having been found with the cheque book from whence the exhibit p1 was obtained. However, he told the court that the cheque book was in a bag that was left for safe custody with him by A2 adding that A2 did not disclose the contents of the bag to A4. A4 told the court that he accepted to keep the mentioned bag because he knew A2 since A2 has been his customer in his business of selling airtime units adding that it was not the first time A2 was leaving items with him for safe custody. He stated that it was A2 who led the police to apprehend him because A2 has his mobile phone number and also knows where he resides.

As regards A5, he told the court that on 22<sup>nd</sup> February 2016 at around 19:00 hrs, he was phoned by his old friend, A2 inviting him for a beer. He declined the offer. A2 further indicated that he had baby clothes for sale whereupon A5 suggested that the duo should transact the following day since it was late. The following day, A2 did not appear at the appointed venue. Instead, A4 was apprehended by police officers in connection with the subject offence. He denied ever signing exhibit p1.



The above is evidence in total in this matter. Parties did not submit towards this judgment. However, they are not prejudiced because I have carefully examined the evidence. Henceforth, I shall state my findings and apply the law thereto.

The following issues are not in dispute:

1. That the sprinter is a 'motor vehicle' within the meaning of section 281A (2) of the Penal Code because it is registrable in accordance with the provisions of section 66 of the Roads and Road Traffic Act;
2. That the sprinter is a thing capable of being stolen within the meaning of section 264 of the Penal Code because it is inanimate, capable of being moved and is property of a person (Tokyo Motors Zambia Limited);
3. That the sprinter was obtained from Tokyo Motors Zambia Limited using a forged cheque;
4. That the sprinter was stolen from Tokyo Motors Zambia Limited within the meaning of section 265 of the Penal Code because the people who took it from Tokyo Motors Zambia Limited had no claim of right over it and that they had the intention permanently to deprive Tokyo Motors Limited of the vehicle. Their intention permanently to deprive Tokyo Motors of the sprinter can be deduced from the fact the vehicle was obtained using a forged cheque and that the vehicle was only recovered from them through the intervention of the police.

What is in dispute is whether or not A1-A5 are the thieves. I shall analyse their respective positions individually.

Starting with A1, it is not in dispute that he is the one who collected the sprinter from pw1. This aspect has been confirmed by Pw1, Pw2, and A1 himself except that A1 is saying that he was just sent by A2. Based on the testimonies of pw1 and pw2, I have found that A1 was indeed sent by another person to collect the sprinter. Pw1 told the court that he had been communicating with Musa who told him that he would send a person to deliver payment by cheque and to collect the sprinter. It is also on record that later, A1 approached pw1 only after Musa had told Pw1 that

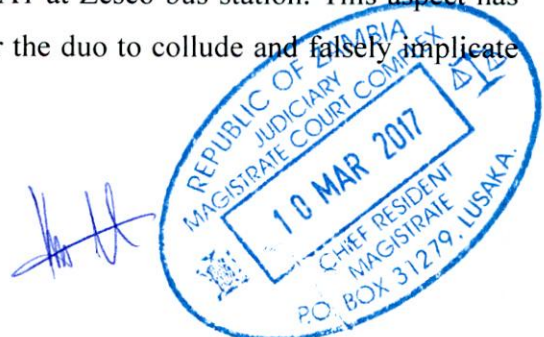




he would sent someone to deliver the cheque and to collect the sprinter. I have no doubt that the person Musa was referring to is A1. This aspect is corroborated by the testimony of pw2 who told the court that he was given a sealed envelope by A2 to give to A1 at Zesco bus station. I have no doubt that this is the envelope containing the impugned cheque since pw2 confirmed that he saw the mentioned cheque being signed and put in the envelope together with the impugned purchase order. The nagging question as regards A1 is whether he collected the sprinter knowing that the basis of payment was a forged cheque. If he was aware that the basis of payment was a forged cheque, then I would be justified in concluding that A1 is culpable. From the onset, I must hasten to state that I have found no evidence indicating that A1 executed the impugned cheque. No witness has told the court that he saw A1 execute the cheque and neither did the handwriting expert state that A1 signed the cheque. Further, Pw2 in fact told the court that the cheque was given to A1 already executed.

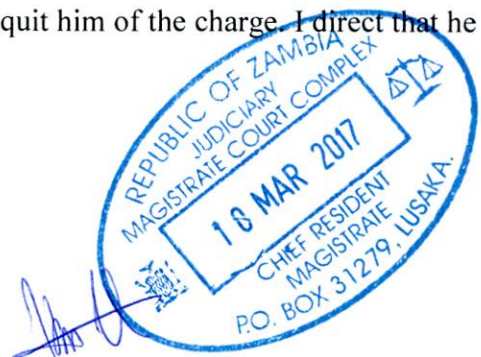
The answer to the question as regards whether or not A1 is culpable, in my view, lies in A1's conduct as he transacted with Pw1. The record shows that A1 introduced himself to pw1 as Damson Nyirongo which he is not. And to that effect he uttered a forged nrc (exhibit p4) to pw1. The question that arises from this conduct is: why did A1 misled pw1 about his identity. My finding is that A1 told a lie about himself because he was aware that he was executing a fraudulent transaction on behalf of the person who sent him. He lied about his true identity in order to elude the consequences of the fraudulent transaction in the event that the transaction backfired. Otherwise I have found no other reason which could have motivated A1 to lie about his identity apart from eluding detection in the event that the fraudulent transaction backfired. In the view that I have taken, I find A1 culpable.

Turning to A2, there is no direct evidence indicating that he is the Musa who communicated with pw1 concerning the payment and collection of the sprinter. However, many witnesses for the prosecution including co-accused persons have sufficiently linked him to both the sprinter and the cheque. As regards the execution of the cheque, Pw2 has told the court that he saw A2 sign the cheque whereupon he gave it to him to deliver to A1 at Zesco bus station. This aspect has been corroborated by A1 and I have found no basis for the duo to collude and falsely implicate



A2. Further, A4 has told the court that the cheque book from whence exhibit p1 was obtained was given to him for safe custody by A2. As regards the collection of the sprinter A1 and Pw3 have told the court that A2 coordinated them at various intervals, for purposes of collecting the vehicle. I have no doubt that A2 acted in the background because he was aware that that he was defrauding Tokyo Motors Limited of its sprinter and in order to escape the consequences of the fraudulent transaction should it backfire. This is the pattern of conduct exhibited by A2. Throughout his dealings with A1, pw1, pw2 and Pw3, he has been acting from the background and now the reason for this elusive conduct has been laid bare: It is because A2 was involved in fraudulent transactions. A combination of these pieces of evidence leaves me with no doubt that A2 is the person who executed the impugned cheque, gave it to pw2 for onward delivery to A1 and thereafter gave instructions to A1 and Pw3 to coordinate their efforts in collecting the sprinter. A2 mentioned Innocent Mweemba as an afterthought because the evidence incriminating him is overwhelming and cogent. I therefore find him culpable.

As regards A4, I have found that he was indeed given the bag that contained the cheque book from whence the subject cheque was obtained by A2 for safe custody. A4 accepted to keep the bag because he knew A2 even prior to the incident. I am further satisfied that A2 never disclosed the contents of the bag to A4. I am equally satisfied that it is A2 who led the police to apprehend A4 because he knew A2 and had his contact details and further that he was indeed aware that he had given him the bag containing the cheque book to keep for him. It is an afterthought for A2 to deny ever transacting with A4 in his airtime business or ever leading the police to apprehend A4. I am of this view because A2's denials are contradicted not only by A4's testimony but also by that of the arresting officer. A2 is now denying A4 as a way of dissociating himself from the bag which he left with A4 to keep for him. The truth is that the bag that was found on A4 belongs to A2. It is for that reason that the impugned cheque which is one of the cheque leafs belonging to the mentioned cheque book was found on A2 and signed by him. A4 kept the bag in good faith on behalf of A2 knowing that he was his acquaintance but without knowing that it contained the mentioned cheque book. I therefore find A4 innocent and acquit him of the charge. I direct that he be set at liberty forthwith.





Turning to A5, I have noted that the only evidence that tends to link him to the subject charge is the handwriting expert (Pw10)'s evidence in which he found that it is A5 who signed exhibit p1 on whose basis the sprinter was released to A1. I have noted that pw10's evidence is contradicted by that of pw2 who said he saw A2 sign exhibit p1. The question that arises under the circumstances is: which evidence should prevail over the other? That of pw2, an eye witness to the signing of the cheque or that of pw10 who never saw exhibit p1 being signed but only arrived at his conclusion based on his analysis. I have found no basis upon which to exclude the evidence of the eye-witness (pw2) since there is no evidence to show that pw2 lied to the court in order to falsely implicate A2 and neither has his testimony been shaken under cross-examination? Under the circumstances, I am inclined to find that indeed Pw2 saw A2 sign exhibit p1. Whether or not the signature on exhibit p1 is similar to that of A5 does not alter my position because it is possible that A2 forged the signature since he has exhibited the tendency of using other people when conducting his fraudulent activities. In any event, the court is not bound by an expert's witness' findings because they are mere opinions. This position is in accordance with the case of GIRAFFE BUS SERVICES LIMITED v ABEL LWITIKIKO MWANDEMWA (SCZ Judgment No. 4 of 2001) in which it was held that the Court is not required to blindly accept what the handwriting expert asserts. The court further held that **"the function of a handwriting expert is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist..."**

I have therefore found that A5 did not sign exhibit p1. Rather, it is A2 who signed it. Consequently, I find A5 innocent and acquit him of the offence. I further direct that he set at liberty forthwith.

In conclusion and for the avoidance of doubt, I acquit A4 and A5 but find A1 and A2 **guilty** and accordingly **convict** them as charged of the offence of theft of motor contrary to section 281 A (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

**DELIVERED IN OPEN COURT THIS ..... DATE OF.....2017.**

  
**KENNETH MULIFFE**

