

IN THE SUBORDINATE COURT OF THE FIRST
CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal jurisdiction)

SSPB/105/2016

THE PEOPLE
V.
LAZAROUS TEMBO

Before Mrs Mwaaka Chigali Mikalile – Principal Resident Magistrate

Accused in person

JUDGMENT

Reference

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

The accused in this matter is charged with one count of Theft by agent contrary to sections 272 and 280(b) of the Penal Code chapter 87 of the Laws of Zambia. Particulars of offence allege that on dates unknown but between 1st July and 31st August, 2015, the accused at Lusaka in the Lusaka District did steal USD 2,900 which was entrusted to him by Emmanuel Mwanza to buy a motor vehicle on his behalf.

The accused pleaded not guilty.

I warn myself at the outset that the onus to prove the case beyond reasonable doubt lies on the prosecution and the accused person has no onus to prove his innocence. Proof falling short of that standard is not sufficient as any resulting doubt has to be resolved in favour of the accused who thereby becomes entitled to acquittal.

In order to establish the guilt of the accused, the prosecution must satisfy me upon each and every ingredient of the offence charged.

For the avoidance of doubt, section 272 of the Penal Code says:

Any person who steals anything capable of being stolen is guilty of the felony named "theft", and, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, is liable to imprisonment for five years.

Stealing is defined in section 265(1) as follows:

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen is said to steal that thing.

Section 280(b) says:

If the thing stolen is any of the things following, that is to say: property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay, or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof; the offender is liable to imprisonment for seven years.

The prosecution therefore must establish that:

1. the accused fraudulently and without a claim of right took something capable of being stolen namely money
2. that this money was entrusted to the accused to pay to a company in Japan for a Hiace bus
3. that the accused did not pay for or did not buy the said vehicle thereby depriving the rightful owner
4. that the accused had intent to permanently deprive the owner of his money

In support of its case, the prosecution called three witnesses. The accused elected to give evidence on oath and called one other witness. The following is gist of the evidence heard in court.

PW1 was Moses Phiri, a bus driver. He told court that the accused is his childhood friend and he knows him as a car dealer. It was his testimony that in August, 2015, his employer, Emmanuel Mwanza (PW2 herein) was looking to buy a bus and asked him if he knew an agent that could acquire one. According to PW1, he thought of the accused and ultimately introduced him to the boss. His boss then gave the accused K 40,000.00. The accused in turn gave the money to PW1 to deposit in his account held at Stanbic bank Arcades branch. This was done and accused then filled in a TT (Telegraphic Transfer) form for the K 40,000.00 to be sent in dollar form (\$5,400). They then began waiting for the vehicle. To his and his boss's surprise, three months elapsed without the vehicle arriving prompting his boss to ask him to follow up with the accused. When asked, the accused said the vehicle was coming from afar and was bound to take that much time. The accused nevertheless contacted an agent in Tanzania who via email stated that they were having elections and the container could only be offloaded thereafter. PW1 identified the email and it was marked ID1. He said he took it to his boss who kept it.

PW1 further testified that after the elections, the accused travelled to Tanzania and upon his return informed him that he did not find the vehicle. The accused then asked to meet PW1 with his boss and when they met, he explained that SBT, the company to which the money was sent had made a refund because they sent less money. The accused also explained that he had decided to use a different company, Be forward, to purchase the vehicle. He further explained that the refund from SBT was \$ 4,400 as it was company police to deduct \$ 1,000. According to the accused, he had settled for a vehicle valued at \$ 3,800 and even availed a document with reassurances

that the vehicle would come. After two months, PW1's boss asked him to find out what was happening and this time, the accused gave him a tracking number to check for the Bill of lading at DHL. According to PW1, he proceeded to DHL where he was told that the number was not in their system and he was advised to go to Be forward along Bwinjimfumu Road. There he was advised that the vehicle had not arrived because it was not paid for in full. Apparently only \$2,500 was paid. He was further told that the money was in their account but they could only refund \$ 1,500. His boss was not pleased with this and instead suggested that he tops up for a whole different vehicle. He topped up \$ 2,300 for the vehicle and paid a fee of \$ 1,500. The vehicle arrived after a month.

PW1 also identified a Stanbic Bank document dated 23rd November, 2015 with an attachment of a vehicle photo (ID2). It was his further evidence that the accused was reported to the police. The accused expressed willingness to refund only K 11,000.00 but even that has not been refunded to date.

When cross examined, PW1 admitted that the accused had suggested that his boss gives him his account number for purposes of depositing the money but his boss refused as he wanted the accused to remit the money to him personally.

PW2 was Emmanuel Mwanza whose evidence was that he met the accused through his driver, PW1. On 17th August, 2015, the accused availed a quotation for a bus he wanted to purchase. PW2 gave the accused K 40,000.00 which was equivalent of \$ 5,400. The money was sent on 19th August, 2015 through Stanbic bank and he was availed the transaction document identified and marked ID3. In October, 2015, the accused assured him that the vehicle was on its way and he even availed a number for an agent who confirmed that the ship had started off. There was further correspondence from the

agent in Tanzania, called Safina, that the ship had arrived (ID1 was identified as the said correspondence). As custodian, PW2 tendered ID1 and ID3 in evidence and the exhibits were admitted marked P1 and P3 respectively.

It was also PW2's testimony that on 20th October, 2015, he received a call from Safina informing him that the ship had arrived and he was with the accused who had travelled to Tanzania. After November, however, the accused told him that the transaction had failed and he would refund the money. The accused did not explain whether the vehicle had reached Tanzania and was taken back to Japan. He just gave excuses. Thereafter, PW2 visited the accused at his office at the Airport and he told him that everything he had been telling him was a lie. This compelled PW2 to report the matter to Emmasdale police. On the 23rd November, 2015, the day of meeting at the police, the accused showed PW2 pictures of a second vehicle and pleaded for a second chance to put things right. The police requested the accused to provide proof that the first transaction was cancelled but he failed to avail that proof. The police then gave him up to 31st December, 2015 to honour the undertaking but the vehicle never came. PW2 and PW1 proceeded to Be forward Zambia with the tracking number and discovered that the second vehicle was not fully paid for. Instead of \$ 3,800 the accused only paid \$ 2,500, thus, Be forward Japan sold off that vehicle. PW2 identified the bank transaction document in the sum of \$ 2,500 accompanied by documents showing the price of \$ 3,800 plus pictures of the vehicle (collectively marked ID2). As custodian, he tendered them in evidence and they were marked P2. It was PW2's further testimony that with the help of the police, the accused was convinced to transfer the \$2,500 from his account to PW2's account. PW2 ended up topping up K 23,000.00 to buy the vehicle that successfully reached Zambia. The matter was later on reported to Ng'ombe police for the difference of \$ 2,900. No refund was made by the accused.

When cross examined, PW2 stated that the accused promised to start paying back in February, 2016 but has not paid a single ngwee to date. He denied assertions that he rejected K 15,000.00 from the accused's relatives. He also stated that what accused owes is \$ 5,400 less \$ 2,500. He also stated that a TT can only be cancelled within a week and that is why he did not believe accused's story that the transaction had been cancelled when many weeks had elapsed.

PW3 was Dt. Insp. Edwin Chikatula of Ng'ombe Police Post whose evidence was that when he was allocated this matter, he instituted investigations and made searches at Stanbic bank. He identified the search warrant issued him (ID4) and the affidavit in support (ID5). At the bank, he was availed the accused's mandate file ID6) as well as bank statements for August (ID7) and November, 2015 (ID8). As custodian of the foregoing documents, PW3 tendered them in evidence and they were admitted marked P4 to P8 respectively.

PW3 testified that the bank statement (P7) reveals that K 40,000.00 was deposited into accused's account on 19th August, 2015 and on the same day, K 28,000.00 was withdrawn. The purchase or funds transfer could not take place as the account had insufficient funds following this withdrawal. As regards P8, it shows that K 29,525.00 which is \$ 2,500 dollar equivalent was deposited into the Be Forward account. The complainant however could not get a vehicle because the money was insufficient. He had to top up to finally get one.

When cross examined, PW3 stated that he did not find out the rate for that day but was told by the bank that the transaction could not proceed due to insufficient funds

In his defence, the accused (DW1) testified that on 19th August, 2015, PW2 and his driver, PW1, gave him K 40,000.00 to deposit into his Stanbic account at Arcades branch. Following the deposit, the

accused sat down with PW1 to prepare the Telegraphic Transfer (TT) form to purchase a Hiace bus from Japan with an invoice of \$ 5,400 which was kwacha equivalent K 43,100.00. The rate on that day was K 7.99. The TT was submitted between 9 and 10h00 and a copy was availed to PW2 together with the deposit slip for the K 40,000.00. At 12h30, the accused received a call from the bank informing him that it was impossible for the transfer to go through due to the shortage of K 3,100.00. According to the accused, he did not tell PW2 about the shortage because PW2 had told him that for any expenses he incurred, he should keep receipts. The accused said in any case, he had resources to sustain the transaction. At 16h30, he went back to the bank and wrote a cheque for K 28,100.00 which he paid to ZRA for clearing the Corolla he had. The idea was to sale the Corolla and deposit back into the account and pay \$ 5,400 for PW2's bus. According to the accused, he did not want PW2 to know what was going on and he assured him that the bus was on its way.

It was the accused's further testimony that on 24th August, 2015, he was involved in an accident with the same Corolla. As a consequence, he ended up selling it at a loss at K 32,000.00. On 24th November, 2015, he deposited part of this money, that is, K 29,525.00 into his account and gave the difference to the people that worked on the vehicle. He then looked at the Be Forward website and found a bus similar to the one PW2 wanted going for \$ 3,881 and he did a TT at the rate of K11.69. There was a shortage. According to the accused, the first amount given him did not add up to \$ 5,400 but was about \$ 5,063 and when one subtracts \$ 2,500, the difference is not \$ 2,900 as claimed.

When cross examined, the accused stated that he withdrew money on the very day it was deposited. He said he did not inform PW2 about the shortage or withdrawal. He also stated that when he checked the exchange rate on the morning of 19th August, the kwacha equivalent

was K 40,000.00 thus PW2 was on firm ground to have given him K 40,000.00. The accused admitted that the bank refuses money when it is less but in this case, the teller accepted it and he instructed them accordingly. The accused admitted the fact that he did not inform PW2 that he withdrew the money to clear his vehicle.

When asked about the police report for the accident, the accused said he never reported the accident to the police. Still under cross examination, the accused stated that the money is still owing because of differences he has had with PW2 regarding the mode of paying back.

DW2 was Sindamile Zulu, a Banker at Stanbic Bank whose testimony was that on a date he cannot recall, the accused instructed them to transfer funds on his behalf but the account was insufficiently funded and so he was called to make good of the account. The accused did not do so hence the transfer was cancelled. According to DW2, another instruction was delivered to the bank on 25th November, 2015 to transfer \$ 2,500. The accused confirmed the transfer and the bank proceeded to transfer the funds. DW2 produced in evidence, the transfer form (IDD1), the transmission copy (IDD2) and accused's bank statement to show that the funds were transferred from his account (IDD3) and the exhibits were marked D1, D2 and D3 respectively. D2 is actually P2 and D3 is P8. DW2 also produced the exchange rates document from Stanbic Bank dated 19th August, 2015 showing the dollar rate at K7.905 on that day and it was admitted marked D4.

Under cross examination, DW2 reiterated that the accused was informed about his insufficient balance.

Having considered the evidence I find the following facts not to be in dispute: on 19th August, 2015, the accused was given K 40,000.00 by

PW2; the exchange rate as at that date was K 7.905 (as per D4) which means it was \$ 5,060 kwacha equivalent; the accused was supposed to transfer the money to Japan for the purchase of a Hiace Mini bus for PW2; the said funds were not transferred because the instruction from accused was for the transfer of \$ 5,400 which could not be supported by his account balance; PW2 never received the said Hiace from these funds. It is a fact that PW2 only received \$ 2,500 of the total amount remitted to the accused.

From these facts, can the accused be said to have stolen PW2's money, to be precise \$ 2,900? If the accused fraudulently converted the money to the use of any person other than the owner, then certainly he is guilty of theft. But what evidence is there to support the charge?

The evidence on record undoubtedly establishes that the accused got the complainant's money (K 40,000.00). The money was entrusted to him to buy a Hiace bus from Japan. On the very day he was given the money, the accused discovered that it was not sufficient to transfer \$5,400 which was required for the vehicle that PW2 wanted. When one calculates using the rate as per D4, one discovers that K 40,000.00 translated to about \$ 5,060. Now instead of informing PW2 about the shortfall, the accused decided to use the money for his own ventures. On the very day of the deposit (19th August), he withdrew K 28,000.00 which according to him, he paid ZRA to clear a vehicle that he had purchased previously. By the month end of August, 2015, the accused had withdrawn the entire K 40,000.00. He had a balance of about K 6,000 on 31st August and this is because there was about K 10,000 that was deposited into the account subsequent to the K 40,000.00 deposit. Before the K 28,100.00 was deposited on 18th November, 2015, the account balance stood at K0.

Without a doubt, the accused converted the money to his own use contrary to the wishes of the true owner. There was after all no agreement that the accused could use the money and later on replace it and send it to Japan for PW2's vehicle. Thus, the accused's excuse that he intended to pay back the money after selling his Corolla (whose existence is highly doubted later on the accident) does not exonerate him.

Clearly, therefore, the accused acted fraudulently and continued doing so by deceiving PW2 and making him believe that the vehicle was on the way when he was well aware that that was not the correct position. The email (P1) allegedly from an agent in Tanzania called Safina, which does not even show the date, is either a fraudulent document or if it is genuine, relates to a different vehicle altogether. In any case it mentions only the ship and there is no specific response regarding the car. The font was enlarged, no doubt, to cut out part of the text so that only favourable words were visible. This was fraudulent behaviour meant to deceive PW2 because no money had been transmitted to Japan for a vehicle.

Furthermore, the accused in November, 2015 sent \$ 2,500 to Be Forward for a vehicle that was going at \$ 3,800. This was obviously meant to calm PW2 as he was now under the impression that the vehicle would finally be imported. The accused of course knew that that would not happen as the money was far less than that expected by Be Forward Japan.

The fact that the accused kept on with the dishonesty conduct is proof of intention to permanently deprive PW2 of his money. PW2 is on record as saying, and this testimony was not challenged, that they had to involve the police to convince the accused to transfer the \$2,500 that was remaining of the \$ 5,000 plus to PW2's account.

From the foregoing, I am without a doubt in my mind that upon receiving the money, the accused formed the intention to use it at his will and I have my doubts as to whether he ever intended to repay it or at least repay the balance. The matter was reported in February, 2016 and yet the accused did not pay a single ngwee. He knew that the complainant did not want piecemeal payments so all he had to do was gather the balance and take it at once to the complainant. He has had a year within which to do that but didn't. But whether or not he intended to repay does not take away from the fact that he converted the money fraudulently. Section 265(2) (e) of the Penal Code states that:

A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with ..., that is to say, in case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

In conclusion, therefore, I am satisfied that the accused took the money belonging to the complainant (\$ 5, 060 less \$ 2,500) and wrongfully exercised dominion over it. He used it for his benefit against the interest of the true owner. He had no claim of right to this money. Simply to say, I am satisfied that the prosecution has discharged its burden of proof.

As such, I find the accused **GUILTY** of theft by agent and I **CONVICT** him accordingly.

DELIVERED IN OPEN COURT THIS ^{20th} DAY OF MARCH, 2017

PRINCIPAL RESIDENT MAGISTRATE

