

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

SSPF-022-2023

THE PEOPLE

AND

ABEL MUSONDA MUYEMBE

Before: Mrs. I. N. Phiri-Mupemo
For the State: Mr. M. Nundwe - Public Prosecutor, National
Prosecutions Authority
For the Accused: In Person

JUDGMENT

Legislation Referred:

- (1) The Legal Practitioners Act, Chapter 30 of the Laws of Zambia
- (2) The Penal Code, Chapter 87 of the Laws of Zambia

Cases Referred To:

1. Moonga v The People (1969) Z.R. 63
2. R v Muchuma 4. N.R.L.R. 64
3. Chisha v The People (1968) ZR 26
4. Dorothy Mutale & Richard Phiri v The People (1977) Z.R
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Introduction

The Accused stands charged with the offence of personation, contrary to Section 378(1) of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence are that the Accused, on a date unknown but between 17th September, 2017 and the 13th of February, 2023 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, with intent to defraud Chihana Sekanayo did falsely represent himself as an Advocate at the Lands Tribunal.

The Accused denied the charge and the matter proceeded to trial.

Evidence

The prosecution led evidence from 4 witnesses. PW 1 was Matildah Chileshe Kaoma, the Vice Chairperson for the Lands Tribunal. PW 2 was Edward Sakala, the Executive Director at the Law Association of Zambia. PW 3 was Sgt. Enock Kambilima, the Arresting Officer and PW 4 was Michael Chisengele, the Registrar of the Lands Tribunal.

The relevant summary of the evidence on record is that the Lands Tribunal was sitting, handling a matter in which the Accused, Abel Muyembe, appeared as an Advocate for the complainant, a Mr. Makoli. Ms. Kaoma (PW 1), the Vice chairperson of the Tribunal requested for appearances for the record but the Accused did not answer. The Accused was alerted by the other Lawyer to state his name.

That stood out for the Tribunal because it is known to lawyers that when the Court asks for appearances for the record, the Court wants the lawyers to state their names. The other thing that stood out was a deposition in an Affidavit in which the Accused described himself as a Consultant of Criminology.

Mr. Michael Chisengele (PW 4), the Registrar at the Lands Tribunal confirmed that he was present when the Accused appeared before the Lands Tribunal in January, 2023 representing a complainant by the name of Joshua Mukali. He testified that the Accused indicated that he was a lawyer when asked to state the capacity in which he appeared before the Tribunal. The Accused placed himself on record as Abel Muyembe coming from the firm Abel Muyembe and Company and representing the complainant in that matter,

Joshua Mukali. The person who was presiding was PW 1. The Accused appeared in Chambers and wore a suit with a shirt and bib which lawyers wear.

After that Tribunal sitting, PW 1 requested the Administrative Assistant at the Law Association of Zambia to check whether there was a Legal Practitioner by the name of Abel Muyembe or a law firm by the name A. Muyembe and Partners. The response was in the negative.

The next time the Accused appeared before the Lands Tribunal on 13th February, 2023, the Accused appeared with his client. PW 1 asked the Accused to state the law firm he was coming from and when he was admitted to the Zambian Bar. The Accused said he was admitted to the Bar a long time ago and was quick to add that he did not have a practicing license for the year 2023. PW

1 testified that she quickly reiterated that all legal practitioners knew the year they were admitted to the Bar. She testified that at that point, the Accused said he was appearing as an Attorney for the Complainant.

It was in this regard that Mr. Edward Sakala (PW 2) testified that the Accused was not a member of the Law Association of Zambia (LAZ) and that the Law Firm A. Muyembe and Company was not registered with LAZ. The Accused's name and firm did not appear in the LAZ records and on the list of practitioners. According to PW 2, law firms are approved by the Legal Practitioners Committee before they proceed to register with PACRA. To be able to set up a law firm, one needed to have a law degree, a practicing certificate, must have practiced law for 5 years and must have been approved by the Legal

Practitioners Committee. Thus a law firm not registered with LAZ is not in good standing with the law and a person not qualified cannot practice law or have audience with the Court. Such a firm or person cannot represent a client in land matters as it were in this case.

The matter was reported to Northmead Police Station. The police were given a letter from the High Court and a letter written by LAZ stating that the Accused was purporting to be a lawyer. Sgt. Kambilima interviewed the Accused. He testified that the Accused did not give a satisfactory explanation. The Officer inspected the Accused's office called Muyembe and Partners Associates situated at Loti House along Cairo Road. He observed a lot of documents relating to legal matters. He also wrote to LAZ and to PACRA to ascertain if the company or firm existed. LAZ

indicated that the firm did not exist. He established from PACRA that the Accused was registered differently and not in the names Muyembe and Partner Associates. He produced into Court the correspondence between the police and PACRA herein exhibited as P2(a) and (b).

This was the evidence of the prosecution.

A summary of the Accused's defence is that some time in 2017, his piece of land located in Chinika Industrial Area was encroached upon. He took the matter to the High Court using his business address Muyembe A. and Partners trading as Barlon Property Consultants. The Judge was not happy with this name. He enquired whether it was a law firm and wrote to the Law Association of Zambia requesting them to investigate the

Accused. The Accused only learned of this letter when he was arrested on 13th February, 2023.

As regards the events of 13th February, 2023, the Accused testified that he was arrested in his capacity as a Property Consultant registered as A. Muyembe and Partners trading as Barlon Property Consultants Agents; a registered firm under Chapter 389 of the Laws of Zambia.

The Accused testified that a Mr. Joshua Mukali approached him for purposes of selling a farm. Because of some disputes over the land, and following the advice of the Accused, the matter went before the Lands Tribunal in 2020. The address used belonged to the Accused because Mr. Joshua Mukali lived in Chibombo. The Accused attended the proceedings before the Lands Tribunal only as a Consultant or Agent for the

Complainant. His role was that of being a contact; his address was used, the Court was communicating with him because he was in Lusaka and he would in return inform the Court if the Complainant was unable to attend Court.

In 2023, Joshua Mukali, the Accused's client was unable to attend Court because his legs were swollen. The Accused attended court before the Tribunal; all the proceedings were in Chambers. When he appeared before MC Kaoma (PW 1), Ms. Kaoma asked him the capacity in which he was appearing. The Accused said he was acting for the complainant, only helping the complainant as a consultant.

Prior to that sitting, the Accused served a notice of hearing on the other party. The address that was written on the notice of

hearing belonged to the Accused. In the Accused's view, he was engaged as an Agent on behalf of the Complainant. PW 1 was however not happy. She called the Police and alleged that the Accused was masquerading; swindling the public in the name of being a lawyer or an Advocate. The Accused was then taken to Northmead Police Station.

The Accused testified further that that he attended only Chamber matters at the Lands Tribunal and dealt only with the matter involving Joshua Mukali and not any other. He revealed that he possesses a General Certificate of Education (GCE) and a certificate in General Principles of Law from the University of Zambia. At the time of his evidence, the Accused was pursuing a degree; as such, he was an Associate

Degree Holder. He admitted having a gown which he said he used for business.

The Accused denied practicing law. He confessed having represented a client in Chambers only to inform the Tribunal because his client was not present. He admitted that his firm was not known at the Law Association of Zambia (LAZ). It was known at the Zambia Institute of Estates Agency. The Accused acknowledged that a person who has not passed through ZIALE ought not to masquerade as a lawyer. He emphasized that his patent certificate was written Consultants Agents.

This was the gist of the Accused's defence.

Analysis

Having carefully considered the evidence, I warn myself from the onset that, as it was held in the case of **Moonga v The People (1)**, the

Accused's plea of not guilty disputes all the ingredients of the offence charged. In this respect, it was held in the case of **R v Muchuma (2)** that a plea of not guilty puts the prosecution under the necessity of proving all the elements of the offence. The prosecution must prove beyond all reasonable doubt that an offence was committed and that it was committed by the Accused. As such, the case of **Chisha v the People (3)** guides that there is no obligation on the part of the Accused to prove his innocence or indeed to give a satisfactory explanation.

I further remind myself that if after considering all of the evidence in this case, a doubt is created in my mind as to the guilt of the Accused person; I ought to resolve the doubt in his favour. I am guided on this point by the

case of **Dorothy Mutale & Richard Phiri v the People (4)** in which it was held that where there are lingering doubts, the Court is required to resolve such doubts in favour of the Accused.

With regard to the law applicable, Section 378(1) of the Penal Code which creates the offence of personation provides that

"Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour."

In order for the prosecution to establish its case against the Accused, it must be proved beyond all reasonable doubt that

- i. The Accused represented himself to be some other person

ii. That the said representation was false

iii. That the Accused intended to defraud or to deceive the said Chihana Sekanayo

I therefore ask myself whether the Accused did represent himself to be some other person. PW 1 and PW 4 testified that the Accused appeared before the Lands Tribunal representing a client. The Accused himself confirmed that he did appear in Chambers and when asked in what capacity he was appearing, he indicated that he was appearing for the complainant.

Further, the Accused testified that the address that was being used for court correspondences with his client was his. The Accused's argument that he was appearing as a consultant does not

hold water in the circumstances especially because the Accused, as a consultant, did not have a Power of Attorney to represent his client in the manner he seemingly wants to suggest. The Accused was clearly playing the role of a Legal Practitioner.

The question I ask myself is whether the Accused was qualified to play such a role. Section 41(1) and (2) of the Legal Practitioner's Act provides that

41. (1) Subject as hereinafter provided, no person shall be qualified to act as an advocate within Zambia unless his name is on the Roll and he has in force a practising certificate.

(2) Every person whose name is on the Roll and who has in force a practising

certificate or who is admitted to practice under subsection (1) shall be entitled to practise as an advocate in any court in Zambia other than a local court and shall be deemed to be an officer of the Court.

The evidence of the prosecution is that the Accused is not a legal practitioner and therefore not entitled to practise as an Advocate. In defence, the Accused testified that at the time of his testimony, he was studying to obtain a law degree. There is no evidence that the Accused's name is on the roll and that he possesses a practising certificate referred to in Section 41 of the Legal Practitioner's Act. It follows that the Accused's acts of appearing before the Lands Tribunal to represent his client and receiving court correspondence using

his address on behalf of his client amounted to masquerading as a legal practitioner. There is no such thing as being an Agent in this context as one can only play this role when qualified as aforesaid.

However, to answer the question whether the Accused did represent himself to be some other person in view of the aforesaid, I have carefully analysed the provision of the penal code under which the Accused is charged. The provision states that:

"Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour." (*Emphasis on the underlined*)

The use of the qualification "living or dead" in my considered view appears to speak to a situation where a person represents himself to be another person or individual. It does not appear to me to mean that a person held himself out to be holding a particular position or qualification authorising him to play a certain role or do a particular act.

The evidence before me is that the Accused held himself out to be a lawyer or legal practitioner when he in fact is not.

I thus took occasion to address my mind to Section 101(b) of the Penal Code Chapter 87 of the Laws of Zambia which in my view appears to speak closely to this scenario before me. Section 101(b) enacts that:

101. Any person who-

(b) without authority, assumes to act as a person having authority by law to administer an oath or take a solemn declaration or affirmation or affidavit or to do any other act of a public nature which can only be done by persons authorised by law to do so is guilty of a misdemeanour. (*Emphasis on the underlined*)

I noted however that this provision is limited to false assumption of authority with respect to acts of a public nature.

The question further begging an answer is whether the Accused in fact intended to defraud or to deceive Chihana Sekana as alleged on the particulars of the offence assuming the Accused did hold himself out to be some other person, living or dead. I must hasten to state that no

evidence was led by the prosecution to this effect. Simply expressed, no reference to Chihana Sekana whatsoever was made by any of the prosecution witnesses to suggest that it was the Accused's intention to deceive the said Chihana Sekana. I have once again carefully addressed my mind to Section 378 aforesaid. It states that

"Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour." (Emphasis on the underlined)

The prosecution has not demonstrated in any material manner that having held himself out to be another person, the Accused's intention was to defraud the said Chihana Sekana. As stated above, the burden of proof rests on the

prosecution. There is no obligation on the Accused to prove his innocence or to give a satisfactory explanation.

The evidence before me discloses an offence provided for in the Legal Practitioners Act Chapter 30 of the Laws of Zambia. Section 42 of the said Act enacts that:

42. (1) No unqualified person shall act or practise, directly or indirectly, as an advocate or as such sue out any summons or other process, or commence, carry on or defend any action, suit or other proceeding in the name of any other person in any court of civil or criminal jurisdiction, or act as an advocate in any cause or matter, civil or criminal, or act as a Notary Public.

Section 43 further states that:

43. Any unqualified person who wilfully pretends to be, or takes or uses any name, title, addition or description implying that he is qualified or recognised by law as qualified to act as an advocate, or a Notary Public, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand penalty units or to a term of imprisonment not exceeding two years, or to both.

I therefore ask myself whether a person can be acquitted in the face of evidence that the Accused did appear before the Lands Tribunal and placed himself on record as acting for the complainant and it is very clear that such

person is in fact not an Advocate or a legal practitioner.

The issue is that the evidence on record depicts an offence provided for by another law different from that pursuant to which he stands charged which also attaches penal sanctions. While I agree that the Legislature had in its contemplation a desire to deal with such conduct as indicated in the Legal Practitioner's Act, I am of the considered view that the defect is curable in the circumstances given.

This is so because the offence proved in the Legal Practitioners Act is at par with that pursuant to which the Accused was charged. Both are misdemeanours providing for the same punishment and both generally relate to misrepresentation, and undoubtedly, an offence

was indeed committed. The question to consider therefore is whether the Accused's defence would have been different had he been charged under the Legal Practitioners Act. The answer in my view is in the negative. This is because the evidence that was led by the prosecution proved the ingredients of the offence under the Legal Practitioners Act and it was against that evidence the Accused rendered his defence. The Accused defence cannot certainly be said to have been prejudiced in any material manner.

Having said the above, I find that the prosecution has proved to the required standard the offence of pretending to be an Advocate provided for in Section 43 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia. I am satisfied beyond all reasonable doubt that the Accused, being an unqualified

person, did wilfully pretend to be qualified to act as an Advocate.

I therefore set aside the charge of personation contrary to Section 378 of the Penal Code Chapter 87 of the Laws of Zambia aside and I substitute it with the offence of pretending to be an Advocate contrary Section 43 of the Legal Practitioners Act, Chapter 30 of the Laws of Zambia. As such, I find the Accused person guilty of the offence of pretending to be an Advocate aforesaid. I accordingly convict him.

Parties are informed of the right of appeal within 14 days.

Delivered this 16th day of May 2023

