

**IN THE SUBORDINATE COURT OF THE FIRST
CLASS FOR THE NDOLA DISTRICT
HELD AT NDOLA**

SN/06/22

(Criminal jurisdiction)

BETWEEN:

THE PEOPLE

VERSUS

MC MPHERSON CHIANDA, BEST MWAICHI AND ISAAC KAMWIMBA

For the Accused: L.MATIBINI, C MATIBINI, C.MAGUBBWI AND MS.NGOZA

For the state: D. NGWIRA AND S. KALALUKA

JUDGMENT

CASES REFERRED TO

1. **SIMANGO v THE PEOPLE (1974) Z.R. 198 (S.C.)**
2. **THE PEOPLE v MABUBA (1972) Z.R. 21 (H.C.).**
3. **MWEWA MURONO v THE PEOPLE (2004) Z.R. 207 (S.C.),**

STATUTES REFERRED

1. **THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA.**
2. **PUBLIC FINANCE ACT NO. 15 OF 2004**
3. **COMPANIES ACT NO. 10 OF 2017**
4. **THE POSTAL SERVICES ACT NO 22 OF 2009**

OTHER WORKS

1. **Oxford Dictionary of Law 5th edition (2003)**
2. **Halsbury's Laws of England 3rd Edition Volume 10**

CHARGE

In this case the accused persons stand jointly charged with 13 counts.

COUNT 1

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 29th December, 2017 and 31st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k50, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 2

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 1st August, 2018 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k21, 945.256 the property belonging to the government of the Republic of Zambia.

COUNT 3

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 1st September, 2017 and 31st December, 2017, at Ndola of the Copperbelt Province

of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k27, 363.578 the property belonging to the government of the Republic of Zambia.

COUNT 4

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 1st March, 2018 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k5, 500.000 the property belonging the government of the Republic of Zambia.

COUNT 5

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 256 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 1st March, 2018 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k20, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 6

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 31st October, 2017 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k16, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 7

The accused persons stand charged with the offence of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 15th December, 2017 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k50, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 8

The accused persons stand charged with the offence of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 1st January, 2018 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k50, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 9

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 9th October, 2017 and 1st December, 2017, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k25, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 10

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 1st January, 2018 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k6, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 11

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 16th October, 2017 and 1st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General,

Director of Finance and Finance Manager respectively, did steal k24, 300.000 the property belonging to the government of the Republic of Zambia.

COUNT 12

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 16th January, 2018 and 31st December, 2018, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k25, 000.000 the property belonging to the government of the Republic of Zambia.

COUNT 13

The accused persons stand charged with the offense of Theft by Public Servant contrary to section 265 as read with section 277 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence allege that MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA, jointly and whilst acting together with persons unknown on unknown date but between 25th October, 2017 and 1st December, 2017, at Ndola of the Copperbelt Province of the Republic of Zambia, being persons employed in the public service as Post Master General, Director of Finance and Finance Manager respectively, did steal k14, 000.000 the property belonging to the government of the Republic of Zambia.

The accused persons pleaded not guilty.

At this point I wish to adopt the words of the Supreme Court in the case of **MWEWA MURONO v THE PEOPLE (2004) Z.R. 207 (S.C.)**. In that case the Supreme Court held among other things that **in criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the**

prosecution. The standard of proof must be beyond all reasonable doubt. I do therefore warn myself accordingly.

Having directed myself on who bears the burden of proof and the standard of that proof it has now become imperative to analyze the law creating this offence in order to appreciate the elements constituting the offence before I turn to the evidence adduced by both parties herein.

In these counts accused persons are charged under sections 265 as read with section 277 of the penal Code Chapter 87 of the laws of Zambia.

Section 272 creates the general offense of theft and it is couched as follows;

“Any person who steals anything capable of being stolen is guilty of the felony termed “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.”

Section 277 extends the punishment of theft committed by persons employed in public service in respect of property of Government.

If the offender is a person employed in the public service and the thing stolen is the property of the Government, a local authority or a corporation, body or board, including an institution of higher learning in which the Government has a majority or con-trolling interest, or came into his possession by virtue of his employment, he is liable to imprisonment for fifteen years.

For the purposes of criminal law the expression ‘theft’ is defined by section 265(1) of the Penal Code 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.”

In this context the word ‘taking’ is defined by section 265(5) in the following terms;

A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

Further, subsection 2 of the same section of the Penal Code defines “fraudulent taking” to mean taking or converting by a person if he does so with an intent permanently to deprive the general or special owner of the thing of it among others.

In the light of the foregoing therefore, the following are construed to be elements of the offense of theft by public servants;

- 1. Theft of the money as per indictment which is proved by**
 - a) Taking of the money as per indictment**
 - b) The identity of the offenders**
 - c) Intent of the offenders at the time of the taking**
- 2. The offenders were public servants at the time of stealing**
- 3. The money stolen is property of Government**

Having analyzed the law creating the offense and having identified the elements thereof it has now become imperative to review the evidence adduced in this matter in order to satisfy myself as to its truthfulness or falsity.

In their endeavor to prove their case the prosecutions called to court 11 witnesses. At the close of the prosecutions’ case I put accused persons on their defense and A1 and A3 elected to give evidence on oath. While A2 elected to remain silent and called one witness which they are perfectly entitled to do at law. The evidence of both parties is as follows;

PROSECUTION EVIDENCE

PW1 was KENNDY MUMBA a Director at community development whose duties include; supervision, to administer and to monitor the implementations of social programs in the country and also provides his services in matters involving Child welfare as commissioner of child welfare.

PW1 testified that on 22nd October 2018, he was summoned and appeared in person at the Drug Enforcement Commission offices (herein after called DEC) at Ridgeway by the joint investigation team who were investigating allegations of mis-application of funds of social cash transfer program which was one of the programs administered by the Ministry of Community Development and social services (Herein after called the ministry) under his department.

That he gave a statement to the investigators. That the investigators were interested among other things what led to the allegations and for former President Edgar Lungu to institute an investigative team to follow up the allegations. In response PW1 acknowledged that they had problems on the execution of a contract which the Ministry had entered into with Zambia Postal Services (herein after called Zam post). PW1 testified that the Ministry entered into a contract for delivery of social cash transfer fund payments to the beneficiaries in Western and Luapula provinces.

That following the said contract the Ministry disbursed k29, 000,000 to Zam post in September 2017 to pay the beneficiaries in the 2 provinces as well as the commission for Zam post as per contractual obligation. That k27, 000.000 was for the beneficiaries and K2, 000.000 was Zam Post commission.

That in December 2017 the Ministry made the second disbursement to Zam Post of k69, 000.000 which included; Western, Luapula, North western, Northern and Muchinga provinces and 2 districts namely Mpongwe and Lufwanyama districts. That k64, 000.000 was for paying the beneficiaries and k5, 000.000 was Zam Post commission.

PW1 testified that he informed the investigators that the contract had obligations on both parties to facilitate execution and delivery of the service. That the obligations for Zam Post included;

1. Disbursing funds to the beneficiaries within 72 hours after receipt of the funds from the ministry.
2. Introducing beneficiaries on the E-Wallet payment system.
3. Paying beneficiaries not beyond the radius of 7km
4. Introducing 0% charge to the beneficiaries
5. Introducing or opening savings and investment accounts for the beneficiaries.
6. Submission of returns by Zam Post

While the Ministry was expected to disburse funds to Zam Post, monitor and supervise the performance of the contract.

That when the disbursements were made, the Ministry started experiencing non-compliance of the obligations. To an extent that PW1's office started receiving complaints from the districts and provinces that the beneficiaries were not receiving the money. Which resulted into the Ministry

visiting Zam post in order for Zam Post to justify why the beneficiaries were complaining of not receiving the funds.

That the ministry did not disburse the funds for the circle for November and December 2017 as they awaited for the justification from Zam Post and for the returns.

PW1 testified that it was during that period that the Ministry learnt that Zam Post deviated the funds to buying vehicles, paint their offices and pay retirees which funds were meant to pay beneficiaries.

PW1 further testified that even though Zam post admitted during one of the meetings for the mis-application of funds, however the amount was not agreed upon, as Zam Post stated that the money that was misappropriated was k21, 000.00 whilst the Ministry had a figure of k47, 000.00.

That based on that, the Ministry made it clear that there was breach of contract and the contract was terminated.

PW1 testified that he later learnt that Zam Post was also depositing the money for the beneficiaries into a fixed deposit account which was not part of the contract. That no official from Zam Post was authorised by the Ministry to deposit money into a fixed deposit account. That the said money that was deposited into the fixed deposit account accrued interest which did not benefit the beneficiaries and the Ministry.

In cross examination by Defence Counsel, PW1 stated that the amount that was disbursed to Zam Post by the Ministry was k98, 000.000. That other amount that was disbursed to Zam Post was k35, 000.000. That the ministry disbursed funds to Zam Post of less than k150.000, 000, however the total amount on the indictment is k285, 158. 834. PW1 stated that he was the person responsible for the administration of the said Program.

He stated that, the payment circle for November and December 2017 was disbursed to the districts and not Zam Post.

PW1 further stated that after the money was disbursed to Zam, Post, it was required that the beneficiaries are paid within 72 hours after receipt of the money from the Ministry. That when money was disturbed to Zam Post schedules of payments were also sent, though in other

circumstances schedules of payments were delayed which meant that the money could not be paid within 72 hours.

He further stated there was forensic investigation that was carried out by the Auditor General and that there was a report, which he read in summary which talked about the mis-appropriation of funds by Zam Post.

That Zam Post deposited money into a fixed deposit account, however he did not check whose bank account it was, whether it was for Zam Post or the 3 accused persons.

He also stated that according to the Ministry the money that was misappropriated was k47, 000.000, however according to Zam Post it was k21, 000.000.

That the ministry took the decision to terminate the contract with Zam Post. That the notice of termination of the contract was done between August and September 2018. That he could not remember the exact amount that was disbursed to Zam Post at the time of the termination of the contract.

That the painting of offices, buying of vehicles was done by Zam Post and he was not sure if the accused persons benefited in any way.

There was nothing in re-examination.

PW2 was EVERISTO CHIFUMBANO who used to be a principal accountant at the Ministry between 2017 and December 2018 whose duties were that of managing of the operations of the accounts units, which included receiving instructions from his supervisors.

PW2 testified that in April 2018 he was summoned by the joint investigative team on social cash transfer fund to give an account of his involvement in the disbursement of the funds to Zam-Post. He testified that, he told the team that on 20th September 2017, he received instructions from the Permanent Secretary to pay k27, 000.000 to Zam Post for the beneficiaries and K2, 100.000 as commission to Zam Post. That to the authority were schedules attached listing provinces and districts which were to receive the social cash transfer funds.

That on receipt of the instructions he instructed his officers to raise payment vouchers and commitment form which was signed by the accounting officers and himself. That after the

vouchers were raised the electronic funds transfer was used and it was signed by him and later taken to the bank and a copy was stamped by the bank.

That after k27, 000.000 was paid to Zam Post, it was Zam Post to pay the beneficiaries. That after the payment was made they had no control.

He testified that on 8th December 2017, he received instructions from the Permanent Secretary to pay k64, 000.000 to Zam Post for the beneficiaries and k5, 500.00 as commission to Zam Post. That to these instructions was an attachment of the schedules listing provinces and districts to be paid.

That on receipt of the instructions he instructed his officers to raise payment vouchers and commitment forms which he signed. That after the vouchers were raised the electronic funds transfer was raised and it was signed by PW1 and Mr HENRY NKOMA and later taken to the bank and a copy was stamped by the bank.

He testified that the purpose of k64, 000.000 was to pay the beneficiaries of the social cash transfer fund of 5 provinces and districts namely; Luapula, Northern, Muchinga, North western province and Mpongwe and Lufwanyama districts. That k5, 000.000 was commission for Zam-Post.

In court PW2 identified P1, P2, P3, P4, P5 and P6.

In cross examination by Defence Counsel, PW2 stated that he was the Principal Accountant at the Ministry from April 2017 upto 2018 December. That during the commencement of the contract between Zam-Post and the Ministry he was the Principal Accountant. That all the payments to Zam-Post were paid through his office.

He stated that the total amount that was disbursed to Zam-Post was k98, 000.000 under his hand. That k335, 000.000 was not paid under his hand to Zam-Post.

There was nothing in re-examination.

PW3 was WISHIKOTI KATAMBI a banker at Zambia National Commercial Bank (herein after called ZANACO) whose duties include; receiving of customer queries, resolving customer complaints and submission of customer net promoter secure cards.

PW3 testified that on 24th March 2020 he was approached by Anti-Corruption Commission (herein after called ACC) who went to the bank to verify transactional details regarding their client the Ministry.

PW3 proceeded to generate statements of the transactions that were in question. That the ministry on 14th December 2017 transferred k5, 175,225.60 to Zam-Post. That on the same date the Ministry also transferred k27, 363.578 to Zam-Post.

In court PW3 identified P7.

There was nothing in cross examination by Defence.

PW4 was FREDRICK CHIWAYA Director finance at Zam-post. Who testified that in 2017 and 2018 he was a finance Manager for Zam-Post and he was responsible for the Pay roll, creditors department and bank reconciliation.

He testified that Zam Post had two main accounts namely Zam-Post main collection account. That at the time he joined Zam-post he checked on the bank statement and the account had k9, 999, 00 and on 20th September 2017 Zam-post received a sum of k27, 364.000 from the Ministry. The purpose of the money was to pay beneficiaries who were on the social cash transfer fund scheme.

The other account is Zam-Post Agency Commission account and when he joined Zam-Post he checked the bank statement for the said account dated 14th December 2017 which had an amount of k1, 319.00. That on the said date Zam-post received an amount of k64, 000.000 and k5, 100.000 from the Ministry which was also meant for the social cash transfer fund beneficiaries.

In court PW4 identified P8 and P9.

In cross examination by Defence Counsel, PW4 stated that he joined Zam-Post on 13th March 2018. That P8 had an amount of k27, 363.979 which came from the Ministry which was meant for the social cash transfer fund beneficiaries. That the balance in the Zam-Post main collection on 28th September 2017 was k9, 999.00. That he saw the bank statements when he joined Zam-Post in 2018 and that if there were any unauthorised payments he would have known. That the amount on P8 related to 14th December 2017 which date was before he joined.

He also stated that part of duties was bank reconciliation, pay roll and creditors section.

That Zam-Post started receiving the social cash transfer fund in 2017 which said money was supposed to be disbursed to the beneficiaries.

That he was the finance Manager for Zam-Post's two main accounts.

He further stated that before any payment is made, there must be authorisation by the head of department or the Chief Executive Officer (herein after called C.E.O) and evidence must be attached to show that the money is available, payment voucher must be raised and it must be authorised by the signatories. That once the eternal procedures are complied with and the money is paid there is a reflection of the amount paid which is to be found on the bank statement.

That any amount upto k50, 000.000 is done through a bank transfer which should have a transfer number.

That when he looked at the bank records dated 19th December 2017 and 31st December 2018, he did not see a sum of k50,000.000 which went to the 3 accused persons accounts. That when he was summoned by the joint investigative team he did not tell them that a sum of k50, 000.000 was stolen by the 3 accused persons.

That the period that he was finance manager for Zam-Post he did not come across any amounts on the indictment that it was stolen by the 3 accused persons.

That the office of the finance Manager is able to know when the money in the institution has gone missing. That k300.000.000 had not disappeared from the accounts of Zam-Post. That there was no report that went to the board of Zam-Post in relation to any missing money.

There was nothing in re-examination.

PW5 was DAVID BWALYA MUSONDA Manger Financial Services at Zam-Post. Who testified that between 2017 and 2018, he was head of car sales department at Zam- Post. That he was the relationship Manager between Zam-Post and Japanese exporters that had contracts with Zam-Post.

That on 23rd May 2020 he was summoned by the joint investigative team and they were inquiring from him on the transfers that were made from Zam-post to a fixed deposit account which said transfers were coming from the Ministry to Zam-Post for the social cash transfer fund.

That the team presented 12 letters to PW5 which they wanted him to confirm.

He testified that he had worked with A2 for over 16 years and hence he was familiar with his signature.

That the finance Manager, finance director used to schedule meetings with DW1 the CEO in the meetings the Finance unit would present the cash flow and balances that were sitting on various accounts that Zam-Post held. That based on the balances DW1 in conjunction with A2 and DW3 they would come up with a payment plan. That based on the agreement, instructions would then be given to signatories.

That once the payments had been agreed upon the Finance manager will then issue instructions. That in this case, their bank manager would be called and be advised that they wanted to place funds into a fixed deposit account for a specific period.

That the money that was being placed into the fixed deposit account was from the Ministry which was meant for the social cash transfer funds beneficiaries.

PW5 in his testimony outlined the procedure for signing;

That once the approval has been given by the chief executive officer (herein after called the CEO) in this case DW1, the instruction are then given to the secretary to prepare letters and the first signatories are from panel A who are the custodians of the funds in this case A2. That panel B signatory would then be required to sign as a mere formality as the approval has already be given.

That the funds that were deposited into the fixed deposit account varied from 7 days to 10 days and that in that period the beneficiaries would not be paid.

He further testified that he did not know which authority that the 3 accused were using to place the money into a fixed deposit account from the ministry which was intended for the beneficiaries.

He further testified that to his best of his knowledge the Ministry was not owing Zam Post any money as the commission was paid to them.

In court PW5 identified DW1, A2, DW3 and P10A-P10L.

In cross examination by Defence Counsel, PW5 stated that, that the meetings would be held at Zam Post to deliberate on the funds to be deposited into the fixed deposit account. That P10A-P10L related to the funds to be deposited into a fixed deposit account. That the fixed deposit

account was for Zam Post and not the 3 accused persons and that the beneficiaries of the interest that was accrued was Zam Post and not the 3 accused persons.

That the letter dated 29th December 2017 was addressed to the relationship manager and Barclays Bank Ndola as it was then, instructing the manager to place funds into a fixed deposit account.

He further stated that he did not know what was happening to the principal amount after it matured from the fixed deposit account.

That the money that was placed into the fixed deposit account was meant for the social cash transfer funds beneficiaries.

That PW5 was one of the signatories from Panel B, however he did not sign on any sheet to pay the beneficiaries.

That the letters (P10) had an instruction that the funds should be reverted to the principal account upon maturity, however he did not know whether the money was being reverted to the principal account by the bank.

He stated that he could not re-call if at the letters (P10) had supporting documents. Further he could not confirm if at all, his signature was not appended on P10 then the bank would disregard the instruction.

That whenever the money was received from the Ministry it was made known to them through the meetings that they would have and also the purpose of the money.

He lastly stated that he was he was informed that he was required to sign on the instruction for the money to be deposited into a fixed deposit account.

There was nothing in re-examination.

PW6 was MOSES KANYANTA MUSONDA who testified that in 2018 he used to work as assistant director at Zam Post and his duties included, providing support to the office of the director of operations, ensuring that the efficient and effective operations were adhered to across the co-operation. That he was also a signatory to the bank co-operation bank account with Barclays bank (ABSA).

He testified that on 21st May 2020 he was summoned to appear before a joint investigative team with regards to an instruction that was sent to the bank.

He testified that, at the time he was signing on P11 it already had prior approvals from senior management that would save as authority for any signatory to proceed to sign. That senior management included DW1, A2 and DW3.

That the source of the funds from P11 was from the Ministry, which was meant for the social cash transfer funds beneficiaries.

In court PW5 identified DW1, A2, DW3 and P11.

In cross examination by Defence Counsel, PW6 stated that the other responsibility he had was to oversee the payments that were coming from the Ministry. That he was also coordinating the logistics for the social cash transfer funds in North Western province and also coordinating with provincial officers, ensuring that the money was paid to the beneficiaries.

He stated that when the money was transferred from the Ministry to Zam-post he was being informed.

That he was a supervisor for Ms SHUPIWE the person who was assigned to follow up on the payment schedules as she was the project manager. He stated that at times the payment schedules were sent late from the Ministry which delayed payments. He stated that when the payment schedules were not sent the money would be in the bank.

That the essence of the money on P11 to be placed into a fixed deposit account which was to earn interest. That P11 was bearing his signature as a signatory from Panel B. That P11 had an instruction that the money should be reverted to the original Zam Post account upon maturity and not to the 3 accused person's accounts. He stated that the bank could not disobey the instructions from Zam Post. That there was no intention and other signatories to deprive Zam Post of k21, 900.000 and that it was not the intention to benefit from the said money.

That the money from the Ministry was being paid to Zam Post headquarters then transferred to the provinces.

He stated that there was no anytime that the money was not paid to the beneficiaries based on the fact that the money was stolen.

There was nothing in re-examination.

PW7 was ELIJAH KAPUTO MANIGA a Principle Accountant at Ministry of Finance and National Department of directorate of Policy and Research-Accounts Generals Office, whose duties include; review of public finance, management policies, research on public finance management policies and accounting standards. Provides expert and technical guidelines on public finance management on Parliamentary committees dealing with public accounts.

He testified that what constitutes public finance management are sets of rules and laws used by the government to mobilize, allocate resource, execute the budget to provide service to the general public and account for those resources and audit the results.

That the rules and laws apply to government institutions that are mandated to provide public service to the general public.

He testified that he was approached by PW11 in this case who requested him to provide guidance on the procedures that are required to be complied with by an institution to which funds appropriated by Parliament can be invested into a fixed deposit account with a view to earn interest.

PW7 testified that he provided the guidance in terms of the procedure outlined in the Public Finance Management Act of 2004, that was applicable for the financial years ended 2017 and 2018. That the sections 22 under part of the same act was applicable.

That the Act provides that;

‘Money standing to the credit of the Republic in the Treasury Account or with any other bank account and not immediately required for any other purpose may be authorised to be invested by the Secretary to the Treasury with a bank at call or subject to notice not exceeding 12 months or in any of the investments authorised by law for the investment of the trustee funds.

That where any investment under subsection (1) is realised the proceeded shall be paid by the Treasury to the credit of the Treasury account.

That all investments made under this section shall form part of the consolidated fund.

PW7 further stated that in terms of funds allocated for public expenditure, a budget is presented before Parliament for approval and the approval is done through the enactment of an Annual

Appropriation Act, which Act allocates funds to a specific head of Revenue and expenditure and funds allocated are supposed to be expended within the limit to a specific head.

He testified that in this case at hand Act applicable is for 2018 and 2017 financial years.

That the controlling officer responsible for the head was the Permanent Secretary and the Ministry of community development and social services.

That it thus meant that the request was supposed to be made by the Minister who was the controlling officer, who was the officer responsible for the identification and requesting or for investment of the funds appropriated under the Ministry.

He testified that the request is supposed to be made to the Secretary to the Treasury. That in the request the controlling officer is required to provide reasons as to why any funds should be invested, the amount of the funds to be invested and the interest to be earned.

That once the request is made, the request submitted is subject to expert review by officers within the Treasury who will review as to whether the request is within the laws that govern the Public Finance Act. That after the review is done, a recommendation is made to either grant the authority or not.

That one of the key guidelines given is the treatment of the interest earned from the investment which provided under section 21 of the Public Finance Management Act of 2004 which states that;

That all interest accrued on bank accounts and other investments shall constitute general revenue and shall be paid into the Treasury account.

That when the authority to invest, the amount to invest shall be restricted to the amount submitted in the request and to the period indicated in the request.

He testified that the social cash transfer fund was appropriated by Parliament to be disbursed to the beneficiaries of the fund that were identified.

He testified that in this case the social protection guidelines were not followed. Further he stated that if at all they were followed, the controlling officer was required to undertake such an investment as per guidelines.

He testified that the only funds that are appropriated for investments are funds appropriated under the Ministry of Finance and such funds are invested by the Secretary to the Treasury.

He testified that he reviewed the letters of investments of the funds that were generated by Zam Post and that he noted that some irregularities existed in that, the social cash transfer funds were appropriated to the Ministry of Community Development and social services head of Revenue and expenditure and therefore the person mandated to oversee the execution of such funds was the Permanent Secretary under the Ministry who was appointed as the controlling officer by the Secretary to the Treasury for the financial years 2017 and 2018. That it was therefore only the controlling officer appointed who has the mandate and authority to request for the investment of funds appropriated to that head.

That in this case the letters were generated by Zam Post and not by the controlling officer.

That the second irregularity was the application of the interest earned. The interest earned was not deposited into the consolidated account. That it was mis applied which is contrary to section 21 of the Public Finance Management Act of 2004.

That the instructions to the Bank by Zam Post was also an irregularity in that it was not generated by the controlling officer.

That in this case Zam Post was appointed by the ministry as an agent to disburse funds to social cash transfer funds to beneficiaries and Zam Post was paid commission.

In cross examination by Defence Counsel, PW7 stated that he did not see the Auditor General's report. That section 21 of the Public Finance Management Act deals with the interest earned from the investment. Section 22 of the same Act deals with the procedure that ought to be undertaken.

That the instruction to the bank by Zam Post stated that the funds should be reverted to the original account upon maturity. That the funds that were invested by Zam Post were for the beneficiaries.

That the interest that accrued from the investment was mis applied as it was not deposited into the consolidated account and that there was a penalty under the Act.

He also stated that he was not shown any interest that was accrued from the investment.

That Zam Post was appointed as an agent by the Ministry to pay beneficiaries

That the interest that was earned from the investment was not accrued to Public revenue instead it was accrued to Zam Post.

That, decisions at Zam Post are made by directors. That the instructions to the bank were made under the instructions of Zam Post directors. That Zam Post is a government institution.

There was nothing in re-examination.

PW8 was PHIRI OLIVER JOE a Financial Accountant Finance from Zam Post whose duties include; to supervise the reconciliation of bank accounts, prepare the daily cash position and any other task assigned to him.

PW8 testified that Zam Post has two signing system arrangement of Panel A and Panel B. one signatory from Panel A and one from Panel B. Both signatories must sign on an instruction for it to be processed by the bank.

He testified that between the 2017 and 2018 Panel A consisted of people from Finance department and Panel B consisted people from operations.

That the Zam Post board passed a resolution on 13th September 2018 to revise the then existing signatories and appoint new ones.

PW8 further testified that on 20th May 2020, he received officers from the joint investigative team who wanted to find out on the funds that were deposited into a fixed deposit account by Zam Post. He told them that during the period of 2017 and 2018 he used to prepare daily cash position. Which is a list of bank balances which said list was forwarded to the Financial Manager for approval from the post master general for the utilization of funds for the particular day.

That in relation to the fixed deposit account he used to receive instructions from the finance Manager, after he had negotiated for favourable rates with various banks. That sometimes he would receive verbal or written instructions.

That after receiving instructions he would instruct the secretary to the Finance Manager to type the instruction if verbal and they would give the letter to the Finance Manager to check. That there after the letter would be forwarded to signatories to sign. Thereafter the letter would be emailed to the ABSA bank. (Barclays bank as it was then).

He testified that letter (P10) was bearing the signature for BEST MWAICHI (DW3). He stated that he was familiar with his signature because he had worked with him for 5 years.

That P11 was bearing the signature for ISAAC KAMWIMBE (A2) that he was also familiar with his signature as he was his immediate boss.

He testified that the instructions used to come from the finance Manager for PW8 to place the funds into a fixed deposit account.

That between 2017 and 2018 they had financial problems as an institution.

That the source of funds that were deposited into the fixed deposit account were from the Ministry.

That the decision to deposit the money into a fixed deposit account was made by the Finance Manager DW3 who got approval from DW1.

That when instructions are received would go with an email which was printed out.

He further testified that P13 was sent by DW3 to the Post Master general and that it was copied to the finance director. That P13 was approved by the Post Master General. That at the time P13 was approved PW8 was the Financial Accounting Finance.

That P13 instructed PW8 to deposit the money into a fixed deposit account.

That he used to prepare daily cash position. That P14 dated 22nd September 2017, had a balance of k57, 753.00 in ABSA bank.

He also testified that apart from the written instructions that were he given to him, he also received an email that he printed out which had a request for rates and it came from DW3.

That P15 was written by DW3 to KAPESO at ABSA bank and it was copied to DW1 and A2. That P15 was requesting for money to be placed into a fixed deposit account with a favourable rate. That the bank responded that the rate would be at 7.7%. That the email was then forwarded to PW8 for his attention to carry out the instructions on placing the funds into a fixed deposit account. That the k50, 000.000 was funds for the social cash transfer fund which was meant to pay beneficiaries.

That when the money was deposited into a fixed deposit account. The beneficiaries were not paid.

In court PW8 identified P12, P10, P11, P13, P14 and DW1, A2, DW3.

In cross examination by Defence Counsel, PW8 stated that in the period 2017 and 2018 he was the financial accountant finance Zam Post. That the Zam Post board of directors passed a resolution to change signatories. He stated that in 2017 and 2018 Zam Post had board directors. That senior management was answerable to board of directors, and that they were assigned duties and responsibilities. That the main duty for senior management was to manage Zam Post and to make decisions that were for the benefit of Zam Post.

That the 3 accused persons and PW8 were employed to perform duties for Zam Post.

He further stated that on P13 risk was put into consideration. That P15 indicates a request for a fixed deposit favourable rate on a period of 7 days. That the favourable rate was granted to Zam post. That a sum of money was deposited into the Zam Post fixed deposit account.

That signatories on P10 were A2 from panel A and Mr Musonda from panel B which was signed under the authority of Zam Post.

That the instructions on P10 were that, upon maturity of the money, the money should be reverted to the original account. That upon maturity the money went into the Zam Post account and not to the 3 accused person's accounts.

That in 2018 Mrs MWENYA became the acting financial director and BRINGTON NGOMA was acting as post master general.

That after the 3 accused persons left, Zam Post continued placing money into a fixed deposit account from September 2018 to January 2019.

That to his knowledge no money was converted to the benefit of the accused persons which was meant for the social cash transfer fund beneficiaries.

That the interest that was earned was used by Zam Post and not by the 3 accused persons.

That he was aware that the money from the ministry was supposed to come with a payment schedule. That at the time the money was placed into the fixed deposit account the schedules were not sent to Zam Post.

He lastly stated that, some funds were paid to the beneficiaries and some funds were returned to the ministry.

There was nothing in re-examination.

PW9 was CHANDA SUSAN KAPESO a banker at ABSA whose duties include; account opening, service management and receiving instructions which include payment instructions from clients, or changes to mandate held by the bank.

She testified that on 18th May 2020, they received officers at the bank from ACC and DEC that went to inquire on one of their clients Zam Post and the request was for statements of a particular period pertaining to fixed deposit placements. As the bank they provided them with the information.

She told this court that when an instruction is received by the bank, it is stamped with a receipt stamp. Then the client is then called to inquire if the instruction is in order. There after the instruction is stamped again to verify the signatories and from there it is sent for processing.

She testified that the handwriting in red ink on P10 and P11 was hers. That she was familiar with A2's and A3's signatures as she had seen them on a number of instructions.

That P10 and P11 were requests by Zam Post to place funds in a fixed deposit account.

In court PW9 identified P10A-P10M and P11.

In cross examination by defence counsel, PW9 stated that, Zam Post is their client. That Zam Post had two accounts with ABSA. That P11 was a payment instruction requesting for funds to be deposited into a fixed deposit account by Zam Post from another Zam Post account.

That she did not recall receiving instruction from the acting finance Director Mrs Mulenga.

There was nothing in re-examination.

PW10 was GIDEOM CHIBWE a banker at ABSA bank whose duties include; looking at the company relationships and account opening.

He testified that Zam Post was their client. He testified that he had a bank statement for Zam Post.

That P16 was a report that showed the fixed deposits that were place on what dates, amounts and also from which account.

In court PW10 identified P16.

In cross examination by defence counsel, PW10 stated that he printed out P16 from their Ndola office. That P16 reflected the fixed deposit funds from Zam Post. That the statement was confirming the reflection on what was in the Zam Post accounts. That the funds were moved from one Zam Post account to another.

That upon maturity of the funds, the principal amount was to be returned to the original account together with interest.

That P10 (F) had the fixed period of 14 days. That on P16 the k50, 000.000 was placed into a fixed deposit account on 29th December 2017.

That on P10 (A) they received another instruction to place money into a fixed deposit account, however he could not confirm if the k50, 000.000 was the same money that was taken back to the main account. He stated that it was possible that it could be the same money as it could be confirmed by the bank statement.

That P10 G was another instruction for 14 days.

There was nothing in re-examination.

PW11 was VICTOR MUTANTABOWA an investigations officer at ACC, whose duties include; receive complaints, conduct investigations.

He testified that on 20th September 2018, ACC received an allegation that was reported for corrupt practices by named officers at the ministry and Zam Post in relation to social cash transfer funds.

That the complaint was authorised into a full scale inquiry to be conducted by ACC and DEC.

On 9th September 2020, joint investigative team started conducting the investigation.

During the investigations they came across the contract P17. That one of the conditions in the contract under clause 8.3, stated that Zam Post was to pay beneficiaries of the social cash transfer within 72 hours upon receipt of the funds from the ministry.

That the investigation at the ministry revealed that, the first disbursement according to the contract was for Luapula and Western provinces. That the disbursement of an amount k29, 000.000 plus was made between 26th September 2017 and 28th September 2017. That the money included 8% commission for Zam Post as it was stipulated in the contract.

That the investigations also revealed that not all beneficiaries were paid in the cycle for July, August 2017.

He testified that Zam Post expressed readiness to the Ministry to pay social cash transfer funds in 3 more provinces and 2 districts on the Copperbelt. As the result the Ministry added to the coverage 3 more provinces namely; Muchinga, Northern and North western provinces and 2 districts namely; Lufwanyama and Mpongwe. That following the addition of provinces and districts, social cash transfer funds of over k60, 000.00 was disbursed by the ministry for the provinces and districts which also included 8% commission for Zam Post.

He testified that the investigations revealed that Zam Post and the Ministry had challenges in executing the contract. That one of the challenges that observed was that there was delay of payments to the beneficiaries. That the 72 hours clause was not being fulfilled and that in some cases the beneficiaries were not paid at all.

That when they conducted the investigations to establish the delay in payments, the investigation revealed that the social cash transfer funds were being placed into a fixed deposit account by Zam Post at ABSA bank. That they learnt that amounts ranging from k50, 000.000 were being placed into fixed deposit account for more than 3 days by Zam Post in order to earn interest.

That investigations also revealed that the 3 accused persons whilst jointly acting together did instruct the bank by way of letters through emails instructing the bank to place funds into a fixed deposit account.

That they also conducted investigations at ABSA bank, were they established that the letters were received by the bank and the bank verified the signatures of the people that signed and the bank confirmed that indeed the instructions were issued by Zam Post, however the actors of the instructions were the signatories.

That during the investigations they retrieved a number of emails. Some emails were originated by DW3, coping in DW1 and A2.

That they established that the meetings held by Zam Post, the 3 accused persons were having meetings to have the social cash transfer funds be placed in the fixed deposit account.

He testified that P13 was originated by DW3 and that it was sent to DW1 and was copied to A2. That P13 had the rate of 7.7%, the subject was; fixed deposit rates. The period was 14 days. That the instructions on P13 were approved on 15th December 2017 by DW1.

That they established that P10 (f) the instructions dated 15th December 2017, came up as the result of the email P13.

That P15 was another email confirming the instructions on P10 (G) dated 10th January 2018.

That after the investigation was conducted they were convinced that the social cash transfer funds were being deposited into a fixed deposit account in order to earn interest.

That they also went to the Ministry of Finance to inquire whether any authority was sought from the secretary to the Treasury, because they had also established that it was only the Secretary to the Treasury who gives authority to invest public funds. That it was established that no authority was sought or given for the funds to be placed into a fixed deposit account to earn interest.

That at the ministry they established that there was no authority that was granted to Zam Post to deviate social cash transfer funds to a fixed deposit account.

That after the investigations were conducted, the joint investigative team called the 3 accused persons to be interviewed. That under warn and caution statement, A1 gave a statement and A2 and A3 opted to remain silent.

That investigative team resolved to charge and arrest the 3 accused persons with the subject offence as they were the ones that issued the instructions.

That it was their understanding that the subject offence represented 2 scenarios firstly that there was fraudulent taking. That the use of the money was converted. The intended purpose was to pay social cash transfer funds beneficiaries, however the purpose was deviated and the money was placed into a fixed deposit account. He stated that it was the reason why the 3 accused persons were charged with the subject offence. That the accused persons were charged with 13 counts which was beyond k98, 000.000, which the ministry gave to Zam Post because they treated each placement into the fixed deposit account as a separate count.

In court PW11 identified P17, P10, P11, P13, P15 and DW1, A2 and DW3.

In cross examination by defence counsel, PW11 stated that Zam Post is a body created by the government. That k98, 000.000, was disbursed to Zam Post by the Ministry. That after receipt of the money, Zam Post was to pay beneficiaries within 72 hours. That it was the obligation of the Ministry to attach payment schedules (list). That payment lists were sent to Zam Post but were not just delivered on time, which resulted into delayed payments.

That P10 the instructions came from Zam Post to the bank, requesting for the funds to be placed into a fixed deposit account.

That during the course of the investigation, he did not come across any instructions requesting for the money to be placed into any of the accused person's accounts.

That the investigations revealed that 3 accused persons were acting jointly to place funds into a fixed deposit account.

That during the investigations they did not find other placements that were made after September 2018.

That the money that was placed into a fixed deposit account was from one Zam Post to another Zam Post account.

He further stated that it was not possible to steal what is not there.

That he was not aware that the intended beneficiaries were all paid.

That the 13 counts had a total amount of k335, 000.000. That the money was stolen 13 times that was disbursed to Zam Post by the Ministry hence amounting to k335,000.000. That each time the money was placed into the fixed deposit account it amounted to theft.

That they conducted investigations on the account number 0166496152 from Barclays bank as it was then and that statements were obtained.

That the intended purpose for the money was to pay beneficiaries, however the intended purpose was deviated.

That they also travelled to 5 provinces to conduct investigations.

That the interest was to the benefit of Zam Post.

That investigations revealed that some monies were taken back to the Ministry by Zam Post. There was nothing in re-examination.

DEFENCE

DW1 was MCPHERSON MUMBI CHANDA who testified that he used to work as Post Master General for Zam Post from January 2012 to March 2019 and that his duties included; managing and controlling the co-operation on behalf of the Zam Post board, carrying out lawful instructions and directives of the board and promoting the interests of the co-operation.

That the functions delegated to him by the board and that the authority had exclusions as stipulated in section 20 (7) of the Postal services Act which included; the sale, disposal or writing off property, general variation of the salaries, wages and allowances of the employees.

He testified that Zam Post is owned by the government. That the function to manage and control the co-operation rested on his office and assisted by the directors.

That Zam Post was looking for different business opportunities in both the private and public sector.

That Zam Post engaged into a contract with the Ministry of paying social cash transfer funds beneficiaries on behalf of the Ministry. That DW1 signed the contract on 21st August 2017 on behalf of Zam Post.

That under the contract, Zam Post had the duty to pay beneficiaries of the social cash transfer funds on behalf of the ministry in line with payment instructions from the ministry in all districts of Luapula and Western provinces, to effectively manage and process the payments which ought to be paid to beneficiaries within 72 hours of receipt of the money from the ministry, to provide mobile services to the beneficiaries and also to avail monthly reports to the Ministry every 14th day of the month.

That the ministry had the obligation to avail the payment lists to Zam Post on time and also to disburse funds to Zam Post on time.

That the payment lists were supposed to be sent first to Zam Post before the funds, however what occurred on all the 3 transfers, the funds were sent to Zam Post ahead of the payment lists.

That the delay in the receipt of the payment lists took long durations to be received, ranging from one month to 2 and half months.

That on 28th September 2017, Zam Post received k27, 000.00 from the Ministry and that the money was not received with the payment lists.

That when Zam Post inquired about the payment lists from the Ministry they were told that the payment list was not finalised as they were still putting some more names of the beneficiaries. That they were also told that the payment lists would be received in to 2 to 3 weeks' time.

That Zam Post used to have management meetings which comprised, of the Post Master general as the chairman, the legal counsel, head of finance , head of operations, head of internal audit, head of human resources and head of departments.

That the duty of the legal counsel was to draft contracts, giving legal advice to management, being a secretary for board meetings and attending to litigation matters.

That during one of the management meetings, management deliberated on how to exercise custody of the funds that would not be payable to the beneficiaries during the period that the payment lists were not availed to Zam Post.

That money was sitting in the Zam Post main collection account, which had multiple deposits and payments in the course of the Zam Post operations.

That management thus considered to isolate the funds and place them into a 7days fixed deposit account in anticipation that the payment lists would have been sent by then.

That management also considered the legality of such an action. Given that the legal director was one of the directors. Further that sections 18-23 of Public Finance Act of 2004 did not apply to statutory co-operations, hence they confirmed that placing money into a fixed deposit account was legal.

He further testified that section 20 of the same Act clearly stated that; no person shall open or close a bank account without the authority from the Secretary to the treasury.

That the board of directors passed a resolution for the removal and additional of authorised signatories (P12). That DW1, A2 and DW3 were removed as signatories.

He testified that opening and closing of bank accounts and also authorisation of bank signatories were functions of the board which was delegated to management.

That for statutory co-operations it is the board that gives approval for opening bank accounts.

That statutory co-operations send bank statements to the co-operation and not to the Secretary to the treasury.

That section 20 of the same Act provides that no;

Person shall be allowed to transfer funds between 2 bank accounts held at a bank or to transfer funds in another bank without the authority of the Secretary to the treasury.

He testified that statutory co-operations have authority to move funds to finance their branches from one bank account to another without seeking authority from the Secretary to the Treasury.

That according to the elements in sections 20-23 of The Public Finance Act, management was satisfied that the accounts such as Zam Post was under the authority of the board as delegated to management. That the delegation included treasury management by way of the short term placements.

That the management thus resolved to place the funds in a fixed deposit account for 7 days. That the finance director and finance manager negotiated for favourable rates. That thereafter authority was sought from DW1 as the Post Master General as it reflected on P13 and P15. That he approved an amount of k27, 000.000 to be deposited into a fixed deposit account for 7 days and that after 7 days the amount was to revert to the original Zam Post account upon maturity. That at maturity the money was reverted to the original Zam Post account with interest.

That after maturity the Ministry was contacted to inquire about the payment lists and they were told that the lists were not ready.

That after being told that the payment lists were not ready, they placed k25, 000.000 into a fixed deposit account for another 7 days. That upon maturity the payment lists were still not available, again the funds were deposited into a fixed deposit account for 7 days. That upon maturity the payment lists were made available and only to pay out k13, 000.000 for Luapula and Western provinces.

That from the k27, 000.000 there was a balance of k14, 000.000 which was placed into a fixed deposit account awaiting payment lists.

That the payment lists were only received after 2 months and the beneficiaries were paid.

That Zam Post received additional funds of k64, 000.000 from the Ministry on 14th December 2017 and the money was not accompanied by the payment lists.

That payment lists for an amount of k31.000.000 were only sent January monthend 2018. That k33, 000.000 was placed into a fixed deposit account. That they also had excess of k13, 000.000.

That they received k50, 000.000 without the payment lists and management decided to place the funds into a fixed deposit account for 2 weeks. That k50, 000.000 was rolled over into the fixed deposit account 3times

That the rational of placing the funds into a fixed deposit account was that the funds should not be tied up when the payment lists were received. That funds were also callable within 24 hours in the event that payment lists were received.

That between 15th December 2017 and 9th January 2018, payment lists were received amounting to k31, 000.000 and the money was distributed to the paying districts and Zam Post remained with an amount of k47, 000.000.

That a placement of k25, 000.000 was deposited into a fixed deposit account. On 25th January 2018 k6, 000.000 was deposited into a fixed deposit account. Another placement of k5, 500.000 was made on 1st March 2018.

That on 28th February 2018 the Permanent Secretary wrote a letter to DW1 and copied PW1 to immediately realise the payment lists to Zam Post.

That placing of money into a fixed deposit account was done in good faith and that the money could gain some interest and add to the income of Zam Post in which the government is a shareholder.

That when the money was deposited into a fixed deposit account no beneficiary was deprived as they had not received the payment lists.

He further testified that section 90 of the Public Finance Act gives immunity from Prosecution to the Post Master General and the Postal officers.

That the total amount that was received whilst he was Post Master General was k98, 000.000 and not the k335, 000.000 as reflected on the indictment.

In court DW1 defined DDP1, DDP2.

In cross examination by the STATE, DW1 stated that he was the controlling officer of Zam Post. That section 265 of the Penal Code Chapter 87 of the laws of Zambia defines theft. That the purpose for k27, 000.000 was well known. That the social cash transfer funds was meant to be distributed to the beneficiaries and not for any other purpose. That funds were used to earn interest.

That the purpose for the money was not changed. That the ministry did not authorise Zam Post to deposit the money into a fixed deposit account. That Zam Post had the right to deposit the money into a fixed deposit account as stipulated in the Public Finance Act and the Postal services Act.

That there was no clause in the contract that authorised Zam Post to use the money to gain interest, however the board resolution gave Zam Post the right to use the money to gain interest.

That Zam Post did not seek authority from the Secretary to the Treasury to place the money into a fixed deposit account.

That all the commissions that were due to Zam Post were paid in full.

That DW1, A2, A3, MWABA MALAWO (Legal counsel), PEARL KACHINGA (head of audit), Mrs MWANZA (head of human resource), were part of the management meeting that resolved that the money should be deposited into a fixed deposit account. That Zam Post senior management is responsible for the day to day management of Zam Post. That the directors were acting on behalf of Zam Post.

That A2 took part in the signing on P10.

That he did not take time to confirm the legality of placing the money into a fixed deposit account.

That section 18 of the Public finance Act states that the Act shall not apply to Zam Post which is a statutory co-operation.

That placing the money into a fixed deposit account without consent from the Ministry was done in good faith.

That when the money was placed into a fixed deposit account the beneficiaries were not paid.

Zam Post main collection account is an interest earning account, however he did not have evidence to prove that it was indeed an interest earning account.

That he did not benefit from the interest that was earned. That it was possible to steal to benefit another person.

That DDP2 was dated 28th February 2018. That on 14th December 2017, Zam Post received k64, 000.000 from the Ministry. That when the money was received, Zam Post made a follow up on the additional payments.

In re-examination DW1, stated that sections 18-23 of the Public Finance Act did not apply to the Statutory Co-operation.

That the directors were acting on behalf of the Board and the authority was delegated.

DW2 was ABRAHAM SICHILIA YANGO a branch operations manager at ABSA bank Kitwe branch, whose duties include; receiving deposit from co-operate customers, handle payments from deduct payments.

That on unknown date in May 2022, as a bank they received summons requesting the bank to bring some documents to court. Among the documents was the 2 bank statements accounts for Zam Post main collection account and Zam Post government grant.

That the bank received 4 instruction letters from Zam Post for the placement of funds into a fixed deposit account. That the bank acted upon the instructions and the money was placed into the fixed deposit account for Zam Post.

That one of the instructions was that the funds could be called back by Zam Post at short notice and without loss of interest. That also the funds should be reverted to the original account upon maturity and that upon maturity the funds were reverted to Zam Post account as reflected on the bank statements DDP3.

In court DDP3 and DDP4.

In cross examination by the STATE, DW2 stated that the copies of DDP4 were a mirror of the original copies.

That the letter dated 28th September 2018, on the original letter had nothing written in ink, however the copy had ink written on it. That the original letter and the photocopy were at variance. That on the original letter it was not possible to tell who signed on it as it had no name, yet the copy had names of CHANDA KAPESO.

That the letter dated 30th September 2018, had the names ABRAHAM as the person who did the call back on the copy, yet the original copy was bearing no name.

DW2 stated that he was familiar with CHANDA KAPESO's signature which was appearing on the photocopies and not on the originals.

That CHANDA KAPESA did not verify the signatures on the originals. That the copy letters were not reflecting the image on the original letters.

That DW2 printed the letters and he was in custody of the letters upto the time he came to court and that when he printed out the letters they did not have the names OLIVER JOHN PHIRI. That the writings were written after they were printed out on 16th May 2022, by CHANDA KAPESA.

That he did not know the source of the funds that were placed into a fixed deposit account by Zam Post.

That he joined ABSA bank in 2001.

That the instructions to place funds into a fixed deposit account were acted upon and honoured by the bank.

That P8 was a bank statement for Zam Post main collection account which was bearing an amount of k27, 000.000 which came from the Ministry.

That P10 B was an instruction from Zam Post to place the money into a fixed deposit account.

He stated that when the money is deposited into a fixed deposit account it accrues interest.

That P8 was bearing an amount of k27, 363.578 and the purpose was for the social cash transfer funds beneficiaries.

There was nothing in re-examination.

DW3 was ISACC KAMWIMBA, who testified that he used to work for Zam Post as a finance manager from 17th August 2017 upto March 2018. That there after he was appointed as Director Operation for Zam Post upto March 2019, when he resigned.

That some of his duties included; treasury management, reviewing of financial statements.

That the Ministry and the Zam Post entered into a contract in August 2017, for paying social cash transfer funds to beneficiaries in western and Luapula provinces.

That after the contract was signed, Zam Post received the first funding amount of k27, 363.578 in September 2017. That upon receipt of the funds as the finance department they inquired about the payment lists through the office of the director social welfare. That Zam post was advised that the payment lists would be made available after 14 to 21 days.

That in the absence of the payment lists it was not possible to pay beneficiaries.

That management held a meeting, where it was resolved that the social cash transfer funds which were received in the Zam Post operational account, the funds should be isolated from the operational account.

That isolation was made by way of placing the money into a fixed deposit account for a short term.

That the finance department was tasked to engage the bank for favourable interest rates. That the interest rates were obtained and a recommendation was made to the Post Master General DW1.

That the funds that were to be placed into a fixed deposit account were re-callable at short notice upon receipt of the payment lists.

Upon receipt of approval from DW1, he gave the approval to the financial accountant OLIVER JOE PHIRI, who prepared the instructions and the instructions were taken to the authorised signatories and internal audit for validation.

That in accordance with the instructions on P10 the bank placed the funds into a fixed deposit account.

That upon maturity the funds were credited back to the Zam Post original account with interest.

That there after Zam Post received the payment list from the Ministry amounting to K13, 000.000 and the money was distributed to postal areas.

That the payment list was not equivalent to k27, 000.000, thus the same decision was made to place k14, 000.000 into a fixed deposit account.

That when the money was placed into a fixed deposit account the intended purposing of paying beneficiaries was not changed, because custody of the money remained with Zam Post.

That the main purpose of placing money into a fixed deposit account was to isolate the money from the operational account pending receipt of the payment lists from the Ministry.

That part 5 of the Public Finance Act is the only part applicable to Zam Post as it was a statutory co-operation. That section 38 of the said Act outlines how co-operations should manage its affairs. That besides isolating the funds from the Zam Post operational account, the other purpose was meant to meet section 38. Section 40 of the same Act directs the executive officer of a statutory co-operation to protect the assets of the company.

That Zam Post operates under the Zam Post operational services Act of 2009 under which it was established.

That the decision to place the money into a fixed deposit account was not made in their personal capacities but as Post Master General, Finance Director and Finance Manager.

That the interest that was accrued was for the benefit of Zam Post which is owned by the Government.

That the money was not stolen by the 3 accused persons as the money was in the custody of Zam Post.

He further testified that after the 3 accused persons left Zam Post there was evidence that the social cash transfer funds continued to be placed into the fixed deposit account as it was stated by OLIVER JOE PHIRI.

That they were suspended from work on 22nd September 2018, however the dates on DDP4 had dates from 30th October 2018 to 17th January 2018, which showed that even after they left the money continued being placed into fixed deposit account.

He also made reference to section 90 of the Postal services Act that postal officers have legal immunity, who act or omit to act during the dispensation of their duties provided it was in good faith.

In court identified P10.

In cross examination by the STATE, DW3 stated that the funds from the Ministry were not placed into a fixed deposit account.

That during the period 2017 to 2019, Zam Post was facing financial crisis.

That Zam Post could not place the money into any other account that was not accruing interest.

That the intention of the placing the money into a fixed deposit account was not to accrue interest.

That at the times the funds were placed into a fixed deposit account, Zam Post had not received the payment lists from the Ministry.

That the ministry did not terminate the contract because Zam Post failed to pay the beneficiaries.

That Zam Post was not mandated to use the clients' money without authorisation. That the authorisation to place money into a fixed deposit account was not sought from the Ministry.

That the interest that was accrued was not paid to the beneficiaries.

That Zam Post operates through its directors and managers.

That the meeting to place the funds into a fixed deposit account by management on unknown date but between 28th and 29th September 2017 was held. That the inquiry pertaining to the payment lists was made on 28th September 2017.

That the meeting to place funds into a fixed deposit account included 6 people among which was the legal counsel and Ms MWANZA.

He stated that he was not aware that the statements were recorded from the legal counsel Ms MWANZA in which she said that she was not part of the said meeting.

He further stated that the legal counsel in the said meeting advised that there was no need to seek authority from the Secretary to the Treasury to place money into a fixed deposit account.

That the money from the Ministry was strictly meant for paying the beneficiaries.

That in the contract between Zam Post and the Ministry there was no clause that authorised the Ministry to place the funds into a fixed deposit account.

That when the money was placed into a fixed deposit account the beneficiaries were not paid and the interest that was accrued was not to the benefit of the beneficiaries but to Zam Post.

That he did not know what theft by conversion meant.

That he did not give the investigative team any evidence that Zam Post continued placing the money into a fixed deposit account.

He further defined good faith to mean acting in the best interest.

That he knew that Zam Post had the capacity to sue and be sued and that directors act on behalf of Zam Post.

There was nothing in re-examination.

This marked the close of the defence case and A2 elected to remain silent which he is perfectly entitled at law.

I must state here that I received submissions from both parties which were very helpful.

FINDINGS

This is the evidence that I received. I now state my findings of fact. I find that the 3 accused persons at the time of the alleged offence were at all material times employees of Zam Post.

I find that the Ministry of Community Development and Social Services and Zam Post entered into a contract, in which Zam Post was to pay the social transfer funds beneficiaries on behalf of the Ministry. I find the coverage scope included 5 provinces namely; Muchinga, Luapula, North Western, Northern and 2 districts namely Lufwanyama and Mpongwe districts on the Copperbelt Province. I find as a fact that the 3 accused persons at the time Zam Post and the Ministry entered into a contract, the 3 accused persons were employed at the time as Post Master General, Director of Finance and Finance Manager respectively at Zam Post.

I find that upon receipt of the money, Zam Post was to pay the beneficiaries within 72 hours.

I find that the payments lists were not being sent on time to Zam Post.

I find that the Ministry gave Zam Post a total amount of k98, 000.000.

Further I find that Zam Post placed the money from the Ministry into a fixed deposit account. I find that money that was placed into the fixed deposit account gained interest.

I find that Zam Post placed the money into a fixed deposit account 13 times. That the money that was received was being rolled over into the fixed deposit. I find that the 13 counts the accused have been charged with are emanating from the 13 times the money was placed into the fixed deposit account.

I find that the contract between the Ministry and Zam Post was terminated.

I find that Zam Post was paid its commission in full.

DISPUTED FACTS

What begs to be resolved in this case is whether or not the 3 accused persons acted in the best interest of Zam Post when the decision was made to place the money into a fixed deposit account. Whether or not the 3 accused persons acted within the scope of the contract to place the money into a fixed deposit account.

Whether or not theft occurred when the money was placed into a fixed deposit account.

These are the disputed facts I have to resolve in this matter and I propose to resolve them together with the application of the law. Further, I wish to propose to resolve all the 13 counts at the same time since all the 13 counts arise from similar facts if not the same.

However, before I start resolving the disputed facts in this matter, I have found it inevitable to mention that I have taken note that Zam Post is a statutory corporation.

It is trite law that Zam Post is a person at law and it does not have a mind of its own but only acts through its appointed directors. Further were a body corporate commits an offence, the directors are liable because the intention, decision act or omission constituting the crime can be identified as the decision of the directors.

Section 371 of the Companies Act No 10 of 2017 stipulates as follows;

Where an offence under this Act is committed by a body corporate or unincorporated body, and the director, manager or shareholder of that body is suspected to have committed the offence and

is charged of that offence, that director, manager or shareholder of the body corporate or unincorporated body is liable, upon conviction, to the penalty specified for the offence, unless the director, manager or shareholder proves to the satisfaction of the court that the act of constituting the offence was done without the knowledge, consent or connivance of the director, manager or shareholder or that the director, manager or shareholder took reasonable steps to prevent the commission of the offence.

From the section above it is clear that the section is not only limited to directors but extends to managers and shareholders too.

It is also imperative to state from the onset whether or not the money that was received by Zam Post can be deemed as grant money or can fall under Part V of the Public Finance Act No 15 of 2004 in particular sections 35 to 38 which provides as follows;

Section 35;

Before any grant is released to a statutory corporation the secretary to the Treasury shall, in writing, set conditions for the appropriation of the grant and the statutory corporation shall comply with conditions.

Section 36;

The Secretary to the Treasury shall ensure that grants released to statutory corporations are appropriated for the purposes for they are released.

Section 38;

- (1) The Secretary to the Treasury shall cause to be maintained a record of all moneys invested in statutory corporations and ensure that such statutory corporations are managed efficiently so that they yield reasonable dividends to Government.*
- (2) For purposes of subsection (1), the chief executive officer of the statutory corporation shall ensure that financial statements including management reports and returns are submitted to the Secretary to the Treasury on a regular basis.*

WHAT THEN IS A GRANT?

A grant is financial assistance, given by the government to a public body or person for a specific purpose.

Section 267 of the Penal Code provides as follows;

When a person receives, either alone or jointly with another person any money or valuable security or a power of attorney for the sale, mortgage, pledge, or other disposition of any other property, whether capable of being stolen or not with a direction in either case that such money or any part thereof, or any other money received in exchange for it, or any part thereof, or the proceeds or any part of the proceeds of such security or of such mortgage, pledge, or other disposition, shall be applied to any purpose or paid to any person specified in the direction, such money and proceeds are deemed to be the property of the person from whom the money, security or power of attorney was received until the direction has been complied with.

A close look at section 36 of the Public Finance Act states that, the grant is used for its intended purpose.

From the definition and the law above it is in my considered view that the money that was given to Zam Post by the Ministry cannot be classified as grant money. As the money that was given to Zam Post was based on the contract that was entered into by both parties as it is clearly shown on P17.

Hence I find that Part V of the Public Finance Act No 15 of 2004 is not applicable in this case.

It is also imperative to put into consideration sections 90 and 10 of the Postal services Act No 22 of 2009 which talks about immunity, that an officer is entitled to immunity if;

1. He is a Postmaster General or Post officer, member of the Board or Board Committee.
2. They have performed or omitted to perform duties mandated by the Act in good faith.

In this case defence counsel in their submissions referred to a number of cases to define good faith and in applying the law to the facts, defence counsel submitted that, good faith meant that the actions of an officer ought to be based on bad faith or premised on some other arbitrary, capricious or ulterior motive or ground not supported within the enabling power. That in short, the

circumstances upon which the actions are made ought not to disclose mala fides on the part of the officer but demonstrates the highest regard for public interest.

Defence counsel clearly submitted that the actions done must demonstrate the highest regard for public interest, in my considered view I find that it was not in the public interest when the money was placed in the fixed deposit account as it has not been demonstrated that the actions taken by the Post office officers were done in the best interest of the public. Further in relation to the evidence on record nothing has been demonstrated that after the money reverted to the original account the public benefited.

I thus, find that sections 90 and 10 are not applicable to the 3 accused persons.

Having found the facts, I must now apply the law to those facts. I ask myself if on these facts the accused persons have in law committed the offence charged. Turning to the counts, if the accused acted in the way alleged then certainly they would be guilty of the offence charged. But has the prosecution established beyond reasonable doubt that the accused committed the offence?

Reverting to the case at hand, I wish to reiterate herein that the offence of theft by Public Servant has mainly two ingredients. In the case of **SIMANGO v THE PEOPLE (1974) Z.R. 198 (S.C.)** it was held that;

“The offence of theft by servant has two ingredients: there must be actual theft of money and the money must be stolen from the employer.”

However, while ingredients of this offense have been noted to be two in a general sense, the Supreme Court meant that there must be proof of ‘theft’ implying that all the elements of theft must be proved beyond all reasonable doubt. Additionally another ingredient must be proved which is separate from ingredients of theft that is to say the property stolen is the property of the employer.

The first fact in issue to be determined at this point therefore is whether or not there was theft of the money as per indictment. In order to resolve the foregoing it has become absolutely necessary to determine all the elements that constitute **theft at law**;

In the case of **Murono v The People (2004) Z.R. 207** that in criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of

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In the case of **Murono v The People (2004) Z.R. 207** that in criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of

the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt.

It follows therefore that before the trial court can be satisfied that all the elements of the offense charged have been proved or not, it must determine each and every element of the offense or offense charged in relation with the evidence on record.

It suffices to state here that the first element of **theft** is **taking** of anything capable of being stolen. In that regard section 264(1) of the Penal Code defines the Phrase "**anything capable of being stolen**" to include every inanimate thing whatever which is the property of any person, and which is movable, is capable of being stolen.

Reverting to this case, it is alleged that cash money amounting to **k335, 000.000** was stolen thus money being nonliving things is within the meaning of something capable of being stolen.

The fact in issue to be resolved therefore is whether or not there was taking of the said money within the meaning of the law?

Before answering this question I have found it inevitable to restate the definition of '**taking**' as provided for by section 265(5) of the Penal Code. It is couched in the following language;

'A person shall not be deemed to take a thing unless he moves the thing or causes it to move.'

This expression is also defined for the purposes of this offense in **Halsbury's Laws of England 3rd Ed V10 at p767 par 1484** as follows;

"The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation."

It follows from the foregoing that any slightest movement of anything capable of being stolen from one place to the other even within the premises of the owner with intent to steal suffices to constitute the offence of theft.

Given the definition of taking as cited above and reverting to the case before me, it is not in dispute that the money that was meant to pay social cash transfer funds beneficiaries was placed into a fixed deposit account by Zam Post, without authority from the Ministry as shown on P10 . This

is sufficient evidence of moving or causing the money in question to move. Consequently, I am satisfied beyond all reasonable doubt that prosecutions have proved the element of taking of the money as per indictment beyond all reasonable doubt.

IDENTITY OF OFFENDER

The crucial question that rises at this point is as to the identity of the person or people that moved or caused the money as per indictment to move or simply put who took the aforesaid money.

The prosecutions have alleged that it is the now accused persons that moved or caused the money to move jointly and whilst acting together with others unknown. In order to prove this allegation a number of witnesses were called as already alluded to who provided direct evidence of the fact that it was A1, A2 and A3 who were giving instructions to place the money into a fixed deposit account without authorization.

I have put into consideration the testimonies of A1 and A3 that the decision to arrive at placing the money into a fixed deposit account was deliberated upon in a meeting which included the legal counsel and Ms. Mwanza to only mention a few, this in itself does not render the action legal.

Further the accused persons with other persons unknown jointly and whilst acting together took steps to ensure that the money obtain a favorable interest rate upon placement of funds into the fixed deposit account as shown on P13 and P15.

In the circumstances I find evidence pointing to the fact that it is the now accused persons who jointly and whilst acting together with others unknown that moved or caused the money as per indictment to move and I find the same to be a fact.

The crucial fact in issue as I see it in this case relates to the intent (*mens rea*) of the Accused persons at the time of taking the money in question.

I must point out here that the *mens rea* for the offense of theft is clearly spelt out in section 265(2) of the Penal Code which is couched as follows;

“A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say:

- a. an intent permanently to deprive the general or special owner of the thing of it;
 - b. an intent to use the thing as a pledge or security;
 - c. an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
- an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

I wish to state here that I have carefully, considered the submissions by all the parties in relation to the evidence on record.

I wish to state from the outset that it has often been said that no one knows what is in the mind of another person until he puts his thoughts into action. It is for this reason that the intent of a person is normally inferred from overt acts. In relation to the offense of theft as already alluded to, what is to be proved is the intent to deprive the owner of his thing permanently among others.

In this case before me while the learned minds have gone extra miles to try and make cases for themselves, the intent of the 3 Accused should be resolved from overt acts. The overt acts in this case includes the act of accused moving the money from one Zam Post account into a fixed deposit account to earn interest without authorization.

In their defence A1 and A3 stated that the essence of placing the money into a fixed deposit account was to separate the money from the Zam Post main collection account.

Further I have put into consideration that with the view of separating the money, the accused persons took steps to ensure that the money obtain a favorable interest rate upon placement of funds into the fixed deposit account as evidenced on P13 and P15.

The black's dictionary law 8th edition defines wilful to mean;

The word wilful or wilfully when used in the definition of a crime means intentionally and purposely as distinguished from accidentally and does not repair any actual impropriety.

The facts of the case show that the accused persons who were in top management wilfully placed the funds into a fixed deposit account without seeking authority from the ministry on 13 different times.

I have also put into consideration that there was an instruction to revert the money to its original account which can be said that there was intention to pay back. This is no defence to the charge as it was held in the case of **EDWARD FRED MALAMA V THE PEOPLE (1978) ZR 336 (SC)**.

I wish to state here that accused seems to indicate that there was intent to pay back the money. However, this does not afford them any defence as it flies right in the teeth of section 265(2) (e) of the Penal Code which is couched as follows;

“A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say:.....in the 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 the light of this provision, the question of intent to pay back or in this case to revert to its original account therefore does not in any way afford a defence to the person who got the money. In the circumstances I am satisfied beyond all reasonable doubt that the prosecutions have proved element of theft against accused beyond all reasonable doubt.

Thus I find that there was intention to deprive the Ministry permanently.

The question that begs an answer at this point is whether the money was converted.

First and foremost it is imperative to note that the money that was given to Zam Post was meant to pay the social cash transfer funds beneficiaries on behalf of the Ministry. Hence in a nutshell the PURPOSE was to pay beneficiaries as P17 clearly provides and the same is not a disputed fact.

The agreed purpose was to pay social cash transfer fund beneficiaries. Therefore, placing the money into a fixed deposit account so that it earns interest was not agreed upon at the time the contract was executed and further no consent was obtained.

No doubt raises only one reasonable inference of that fact that accused persons have converted it to their own use. This is so because the definition of theft under section 265(1) of the Penal Code is not only limited to taking but also to conversion. For the avoidance of doubt I have decided to reiterate the definition; it is couched 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.”

By this definition, it is clear that theft in Zambia is constituted by doing either of the two things that is say fraudulent taking or fraudulent converting of the thing in question. For this purpose the section 265(5) does define the expression “taking” but it does not define the word “conversion”. I wish therefore to borrow definition of William Geldart, in his book titled **Introduction to English Law 143 (D.C.M. Yardley ed., 9th ed. 1984)**. He defined conversion in relation to goods to mean any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with the owner's right of property. It does not include mere acts of damage, or even an *aspor-tation* which does not amount to a denial of the owner's right of property; but it does include such acts as taking possession, refusing to give up on demand, disposing of the goods to a third person, or destroying them.” This definition has been quoted in Black's Law Dictionary (2004) 8th at page 1008.

It must be noted here that section 265(1) uses the phrase “converts to the use” implying that the exercise of dominion over the thing in question must relate to use by the accused in a manner inconsistent with the owner's right of the property. In this case if accused persons indeed placed the money into fixed deposit account without seeking authority certainly that was exercising dominion over the money inconsistent with the owner's right to it.

The agreed purpose was to pay social cash transfer fund beneficiaries. Therefore, placing the money into a fixed deposit account so that it earns interest was not agreed upon at the time the contract was executed and further no consent was obtained. Hence it was inconsistent the owner's right to property in this case the Ministry.

All these facts put together no doubt are sufficient overt acts from which only one irresistible inference can be drawn of the fact that accused persons intended to deprive the Ministry permanently of its money. Consequently I am satisfied beyond all reasonable doubt that there is sufficient evidence of *mens rea* for the offense of theft that is intent to deprive the owner

permanently of the money and I find the same to be a fact as it established that money was not grant money.

Thus I find that 3 accused persons did not act in the best interest of Zam Post when the decision was made to place the money into a fixed deposit account. Further I find the 3 accused persons did not act within the scope of the contract to place the money into a fixed deposit account.

To cement the above, section 270 of the Penal code states that;

when any person takes or converts anything capable of being stolen, under such circumstances as would otherwise amount to theft, it is immaterial that he himself has a special property or interest therein, or that he himself is the owner of the thing taken or converted subject to some special property or interest of some other person therein, or that he is lessee of the thing, or that he himself is one of the two or more joint owners of the thing, or that he is director or officer of a cooperation or company or society who are the owners of it.

It is in my considered view that this section is premised on the establishment of the ingredients of theft, which in the case at hand have be proved.

It suffices to state at this point that all the elements of the offense of theft have been proved beyond all reasonable doubt against accused persons. However, since the charge is one of theft by Public servant it has now become absolutely necessary to consider the other element of whether or not the accused persons were “**public servants**” within the meaning of the law.

The Penal Code does not define the phrase “**a Public servant**” instead section 4 defines “**a person employed in the public service**” which I believe is synonymous with “public servant”. In that regard “**a person employed in the public service**” has been defined to mean any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely among others all persons in the employment of **any department of the Government**, or a person in the employment of any corporation, body or board, including an institution of higher learning, in which the Government has a majority or controlling interest or any director of any such corporation, body or board.

I am further guided by Silungwe J as he was then in the case of **THE PEOPLE v MABUBA (1972) Z.R. 21 (H.C.)**. The learned Judge in that case said;

“For purposes of clarification just in case any Magistrate may be in doubt as to who should be charged under sections 243 and 248 of the Penal Code, I would direct his attention to the definition I have referred to under section 5 of the Penal Code. That definition includes persons employed in various categories. A public servant is therefore not necessarily a person who is employed under or is subject to the regulations of the public service commission or the judicial service commission. It includes as can be seen from (iv) persons in the employment of any department of the Government’. This definition would therefore cover for instance daily Government employees such as of office orderlies or messengers.”

This decision obviously was decided before rearrangement of sections in the Penal Code hence referring to different sections other than the one the Accused persons are charged with. In this case it is not in dispute that accused persons were at the time of the theft employed as Post Master general, Director of Finance and Finance Manager respectively by Zam Post which is a department of government and as such they were public servants within the meaning of section 4 of the Penal Code. I am therefore satisfied beyond all reasonable doubt that accused herein were public servants within the meaning of the law.

Notwithstanding, it is not sufficient only to prove that the offender is a public servant but the prosecution must go further and prove the last element of the fact that the property stolen is property of government which includes Local Authority or it came into possession of the offender by virtue of his employment. To complete the offense therefore either of the two things must be proved that is to say either the property stolen was property of government or the property came into possession of the offender by virtue of his employment

Reverting to the evidence in this case, it is not in dispute that the money was meant for the social cash transfer beneficiaries under the Ministry of Community Development and Social Services and was sitting in the Zam Post account at the time of theft. It was therefore property of government at the time of the theft.

in the circumstance and by the reasons of the foregoing therefore I am satisfied that the prosecution have proved the offence of Theft by Public Servant Contrary to Sections 272 and 277 of the Penal Code chapter 87 of the laws of Zambia. Consequently, I find MC PHERSON CHANDA, BEST MWAICHI and ISAAC KAWIMBA **GUILTY** and I accordingly **CONVICT** them.

IRA 14 days

DELIVERED IN OPEN COURT THISDAY OF.....2022.

KAUNDA SAKWANDA (MS)

.....

RESIDENT MAGISTRATE

