

**IN THE SUBORDINATE COURT OF THE 2<sup>ND</sup> CLASS 2PG/028/17**

**FOR THE LUSAKA DISTRICT**

**HOLDEN AT LUSAKA**

**(CRIMINAL JURISDICTION)**

**THE PEOPLE**

**VERSUS**

**GEORGE MWENYA**

**BEFORE: HON.R. MWANSA**

**FOR THE STATE: MR. MUKOMBWE, N AND MR. KAKOMA**

**FOR THE DEFENCE: IN PERSON**

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**JUDGEMENT**

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In this case the accused person stands charged with the offence of theft contrary to Section 272 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars being that the accused person on the 26<sup>th</sup> January 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did steal a bicycle valued at K800 property of Nyazi Mirriam.

When called upon to plead he denied the charge. Thereafter, I entered plea of not guilty.

I warn myself from the outset that the onus lies on the prosecution to prove their case beyond all reasonable doubt and there is no onus on the accused person to prove his innocence. Accused person is entitled to give and call evidence or say nothing at all. If he elect to remain silent this does not affect the burden on the prosecution. If after considering all the evidence in this case

there is doubt created in my mind as to the guilt of the accused person, this shall be resolved in favour of the accused persons.

I must state aptly that the standard of proof in criminal cases is beyond all reasonable doubt. This has been held in a number of judicial precedents. One such is the case of **Mwewa Murolo .v. The People (2004) 206** where the Supreme Court held inter alia that;

***“The standard of proof must be beyond all reasonable doubt.”***

The offence as provided for under section 272 of the Penal Code Chapter 87 of the Laws of Zambia is 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.”***

On the other hand section 265 (1) of the same act provides that ***“ 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 order for accused to be found guilty of this charge, the prosecution must satisfy me with each and every ingredient of the offence being;

1. That the accused person did the bicycle valued at K800 belonging to the victim
2. That the bicycle is something capable of being stolen
3. The accused fraudulently converted it to his own use other the special owner or general owner
4. That accused had the intention to deprive the owner permanently.
5. That accused person had no claim of right.



The state in this matter called 3 witnesses. **PW1** was Nyanzi Mirriam aged 35 years who testified on oath that she is a business woman who owns a shop in Garden house area right behind Garden House Motel where, she deals in motor vehicle second hand tyres, bicycle tyres as well as bicycles. She recalled that on 26<sup>th</sup> January 2017, whilst home she received a phone call from Mr. Francis Musole around 01:00hrs informing her that someone had broken into her premises and stole a bicycle therein, this prompted her to report the matter to plain view police post where officers accompanied her to the scene and found that the electric fence was cut and the bicycle was hanging on top. The said bicycle was Asama by make, silver in colour costing K800 with a serial number 00903052 and that the shop was secured with padlocks and that there was always a security guard guarding the business premises.

She identified the accused in the dock with a point and the bicycle as an ASAMA by make and silver in colour.

In Cross Examination she told the court that she did not know when the breaking of the wire fence happened however she wondered why the accused went in at night because he never worked there.

PW2 was Francis Musole Kawina who testified on oath that he was a Security Guard working under GUARDCO Security Company where he has worked for three months manning PW1's premises at Garden House.

PW2 recalled that on the 26<sup>th</sup> January 2017 being on duty guarding PW1's premises in front of Garden House Motel which has wall fence made of iron Bars and electrical wire and where tyres and bicycles are sold.

PW2 sat on the side where they have experienced a lot of burglary but he then decided to patrol the whole area and as he was patrolling he found that a thief had entered from the other side of the premises where the bicycles are kept, some bicycles were locked in whilst others were chained together the thief now the accused tried to get the two which were chained together and this

made noise and PW2 alerted. The accused then managed to get the silver bicycle which was unchained and tried to throw over the other side but it got stuck on the wires by its handles, PW2 then asked the accused what he was doing and he didn't respond, then PW2 managed to capture him and later called the other Guard manning the other side who he come and PW2 asked him for phone so that he calls PW1 and they both called her and told her what transpired. PW2 then tied the accused up awaiting PW1 to come to the scene with the police and at that point the accused kept on begging to be let go and said that he was not alone but was acting together with others.

PW1 then later come with the police officers and they apprehended the accused and took him to the police.

PW1 identified the accused positively as well as the bicycle to be silver in colour and having one of the quick release part out.

In Cross-examination he told the court he couldn't leave the place because there was no one to continue guarding the premises that is the reason he couldn't take the accused to the police immediately and that the accused was telling him that he was with other people and that he couldn't guess that the accused was alone.

The time was around 01:00hrs when he kept the accused in the guard room as they awaited for PW1 to come.

PW3 was Muleya Amos who testified on oath that he was a police officer based at Plain View Police Post and that on the 26<sup>th</sup> January 2017 whilst on duty he received a report around 02:40hrs where a Mirrian Nyanzi now PW1 reported that she received a call from her Guard that her company located in Mumbwa road near Garden Motel was broken into and a bicycle was stolen, acting on that report PW2 together with PW1 rushed to the scene and found the suspect now the accused tied up below the back with bicycle tyre tubes.



PW3 went on to check on how the accused accessed the premises and he found that he gained entry through cutting the three wires of the electric wire and he also saw the bicycle still Suspended on the wire fence.

PW3 took the accused to the police station where he interviewed him over what transpired but he didn't give satisfactory answers by saying he was only there to look for coins, this prompted him to charge the accused with the offence of theft, under warn and caution statement in Nyanja the accused denied the charge and he was arrested pending court process.

PW3 identified the accused in the dock by pointing at him and he produced the bicycle as part of the state's evidence and this was admitted accordingly.

There was nothing in Cross examination.

At the end of the case the accused was found with the case to answer and put on his defense and rights where explained according to Section 207 of the Criminal Procedures Code. The accused elected to give unsworn statement and called no witnesses.

DW1 was the accused George Mwenya who avered the court that he was only passing by around 22:00 hrs or so along the road when he was caught and was asked where his friends where and was then beaten and dragged to the guard room. He knew nothing about the bicycle and didn't even know why they apprehended him and accused him of stealing the bicycle because he was never in the premises but was only passing along the road side.

This marked the close of the defence case.

This was the gist of the evidence before me, considering the whole evidence, I found that the following facts are not in dispute; That the bicycle belonged to PW1 and that she deals in motor vehicle second tyres, bicycle tyres and bicycles. PW1's shop is located in garden motel area along Mumbwa Road and

the said premises are guarded by security firm GUARDICO particularly manned by PW2.

I also find that the following facts are in dispute; That accused actually stole the bicycle and that the accused was merely passing.

Having established the facts, I now apply the said facts to the law. I ask myself a question that did accused person commit the alleged offence. The evidence in this matter is tending to implicate him that he is the one who stole the ASAMA silver bicycle belonging to PW1. What evidence is there? There is evidence from PW1 that she received a call from PW2 that her shop was broken into and that a bicycle was found hanging by the electric fence, this evidence is disregarded as it is hearsay nonetheless, there is direct evidence from PW2 who testified that he caught the accused in the premises belonging to PW1 and that he saw him steal and throw the bicycle over the electronic wire fence but it got stuck on the by its handles, the evidence which is strengthened by PW3 who saw the accused tied up in the guard room whilst the bicycle was still hanging on the electric wire fence, the evidence which the accused chose not to discredit in cross examination.

If the accused story is to go by it makes no sense as why PW2 decided to forcibly implicate him for only passing by on the road side in that there is no motive to prove that PW2 would want to forcibly implicate an innocent person merely passing by the roadside as his job is to guard inside PW1 premises and not the outside or along the road.

The onus is not however on the accused to prove his innocence but it lies on the prosecution from beginning to the end as fortified further in ***Mwewa*** above.

This been a case of theft I am persuaded to believe that the accused had no claim of right to the charged property and such I am guided by the case of ***Andine Ali Tembo .v. The People (2011)*** that ***“The defence of bon fide***



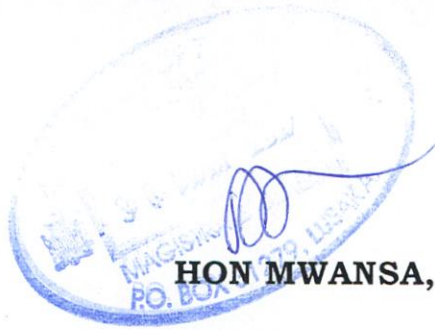
***claim of right is not confined to those cases where an accused person believes the property in question was his or has become his; it is applicable also in those cases where the accused has a bona fide belief that he has the right to keep, or deal with somebody's property."***

Therefore in this case where the accused wasn't owed by PW1, it is not proper case for him to get the bicycle to recover anything as such the last element of no claim of right is satisfied.

Furthermore the bicycle is for sale and costs K800 as such, it is something capable of being stolen, it also has PW1 as the special owner and the accused entering the premises illegally, taking it and throwing it over the fence entails that he intended to deprive the owner permanently by converting it to his own use.

As such the state has fulfilled the requirement as per **Woolmington V the DPP (1935) AC 462**, where it was fortified that ***"Throughout the web of criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the accused guilt .... If at the end if and on the whole case, there is a reasonable doubt, created by the evidence given by either the prosecution or the accused. If the prosecution has not made out the case the accused is entitled to an acquittal.***

In these circumstances before me, I find that the state has proved the case beyond reasonable doubt and there is no slight doubt or lingering doubt that the offence was committed by any other person other than the accused thus, I find the accused guilty as charged for the offence of Theft C/S272 of the Penal Code, Chapter 87 of Laws of Zambia, Volume 7, consequently I convict him accordingly.



**HON MWANSA, R**

**MAGISTRATE CLASS II**