

IN THE COURT OF APPEAL OF ZAMBIA Appeal No.168,169,170/2022  
HOLDEN AT NDOLA  
(Criminal Jurisdiction)

BETWEEN:

ACTIVE SIAMASUMO

1<sup>ST</sup> APPELLANT

MARTIN MULEYA

2<sup>ND</sup> APPELLANT

WISE SING'ANDU

3<sup>RD</sup> APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe JJA

ON: 22<sup>nd</sup> August 2023 and 31<sup>st</sup> August 2023

For the Appellant: C. Kainga-Banda, Legal Aid Counsel, Legal  
Aid Board

For the Respondent: G. Zimba, Deputy Chief State Advocate,  
National Prosecution Authority

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## J U D G M E N T

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Mchenga DJP, delivered the judgment of the court.

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Court of Appeal Act No. 7 of 2016

Cases referred to:

1. Dorothy Mutale and Richard Phiri v. The People [1995-1997] Z.R. 22
2. Naweji v. The People SJ 1981
3. David Zulu v. The People 1977 Z.R.151
4. Saidi Banda v. The People SCZ Judgment No. 144 of 2015
5. Joseph Mutenga v. The People 2008 Z.R. Volume 1
6. Green Musheka Kuyewa v. The People SCZ Judgement No. of 1996
7. Jonas Nkumbwa v. The People [1983] Z.R. 103

1. INTRODUCTION

1.1. The appellants appeared before the High Court (Maka, J.), jointly charged with one count of the offence of vandalism contrary to **Section 341D(1)(2)(a) of The Penal Code.**

1.2. They all denied the charge and the matter proceeded to trial.

1.3. At the end of the trial they were all found guilty of committing the offence and each sentenced to 15 years imprisonment with hard labour.

1.4. They have all appealed against their convictions only.

**2. EVIDENCE BEFORE THE TRIAL JUDGE**

- 2.1. The prosecution evidence was that on 10<sup>th</sup> May 2021, around 06:00 hours, Gift Mwanza a taxi driver operating in Chipepo, carried the appellants in his taxi. They had earlier contacted him by phone indicating that they were in the area buying scrap metal and in need of transport to Chisekesi.
- 2.2. When Gift Mwanza ferried the appellants, they were carrying sacks whose contents are unknown. They dropped off just before Chisekesi.
- 2.3. In the early hours of the 11<sup>th</sup> of May 2021, Adrian Maliwe a businessman of Chisekesi, who was on his way to his fields, was attracted to smoke coming from a fire.
- 2.4. When he got to the fire, he found the appellants burning an electric cable. He had a conversation with them and cautioned them. He then called the police.
- 2.5. By the time the police arrived, the appellants had fled. The police picked the cable and some cutting implements, which they took to the police station.

2.6. The appellants were later that morning apprehended by the police officer who had recovered the cut ZESCO cable. As they were being questioned, Adrian Maliwe turned up at the police station and identified them as the persons he had found burning the cable.

2.7. The appellants were also identified by Gift Mwanza at identification parade, on the 9<sup>th</sup> of July 2021.

2.8. A ZESCO employee testified that a fault was detected on the ZESCO line in Gwembe on the 11<sup>th</sup> of May 2021. It was later discovered that it was as a result of an armoured cable being cut and stolen.

2.9. He also told the trial Judge that the length and type of cable recovered by the police, was the same as that cut off from the ZESCO line in Gwembe.

2.10. In their defences, the 3<sup>rd</sup> appellant elected to remain silent.

2.11. The 1<sup>st</sup> and 2<sup>nd</sup> appellants denied being found with the cable. However, they both admitted meeting and talking Adrian Maliwe in the morning of 11<sup>th</sup> May 2021.

2.12. They said although they met him in the area where there was a fire, they are not the persons who were burning the cable as they were just passing through on their way to Munyumbwe.

### 3. FINDINGS BY THE TRIAL JUDGE

3.1. The trial Judge accepted Adrian Maliwe's evidence of the events of the morning of 11<sup>th</sup> May 2021, in preference to that of the 1<sup>st</sup> and 2<sup>nd</sup> appellants, which she found to be incoherent and not credible.

3.2. She found that even if there was no direct evidence of who vandalised the cable, the circumstantial evidence incriminated the appellants.

3.3. They were found burning a cable of the same length and type, that was cut off on the morning power was lost following the vandalising of the ZESCO line.

### 4. GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

4.1. The sole ground of appeal is that "The trial Judge erred in law and fact when he convicted the

appellants based on circumstantial evidence when the same did not attain such a degree of cogence as to enter only a guilty inference".

4.2. In support of the sole ground of appeal, Mrs. Kainga-Banda submitted that Gift Mwanza's evidence that he received a phone call from the appellants, should not have been accepted, because phone records were not produced establishing that he received a phone call from one of the appellants indicating that they were buying scrap metal in Chipepo.

4.3. She then argued that since no one saw the appellants light the fire, it was possible that it could have been lit by someone else.

4.4. She referred to the case of **Dorothy Mutale and Richard Phiri v. The People**<sup>1</sup> and submitted that the trial Judge should have drawn an inference favourable to the appellants; that is, that someone else had lit the fire.

4.5. That being the case, Mrs. Kainga-Banda argued that going by the decisions in **Naweji v. The People**<sup>2</sup>, **David Zulu v. The People**<sup>3</sup> and **Saidi Banda v. The**

**People**<sup>4</sup>, an inference that the appellants were guilty of committing the offence could not have been drawn.

## 5. RESPONSE TO THE SOLE GROUND OF APPEAL

5.1. In response to the sole ground of appeal, Mr. Zimba submitted that an inference of guilt, is the only inference that could have been drawn on the circumstantial evidence that was before the trial Judge.

5.2. He pointed out that there was evidence establishing that on the morning the ZESCO line in Gwembe was vandalised, the appellants were found burning a cable.

5.3. Mr. Zimba referred to the case of **Green Musheka Kuyewa v. The People**<sup>5</sup> and submitted that the act of running away when the appellants were found burning the cable, pointed at the guilty minds.

5.4. He also referred to the case of **Joseph Mutenga v. The People**<sup>6</sup> and submitted that the trial Judge was entitled to accept the prosecution evidence in preference for the defence evidence, having found it to be credible.

5.5. He went on to argue that even if the trial Judge did not deal with the question whether Gift Mwanza and Adrian Malilwe may have had any motive to falsely implicate the appellants, there was no evidence to warrant such a conclusion. Neither were there any reasons to think that the appellants could have been mistakenly identified.

5.6. Finally, he urged us to dismiss the appeals for want of merit.

## **6. CONSIDERATION OF APPEAL AND DECISION OF THE COURT**

6.1. The first issue we will deal with, is the submission by Mrs Kainga-Banda, that the evidence of the taxi driver, that he received a phone call from one of the appellants, should not have been received in evidence in the absence of phone records.

6.2. We are not aware of any rule of law or practice to that effect. In any case, the case against the appellants, had a lot to do with their possession of the cable stolen on the 11<sup>th</sup> of May 2021 and not the sack they carried on the 10<sup>th</sup> of May 2021.

6.3. The case against the appellants was that on the morning of 11<sup>th</sup> May 2021, a number of faults were



reported on the ZESCO line in Gwembe. It was subsequently discovered that one of the faults had been caused by the cutting of a power cable.

6.4. The same morning, the appellants were found at a place where a cable of the same length and kind that had been cut from the ZESCO line, was burning.

6.5. In the case of **Jonas Nkumbwa v. The People**<sup>7</sup>, the appellant who was facing a charge of aggravated robbery, was early in the morning, found with property that was stolen in a robbery the previous night. The victims of the robbery could not identify their assailants.

6.6. Upholding a conviction that was founded on the doctrine of recent possession, Chief Justice Ngulube, at page 102, said as follows:

"..... the possession of stolen property simplicitor does not inevitably lead to an inference that he had participated in the robbery. While we agree with that basic proposition, we are of the view, nonetheless, that the possession in this case was so recent that there could have been no opportunity for the transfer of the property from another person to the appellant."

6.7. Even though this case is concerned with the offence of vandalism, the principle set out in the

case of **Jonas Nkumbwa v. The People**<sup>7</sup>, is applicable because the case against the appellants is based on the doctrine of recent possession. The trial Judge accepted the evidence that they were found burning the cable stolen when the ZESCO line was vandalised.

6.8. Mrs. Kainga-Banda submitted that since no one saw the appellants burning the cable, it is possible that someone else could have vandalised the ZESCO line by cutting the cable.

6.9. An inference, can only be one of the many possible inferences, if such an inference can reasonably be drawn on the evidence before the court. In other words, it must be one that can be supported by the evidence.

6.10. In this case, it cannot be said that it was probable that a few hours after the cable was cut by a person not in any way associated with the appellants, the appellants found themselves at a place where that stranger was burning the cable.

6.11. We say so, having in mind that the ZESCO line was vandalised in the night and the appellants were

found where the cable was being burnt early that morning.

6.12. In any case, it is immaterial who was the actual person who set the cable on fire. The evidence of Adrian Maliwe, which the trial Judge accepted, established that the appellants were found burning the cable.

6.13. On the evidence that was before the trial Judge, it cannot be said that it was possible to draw an inference that a complete stranger cut and vandalised the ZESCO power line.

6.14. We are satisfied that the trial Judge cannot be faulted for coming to a conclusion that the only inference that could be drawn on the evidence that was before her, was that the appellants committed the offence.

6.15. We find no merit in the sole ground of appeal and we dismiss it.

6.16. However, the matter does not end there.

6.17. Even though this appeal was against conviction only, **Section 16(5) of The Court of Appeal Act** provides as follows:

"The Court may, on an appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such other order as the trial court could have imposed or made, except that- "

6.18. This provision allows us to tamper with the sentence in this case, even though the appeal was against conviction only, and we will do just that.

6.19. **Section 341D(1) (2) (a) of The Penal Code** provides that where an act of vandalism does not result in death, the penalty shall be imprisonment for a period of not less than ten years and not more than twenty-five years.

6.20. When the trial Judge was imposing the sentence, she took into account of the fact that the appellants were first offenders and were remorseful. She particularly noted that they had burnt the cable they had cut to disguise it as scrap metal.

6.21. We do not think that the fact that the appellants had burnt the cable to disguise it was an aggravating factor warranting the imposition of the severe sentence that was imposed in this case.

6.22. The sentences of 15 years imprisonment comes to us with a sense of shock as being excessive. Consequently, we set it aside.

**7. VERDICT**

7.1. The appeals against conviction are dismissed for want of merit.

7.2. The sentences of 15 years imprisonment with hard labour are set aside. In their place, we impose sentences of 10 years imprisonment with hard labour on each of the appellants. The sentences will run from the 22<sup>nd</sup> of March 2022.



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**C.F.R. Mchenga**  
**DEPUTY JUDGE PRESIDENT**



.....  
**K. Muzenga**  
**COURT OF APPEAL JUDGE**



.....  
**Y. Chembe**  
**COURT OF APPEAL JUDGE**