IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 9/35/36/2012**

HOLDEN AT LUSAKA

(*Criminal Jurisdiction*)

B E T W E E N :

LT GEN GEOJAGO ROBERT MUSENGULE **1ST APPELLANT**

AMON SIBANDE **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Wanki and Malila, JJS**
On 1st December, 2015 and .....

For the 1st Appellant: Mr. B.C. Mutale SC and Mr. K. Kaunda of Messrs Ellis & Company

For the 2nd Appellant: Mr. R. Mainza of Messrs Mainza and Company

For the Respondent: Mr. R. Masempela, Senior State Advocate, National Prosecutions Authority

---

J U D G M E N T

MALILA, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Zyambo v. The People (1977) Z.R. 153*
2. *Re Thomas Mumba (1984) Z.R. 38*
3. *Attorney General v. Marcus Kampumba Achiume (1983) Z.R.1*
4. *Saluwena v. The People(1965) Z.R. 4*
5. *R v. Lobell (1957) 1 QB 547*
6. *Musole v. The People(1963-64) Z.R. 173*
7. *Mwewa Murono v. The People(2004) Z.R. 207*
8. *Kafuti Vilongo v. The People (1977) Z.R. 423*
9. *Maseka v. The People(1972) Z.R. 9*
10. *Mushemi Mushemi v. The People (1982) Z.R. 71*
11. *Kalebu Banda v. The People (1977) Z.R. 169*
12. *Tricky v. The People (1968) Z.R.21*
13. *Chuba v. The People (1976) Z.R. 272*
14. *Sithole v. The People (1975) Z.R.106*
15. *Annamma v Chetty & Others (1944) A.C. 142*
16. *The People v. Kalenga Mufumu (1968) Z.R. 181 (H.C.)*
17. *Simutenda v. The People (1975) Z.R. 294 (S.C.)*
18. *Shreeji Investments Limited v. Zambia National Commercial Bank PLC (Appeal No. 143/2009) [2015] ZMSC 4*
19. *Habasonda v. Minister of Home Affairs & Another (2007) Z.R. 207*
20. *Felon Cholwe v. ZESCO Limited SCZ Appeal No 84/2012*
21. *Woomington v. DPP (1935) AC 462,481*
22. *Zonde & Others v. The People (1980) ZR 337*
23. *The People v. Austin Chisangu Liato Appeal No. 219/2014*
24. *Kenious Sialuzi v. The People (2006) Z.R. 87*
25. *Phiri And Others v. The People (1978) Z.R. 79*
26. *Director Of Public Prosecutions v. Ngandu And Others (1975) Z.R. 253 (S.C.)*
27. *Lemmy Bwalya Shula v. The People (1996) S.J. (S.C.)*
28. *Chizonde v. The People (1975) ZR 66*
29. *Lungu v. The People (1972) Z.R. 95 (C.A.)*
30. *Enotiades v. The People (1965) Z.R. 114*
31. *Chimbini v. The People (1973) Z.R. 191 (C.A.)*

P. 622

Legislation referred to:

1. *The Constitution of Zambia cap.1 of the laws of Zambia*
2. *Criminal Procedure Code cap. 88 of the laws of Zambia*
3. *Anti- Corruption Commission Act cap. 91 of the laws of Zambia*
4. *Mutual Legal Assistance in Criminal Matters Act cap. 98 of the laws of Zambia*

We sat with Hon. Justice Wanki when we heard this appeal. He has since retired. This Judgment is thus by majority.

At the hearing of the appeal, Mr. Kaunda, who appeared on behalf of the 1st appellant, standing in for Mr. Mutale, State Counsel, informed us that the 1st appellant had regrettably passed-on on the 21st of November 2015. We were satisfied that the 1st appellant had indeed passed away. In terms of section 335 of the Criminal Procedure Code chapter 88 of the laws of Zambia, the appeal against the 1st appellant therefore abated. However, it is inevitable to make reference to the 1st appellant in this judgment since all the counts that the 2nd appellant was charged with and convicted of, are related to those that the 1st appellant was facing.

The present appeal is against a judgment of the High Court, sitting in its appellate jurisdiction, in which it upheld a judgment of

the Subordinate Court whereby the appellants were convicted and sentenced. We shall, in this judgment refer to the Subordinate Court as the 'trial court' and the High Court as the 'lower court'.

The 1st appellant was tried and convicted on two counts of abuse of authority of office contrary to section 37(2) (a) as read together with section 41 of the Anti- Corruption Commission Act, chapter 91 and five counts of corrupt practices by public a officer contrary to section 29 (1) as read together with section 41 of the Act. The 2nd appellant was tried and convicted on five counts of corrupt practices with a public officer contrary to section 29 (2) as read together with section 41 of the Anti- Corruption Commission Act aforementioned. We must observe that the Anti- Corruption Commission Act, chapter 91 of the laws of Zambia was repealed and replaced by the Anti- Corruption Act No. 38 of 2010 which was in turn repealed by the Anti-Corruption Act No. 3 of 2012. We shall, however, continue to make reference to that law, being the applicable law at all material times.

The particulars of offence for the all counts are inter-related, as we have already mentioned, and can be summarised as follows:

In the first and second count, that the 1st appellant, being a public officer in the Zambia Army, did abuse his authority of office by engaging Base Chemicals Zambia Limited, a company in which the 2nd appellant was the Chief Executive Officer, to supply fuel and do repairs and construction works for the Zambia Army. The value involved was US$1,278,511.46 and US$1,079,888.44, respectively. In the same transactions the 1st appellant was alleged to have corruptly received, as inducement from the 2nd appellant the following: under count three, two garage doors valued at US$2,500.00; under count five, a milking tank valued at US$2,500.00; under count seven, three steel structures valued at US$13,500.00; under count nine, building materials valued at K14,561,000.00 and under count eleven, milking equipment to the value of US$23,875.00. Such inducement or reward was allegedly given to the 1st appellant on account of having engaged Base Chemicals Zambia Limited to supply or undertake construction works or repairs, as already alluded to.

In the fourth count, it was alleged that the 2nd appellant did corruptly give to the 1st appellant, two garage doors valued at US$2,500; in the sixth count, a milking tank valued at US$2,500, in the eighth ground, three steel structures valued at US$13,500, in the tenth count, building materials valued at K14,561,000.00, and in the twelfth count, milking equipment to the value of US$23,875.00. These 'gifts' were extended to the 1st appellant as gratification for having engaged Base Chemicals Zambia Limited.

A compendious narration of the facts as deciphered from the evidence of fifteen prosecution witnesses in the trial court is as follows: The 1st appellant was the Zambia Army Commander between 1st January 2001 and 30th June 2001, the material time for the alleged commission of the offences, while the 2nd appellant was the Chief Executive Officer of Base Chemicals Zambia Limited. For ease of reference, we shall hereinafter refer to Base Chemicals Zambia Limited as the 'company'. The company was engaged by the Zambia Army to supply fuel and to do repairs and construction works for the Army sometime in 2001. Prior to this, the Army was procuring petroleum products from BP, Caltex and Total, until May, 2001 when the 1st appellant issued an instruction to Col. Lwendo (PW1) the then Director of Transport, to instead procure fuel from the company. Pursuant to this instruction, Col. Njolomba (PW12) as assistant to the 1st appellant issued internal minutes to the Director of Finance authorizing payments to the company for the supply of fuel as instructed by the 1st appellant.

With regard to the records of payments from the Army to the company for the fuel, Lt. Col. Hanzuki (PW5), who was the Deputy Director Finance, in the Army in charge of payments and custody of financial records, availed to the Task Force, the letters of authority, loose minutes, authority payments and payment vouchers made to the company which were originated from the 1st appellant's office, including correspondence from the company signed by the 2nd appellant. Amongst these were letters acknowledging receipt of funds for the delivery of the fuel. He tendered in the trial court the said documents and confirmed that payments of US$67,000 and US$44,250 were made on 13th June 2001 and 18th June 2001 respectively, to the company from the 1st appellant's assistant on the instructions of the 1st appellant.

In September 2001, Richard Nyoni (PW4) a contractor, was introduced to the 1st appellant by the 2nd appellant to construct a building for a milking parlour, three calf panes and a servant's quarter at the 1st appellants farm in Makeni. The construction works commenced on the supervision and guidance of the 2nd appellant who

also made payment arrangements with PW4, for the works. It was apparent that a down payment for the purchase of equipment and material for the project had been made by the 2nd appellant who additionally supplied, through the company, the steel for the steel framed milk parlour. The 2nd appellant subsequently referred PW4 to a Mr. Simasiku (DW2) of Mazzinites Company Limited, which was believed to be a subsidiary of the company. Mr. Simasiku was to make arrangements for the payment of the balance for the construction works.

In the same year, the 1st appellant instructed the Quarter Master General for the Army, Brig. Gen. Phiri (PW2) whose duties included dealing with matters relating to accommodation and supplies, to engage the company to construct prefabricated housing units at Kaoma Barracks. Following this, on 17th October, 2001, the company gave a quotation for the project signed by the 2nd appellant and subsequently a contract commencing 8th November, 2001, was drawn up and signed between the Army, on one part, the company and Mazzinites Company Limited, on the other.

During investigations, Vincent Machila (PW13) and Friday Tembo (PW15), who were Investigation Officers at Anti-Corruption Commission compiled and submitted a report to the Task Force. The conclusion of the investigations were that the company, in conjunction with another company, Mazzinites Company Limited, supplied fuel and made construction works for the Zambia Army, and payments by the Army were made in that regard. It was further concluded that the company, through the 2nd appellant, purchased and imported milking equipment and garage doors from Kirk Wentworth of Greenwood Enterprises, South Africa, and steel structures from Pick-a-Structure, South Africa, all consigned to the Army Commander.

Between June 2001 and July 2001 as PW13 and PW15 continued with the investigation, milking equipment was found at the 1st appellant's farm while some garage doors had already been installed at the 1st appellant's property in Kalundu.

The Investigations Officers further obtained documents from the 2nd appellant's business premises. The various documents

retrieved pertained to business reconciliations between the company, the Zambia Army, PW4, the 1st appellant, Mazzinites Company Limited, the Zambia Air Force and Lt. Gen. Kayumba, among others.

After hearing of the prosecution witnesses the trial court found the appellants with a case to answer and put them on their defence. They both elected to give sworn evidence.

The defence was composed of evidence of the appellants as well as DW1, Muriel Mwango Musengule, the 1st appellant's wife, DW2, Victor Mate Simasiku, the Chief Executive Officer of Mazzinites Company Limited and DW3, Mavis Kaira, the Marketing Manager of the company.

At the close of the hearing the trial court found that on the totality of the evidence, the prosecution had established the guilt of the appellants on all the counts, beyond reasonable doubt. The 1st appellant was convicted and sentenced to three years on count one; four years on count two; one year on counts three , five and seven; and three years on counts nine and eleven. The 2nd appellant was

convicted and sentenced to six months on count four and six; two years on count eight; three years on count ten and one year on count twelve. All the sentences were to run concurrently. This effectively meant that the 1st appellant was to serve four years, while the 2nd appellant was to serve 3 years.

The appellants appealed to the High Court against the judgment of the trial court, fronting twenty- four grounds in the case of the 1st appellant and seven grounds on the part of the 2nd appellant. In its detailed and comprehensive judgment covering 133 pages, dated 16th March, 2012, the High Court upheld the convictions and sentences on all the counts, and dismissed the appeal. It is from this judgment that the appellants have now appealed.

Mr. Mainza appeared for the 2nd appellant. He relied on the heads of arguments and the list of authorities filed on behalf of the 2nd appellant on 8th April, 2015, wherein six grounds of appeal were advanced as follows:

1. **That the court below misdirected itself in law and in fact when it held that section 49(2) of the Anti-Corruption Commission Act was not in conflict with Article 18(7) of the Republic Constitution, chapter 1 of the laws of Zambia.**

2. **That the court below misdirected itself in law and in fact when it held that the trial magistrate was on firm ground when she convicted the 2nd appellant on counts three and four of the charge sheet.**

3. **That the court below misdirected itself in law and in fact when it held that there is overwhelming documentary evidence on record in support of count six and in holding that the 2nd appellant had not successfully convinced the court that the allegations against him were unfounded.**

4. **That the court below misdirected itself in law and in fact when it failed to adjudicate upon the submission by counsel for the 2nd appellant that the trial magistrate had breached the provisions of section 169(1) of the Criminal Procedure Code when she failed to set out the points for determination in her judgment.**

5. **That the court below misdirected itself in law and in fact when it held that the trial magistrate's finding in relation to counts five, six, eleven and twelve of the charge sheet was not perverse.**

6. **That the court below misdirected itself in law and in fact when it held that PW4's testimony confirmed that the 1st appellant paid the 2nd appellant for the steel structures and building materials should not be taken or considered at face value.**

The learned counsel further indicated that he would adopt the heads of arguments and list of authorities filed on behalf of the 1st appellant on 31st March 2015, in addition to those made on behalf of the 2nd appellant.

We would be failing in our duty to uphold the 2nd appellant's constitutional right to be heard on all matters he raised and on which we are competent to determine, if we did not give adequate consideration to these additional grounds and arguments. Thus it is pertinent at this stage to outline the 1st appellant's grounds of appeal which we shall consider side by side with the 2nd appellant's grounds of appeal in as far as they assist Mr. Mainza's arguments and the 2nd appellant's case. These are as follows:

1. **The lower court erred in law when it upheld the learned Magistrate's non-compliance of the Constitution and statutory provisions under Article 18 of the Constitution and the Criminal Procedure Code on ground that such misdirection was not fatal.**

2. **The court below misdirected itself in law and in fact when it held that the 1st appellant's decision in counts 1 and 2 was devoid of transparency.**

3. **The court below erred in law and fact by convicting the 1st appellant in counts 3,5 and 6 of the charge sheet and by holding that the 1st appellant failed to give a reasonable explanation notwithstanding the inconsistencies in the evidence on the record showing how he acquired the said gates and the milking equipment.**

4. **The court below misdirected itself in law and in fact by holding the trial court's finding on counts three and five that it was un acceptable to invoice materials meant for public works to private individuals regardless of a reasonable explanation being offered and the evidence confirming that the 1st appellant purchased the items in issue directly from the Republic of South Africa from his own resources.**

5. **The court below misdirected itself in dismissing the 1st appellant's contention on counts three and five that there was gross dereliction of duty on the point of investigations which should have been resolved in the acquittal of the 1st appellant.**

6. **The court below misdirected itself when it upheld the conviction of the 1st appellant in counts seven, nine, and eleven by wholly relying on the evidence of PW4, PW13, and PW15 which we have already contented above as being inadequate, contradictory and unreliable.**
7. **The court below misdirected itself by endorsing the Ruling of the trial court which accepted PW14's evidence which was devoid of materials that were used to reach her conclusion.**

The learned counsel for the 2nd appellant argued, in ground one, that section 49(2) of the Anti-Corruption Commission Act was in conflict with Article 18(7) of the Constitution which states that a

person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

Section 49(2) of the Anti- Corruption Commission Act was couched as follows:

> **"Where, in any proceedings for an offence under Part IV, it is proved that any person solicited, accepted or obtained or agreed to accept or attempted to receive or obtain any payment in any of the circumstances set out in the relevant section under which he is charged, then such payment shall, in the absence of a satisfactory explanation, be presumed to have been solicited, accepted or obtained or agreed to be accepted, received or obtained corruptly."**

Counsel argued that this provision required an accused person to render a satisfactory explanation to the court if found with a case to answer by the trial court; that under this section if an accused person elected to remain silent or elected not to give a satisfactory explanation, the trial court was entitled to presume that any payment received by him was corruptly solicited, accepted, received or obtained and would convict him accordingly. It was his contention that the court's reference to the case of **Zyambo v. The People**[1] and the consequent finding that section 49 (2) was not in contravention of

Article 18 as it merely gives an accused person an opportunity to give a satisfactory explanation if the accused is charged with an offence under the Anti-Corruption Commission Act, was a misdirection. He submitted that the provision under consideration in the **Zyambo**[1] case was section 319 of the Penal Code which requires a person found in possession of, or conveying anything reasonably suspected of having been stolen to give an account of how he came into possession of that property. It was his submission that the **Zyambo**[1] case was irrelevant to the issue in this case as section 319 which was the subject in that case was not declared as being inconsistent with Articles 18(2) and 18(7) of the Constitution. The learned counsel relied on the High Court case of **Re Thomas Mumba**[2] and urged us to adopt the holding in that case as being sound law.

In ground two the learned counsel's argument was that as the 2nd appellant had been charged with an offence under section 29(2) as read together with section 41 of the Anti-Corruption Commission Act, the prosecution had the duty to establish all the elements of the

offence as envisioned in those sections. According to counsel the prosecution did not do so.

It was further submitted that when the trial court summarized the points to be determined in its judgment, it did not mention that the prosecution needed to establish the elements of the offence as required under section 169 (1) of the Criminal Procedure Code which states that-

> **"The judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

Counsel argued that the trial court ought to have stated all the ingredients of the offence which the prosecution needed to establish under counts three and four, that is to say, that the 2nd appellant gave and the 1st appellant received the two garage doors as charged. He contended that the failure by the trial court to do so was in contravention of section 169(1), and that such failure is fatal.

P. 637

Mr. Mainza took another limb under this ground by arguing that the court below misapprehended the testimonies of the appellants regarding the garage doors. He referred us to the portions of the record of appeal where the testimonies of the appellants were recorded, and submitted that the evidence clearly showed that the garage doors which the 1st appellant purchased from Greenwood Enterprises on 10th January, 2002, are not the same as those which were supplied by Greenwood Enterprises to the Zambia Army through the 1st appellant on 14th December, 2001. It was further submitted that the 2nd appellant in his testimony denied having given the garage doors to the 1st appellant.

With regard to the installation of the garage doors, counsel submitted that the lower court misdirected itself when it relied on the evidence of PW15, as his evidence was mainly hearsay; the witness not having witnessed the purchase or the installation of the garage doors. Relying on the case of **Attorney General v. Marcus Kampumba Achiume**[3], he urged us to reverse this finding as being made upon a misapprehension of facts.

P. 638

Counsel further assailed the lower court's finding that the 1st appellant did not give convincing reasons as to why the items were addressed to him in his official capacity. This, he said, was erroneous because the appellants were not obliged to give convincing reasons to the trial court. On this point he relied on the cases of **Saluwena v. The People[4], R v. Lobell[5] and Musole v. The People[6]** where the standard of proof required of an accused person in criminal proceedings was discussed. He argued that the 1st appellant did not just raise doubt in the prosecution evidence but fully explained beyond reasonable doubt that the garage doors at his house were purchased in a separate transaction.

Similar arguments were raised under ground four of the 1st appellant heads of arguments. Counsel contented that the court's findings on the acquisition of the garage doors was a misdirection as it was based on the evidence of PW15 whose evidence was marred with inconsistency. It was submitted that the testimony of PW15 showed that he drew his conclusion that the garage doors and other items at the1st appellant premises were acquired by the 2nd appellant,

from the 1st appellant's failure to give a reasonable explanation at the time he was warned and cautioned. Counsel argued that at the time the warn and caution statement was being recorded, the 1st appellant was merely exercising his rights to remain silent. For that reason the court's reliance on that evidence was a misdirection.

Turning to the 2nd appellant's ground three, which impeaches the lower court's finding that there was overwhelming evidence to support the conviction in count six. It was counsel's submission that the 2nd appellant denied giving the 1st appellant the milking tank which PW13 testified about and produced as P68; that, the 1st appellant also denied having received it. The learned counsel submitted that under cross-examination PW13 stated that he could not establish that P68 was imported by the 2nd appellant for the 1st appellant. For that reason, counsel argued that there was no basis upon which the 2nd appellant was convicted as the prosecution lamentably failed to prove their case beyond reasonable doubt as explained in the case of **Mwewa Murono v. The People**[7] and **Saluwena v. The People**[4]. Counsel further attacked the lower court's finding that

the 2nd appellant had not successfully convinced the trial court that the allegations against him were unfounded. He referred to the testimony of PW4 and submitted that the said witness did not give any evidence that he saw the 2nd appellant supply to the 1st appellant the milking tank during the period in question. He added that contrary to the court's finding, it was clear from the record that the milking equipment, which excluded milking tanks, was imported from Kirk Wentworth to the 2nd appellant. In counsel's view the milking machines that PW13 was referring to in his evidence did not include a milking tank. He further argued that, in any event, it is not the duty of the accused person to successfully convince the court on the allegations charged against him but to merely cast a doubt in the mind of the court, as was decided in the **Saluwena v. The People**[4] case.

In further support of the 2nd appellant's arguments under this ground, in so far as it relate to the issue of the acquisition of the milking tank and milking machines, were the 1st appellant's learned counsel's argument under grounds three, four and five of the 1st appellant's heads of argument. It was submitted by the 1st appellant's

counsel under those grounds that the court, in holding that the 1st appellant failed to give a reasonable explanation on how he acquired the milking equipment, fell into error as the evidence from the prosecution exhibited a number of inconsistencies on how the items were acquired. Counsel referred to the record of the evidence of PW4, PW13 and PW15, and alleged that the trial court had elected to accept only some portion of their evidence, disregarding a substantial portion favourable to the 1st appellant. In counsel's view, PW13 and PW15's evidence was quite inconsistent regarding the acquisition of the items. It was counsel's submission that the court below had no discretion to believe one portion of the evidence over another. Hence in light of such inconsistencies, the trial court should not have relied on the whole of the evidence of the said witnesses. On this point, the case of **Kafuti Vilongo v. The People**[8] was relied on. Counsel for the 1st appellant extended this argument further under ground six of the 1st appellant's heads of arguments contending that it is the same inadequate and contradictory evidence of PW4, PW13 and PW15 on which the trial court anchored its decision to convict the 2nd appellant on counts seven, nine and eleven. Counsel relied on the case of

Maseko v. The People[9] and **Mosheim Mosheim v. The People**[10] in arguing that the trial court and the court below should have shown the reasons why the evidence which was favourable to the 1st appellant was disregarded, failure to which the conviction cannot be upheld.

The learned counsel for the 1st appellant further submitted that none of the witnesses testified positively about the milking equipment. It was argued that the prosecution, therefore failed to connect the equipment found at the 1st appellant's farm, to those listed on the charge sheet. This, according to counsel for the 1st appellant, was fatal to the prosecution's case.

It was further submitted by counsel for the 1st appellant that there was gross dereliction of duty on the part of the investigators which should have been resolved in favour of the appellants. Counsel outlined a number of incidents as evidencing such dereliction. For instance, that PW5, who identified the signature of a Major Mwewa, was not called as a witness; that the correspondence between the Directorate of Transport and the 1st appellant on the status of the fuel in the Army was not produced; that PW14 failed to produce the

material used to examine the handwriting as the handwriting expert Kirk Wentworth, who should have authenticated the 1st appellant's defence was not called. Further that PW15 failed to call any witness to testify about the Z.R.A documents pertaining to the importation and clearance of the goods allegedly consigned to the 1st appellant; that PW13 deliberately and selectively omitted to produce all the documents retrieved from the 2nd appellant's office; and finally, that PW15 conceded that he had established that the 1st appellant imported the goods in question by way of his analysis of the circumstantial evidence. Counsel argued that these incidences and omissions clearly confirmed that there was dereliction of duty which should have been resolved in favour of the 1st appellant as was held in **Kalebu Banda v. The People**[11]. Counsel pointed out that the trial court had observed that PW13 had difficulties in naming some of the milking equipment and desired that efforts should have been made to engage people with the relevant knowledge. In the view of counsel, the lower court in observing as it did, acknowledged all the incidents of dereliction but nonetheless opted to rely on the prosecution witnesses.

It was counsels' submission that the trial court made an unbalanced evaluation of the evidence of PW4, PW13, PW15 and the documents for the purchase and importation of the milking equipment in total disregard to the 1st appellant's defence.

The 2nd appellant's argument in ground four was that the lower court misdirected itself in failing to determine the submissions by the 2nd appellant which pointed out the discrepancies in the trial court's judgment. The learned counsel argued that under section 169 (1) of the Criminal Procedure Code, it is mandatory for the court to set out the ingredients of the offence for which the accused facing trial is charged. He argued that despite demonstrating to the lower court that the trial court failed to do so, the lower court elected not to address that submission in its judgment. He contended that this was a serious misdirection as the court failed to adjudicate upon all the matters before it.

Turning to ground five, the learned counsel for the 2nd appellant endeavored to point out that contrary to the lower court's holding that the findings of the trial court on counts five, six, eleven and

twelve, were not perverse, the record shows that those findings and the reasoning of the trial court were flawed and ought not to have been affirmed. To demonstrate this, counsel recounted the evidence of PW13 and PW15 regarding the documents they retrieved during investigations, which included invoices, a bank draft (P22) and ZRA documents addressed to the 1st appellant(P74 and P64). He argued that the evidence of these witnesses did not negative the evidence of the appellants as required by law. Counsel referred to the evidence of the 1st appellant on the record where he stated that he bought the milking equipment from Kirk Wentworth of Greenwood Enterprises in 2002 and not in 2001 as purported by the prosecution and produced receipts to that effect. Further, that the 2nd appellant also explained in detail the circumstances under which the company paid Greenwood Enterprises through a bank draft (P22) for the supply of milking equipment to Lt. Gen. Kayumba and not the 1st appellant.

The learned counsel also submitted that when convicting the appellants in counts five, six, eleven and twelve, the trial court was laboring under the mistaken believe that the 1st appellant was obliged

to produce all the relevant documents that he intended to use at trial, to the investigation officers. This, he said, was not what the law required of an accused person.

Under ground six the learned counsel impeached the lower court's holding that PW4's testimony that the 1st appellant paid the 2nd appellant for the steel structures and building materials he used in constructing the structures at the farm of the 1st appellant, should not be taken at face value. He argued that PW4, whose evidence the trial court relied on in convicting the 2nd appellant on counts eight and ten, conceded under cross-examination that the 1st appellant confirmed to him that he had paid for the steel structures and building materials; that, however, the trial court did not consider that part of the evidence which was favourable to the appellants as relevant. The learned counsel submitted that in terms of the principles established in the case of **Tricky v. The People**[12], the trial magistrate was obliged to consider the evidence of PW4 under cross examination notwithstanding the fact that it was unfavourable to the prosecution.

The learned counsel submitted that the lower court exhibited bias by not adjudicating upon all matters that came before it and by taking into account only evidence favourable to the prosecution. He ended his submission by positing that the 2nd appellant did offer a reasonable explanation for the transaction and did adduce sufficient evidence, through PW4, DW1 and DW2 to prove that the steel structures were purchased by Lt. Gen. Kayumba, from whom the 1st appellant bought them; that contrary to the trial court's findings, there was no evidence that the company purchased the steel structures on behalf of the 1st appellant. In support of the arguments under this ground, the 1st appellant's counsel's submission was that the 1st appellant's evidence was corroborated by DW2 and DW3 who rebutted the evidence of PW4 regarding the construction of the steel structure.

In further support of this appeal was the 1st appellant's ground seven. The thrust of the argument was that the lower court misdirected itself by endorsing the ruling of the trial court which accepted PW14's evidence. PW14's evidence related to the

identification of the signatories to documents retrieved by the Investigations Officers during investigations. According to counsel, PW14's evidence was devoid of the material which was used to reach her conclusion as a handwriting expert and therefore the trial court's acceptance of such evidence was a gross misdirection which caused an injustice to the 1st appellant. Counsel submitted that this amounted to dereliction of duty on the part of PW14. Counsel referred us to the cases of **Chuba v. The People[13], Sithole v. The People[14]** and **Annamma v Chetty & Others[15]** in supporting the submission that the evidence of a handwriting expert witness is only an opinion and, therefore, the basis on which the conclusion of the evidence is drawn should be brought before court for it to weigh its significance.

Mr. Masempela appeared for the respondent. In response to the 2nd appellant's heads of arguments, he relied entirely on the heads of argument which were filed on behalf of the respondent.

It was argued in response to ground one that section 49(2) of the Anti- Corruption Commission Act did not shift the burden of proving the case on to the accused but creates an evidential burden

of explanation. Further that, the section does not impose an obligation on the accused to render an explanation but, merely informs the accused in advance of the presumption that, where it is proved that he solicited or accepted payment and no explanation is given, he would be assumed to have done so corruptly. Mr. Masempela submitted that a person charged under the provisions of section 49(2) is not treated differently from a person charged under any other law. To illustrate his point, he referred to the cases of **The People v. Kalenga Mufumu**[16] and **Simutenda v. The People**[17], and submitted that the two cases show that the constitutional right to remain silent is fully recognized but the accused must be warned that if he chooses to remain silent in the face of strong evidence against him, an inference of guilt is strengthened. He concluded that the section, therefore, does not contravene Article 18 of the Constitution.

The learned counsel's response to ground two was that the trial magistrate did set out the ingredients of the five counts in the judgment as provided for by the statute. He argued that it was

unnecessary for the court to replace words in the statute with what was contained in the respective counts of the charge sheet.

As regards the argument that the trial court misapprehended the appellant's testimony over the purchase of the garage doors, counsel submitted that the issue was whether there was evidence that the 2nd appellant bought the garage doors for the 1st appellant. He explained that the trial court made a finding that, according to the documents from Greenwood Enterprises and Kirk Wentworth's witness statement, the 2nd appellant did buy the garage doors from Greenwood Enterprises, which were invoiced to the Army Commander as the recipient. He contended that the lower court made a significant observation when it wondered why the 1st appellant did not produce receipts of the purported purchase of the garage doors at the time of investigations. For counsel, this meant that the evidence adduced by the 1st appellant at trial did not exist at the time of investigations.

In response to ground three, counsel's short argument was that the testimonies of PW4 and PW13 as well as the documents from

Greenwood Enterprises were sufficient to convict the 2nd appellant in count six. He submitted that as already argued in ground three, Kirk Wentworth had attested to having received instructions from the 2nd appellant to invoice all the export documents to the 1st appellant. These export documents included the supply of milking equipment to the Army Commander. In counsel's understanding the milking equipment included the milking tanks. Counsel contended that the dates on the documents show that the transactions occurred on 26th June 2001, implying the transactions were within the period in question, that is, 1st January 2001 and 30th June 2001.

Mr. Masempela's argument in response to ground four was that the courts are not obliged to consider counsel's submissions. He referred us to the case of **Shreeji Investments Limited v. Zambia National Commercial Bank PLC[18]**, in which we affirmed this position and to the case of **Minister of Home Affairs & Another v. Habasonda[19]**, in support of the submission that a judgment must reveal a review of the evidence, a summary of arguments and submissions, a reasoning on facts and the application of the law and authorities to the facts. He argued that

the trial court did consider, in the judgment, whether the 1st appellant was given a milking tank as gratification and found as it did. In other words, the trial court properly did address the issue brought before it.

In ground five the learned counsel argued that the lower court was on firm grounds to have found that the trial court's findings were not perverse and that reasons for the findings were given for the convictions on count five, six, eleven and twelve. Counsel submitted that if the appellants had documents to exonerate them, it was unreasonable for them not to avail them. He demonstrated how the court went to great lengths to give a reasoned decision by bringing out the various pieces of evidence that it relied on in respect of the documents regarding the 2nd appellant's purchase of the milking equipment as alluded to in the arguments in the previous grounds.

The learned counsel's submission in response to the final ground was that the court was on firm grounds in accepting the evidence on the importation of prefabricated houses, the foreign exchange transactions and the purchase of steel structures for the

1st appellant. He argued that the lower court affirmed the trial court's rejection of the explanation by the appellants as it was clear from the evidence before the trial court that the source of the financing for the purchase of the steel building material was from the 2nd appellant through the company and the recipient was the 1st appellant.

He prayed that the appeal be dismissed for lack of merit as evidence against the 2nd appellant was overwhelming and had been proven to the standard of proof required in criminal cases.

On 16th December 2015, the 2nd appellant filed heads of argument in reply. Counsel for the 2nd appellant basically reiterated his arguments under ground one, emphasizing that section 49 (2) is in conflict with the Constitution, as an accused is legally obliged to give evidence in response to the allegation, contrary to Article 18(7) and Article 1 (3) of the Constitution. In response to the respondent's submission that a person charged under section 49(2) does not differ from a person charged under any other law, he argued that in the cases relied upon by the respondent in support of this argument, the accused persons were charged with murder under section 200 of the

Penal Code. He submitted that unlike section 49(2), section 200 does not place any obligation on an accused to render a reasonable explanation; that, in the premise, the respondent's argument is misplaced.

In reply to the respondent's arguments in ground two, counsel attacked the respondent's submission that the trial court did outline the ingredients of the offence. He maintained that the particulars that the trial court set out for counts three, five, seven, nine and eleven were not the same that he alleged the trial court failed to set out under section 169(1). The failure to set out all of the points for determination was fatal.

Regarding the respondent's argument that Kirk Wentworth's witness statement showed the 2nd appellant's dealings with Greenwood Enterprise, the learned counsel submitted that the court attached too much weight to Kirk Wentworth's witness statement, to the detriment of the 2nd appellant. He contended that in terms of section 40 of the Mutual Legal Assistance in Criminal Matters Act, chapter 98, the trial court can only convict on such a witness

statement where no evidence has been adduced by the accused to rebut the allegations contained in a witness statement received from a foreign state. For this reason, according to counsel, the court fell into grave error by accepting that statement as proof in the face of the documentary evidence produced by the 1st appellant in the form of receipts issued to the 2nd appellant by Greenwood Enterprises which established that the equipment was legitimately acquired. He argued that it was incumbent upon the prosecution to adduce evidence through the evidence of Kirk Wentworth as the author of those receipts or other witnesses in order to disprove the defence. That, the prosecution failed to do so. He urged us to note from the record that the 2nd appellant denied supplying the garage doors and that the garage doors that were at the 2nd appellant's premises and admitted into evidence as D49 were independent from those the 1st appellant purchased from Kirk Wentworth's company. The learned counsel argued that it was clear that the trial court's finding was based on its assumption and mistaken belief that the 1st appellant was legally obliged to show the proof of purchase to the investigators in order to remove suspicion and defend himself.

Counsel further argued that in the documents produced regarding the bank transactions between Greenwood Enterprises and the company, there was no indication of the 1st appellant's name. He repeated his argument that the 2nd appellant gave undisputed evidence that the payment for the milking equipment was supplied to Lt. Gen Kayumba.

The learned counsel replicated his argument under ground three of his heads arguments stating that it was clear that PW4 and PW13's evidence as well as the documents from Greenwood Enterprises did not prove that the milking tank was imported by the 2nd appellant, nor is there evidence that the garage doors were imported by the 2nd appellant for the 1st appellant. He repeated his argument under his response to ground two that the court erroneously accepted Kirk Wentworth's statement in light of the receipts produced by the 1st appellant, which he claimed were in existence before the witness statement was signed.

In response to the heads in reply to ground four, the learned counsel cited a passage in the case of **Felon Cholwe v. ZESCO Limited**[20]

arguing that since the lower court was sitting as an appellate court, it was obliged to consider counsel's submissions that the trial court was in breach of section 169 (1) of the Criminal Procedure Code. According to counsel, the respondent's argument that the court is not obliged to consider counsels submission is only tenable where the case is at trial level and not on appeal.

The learned counsel's reply to the heads of argument in response to ground five was similar in substance to his submission in his heads of arguments. We do not wish to repeat them except to state that he maintained that the prosecution did not adduce evidence to negative the appellants' explanation of how the milking tank was purchased and that the milking equipment was purchased by the 2nd appellant for Lt. Gen. Kayumba.

The learned counsel submitted that the respondent had not responded to the arguments advanced by the 2nd appellant under ground six that the lower court erred in holding that the portion of evidence of the PW4 which was in favour of the appellants should not be considered at face value. He reproduced the excerpt from the said

heads and submitted that the respondent made no attempt to respond to them.

Counsel for the 2nd appellant concluded by praying that the entire judgment of the lower court be quashed and the 2nd appellant be acquitted accordingly.

We have carefully considered the evidence on the record, the judgment of the lower court and the eloquent heads of arguments and submissions by counsel for both parties. We note that the grounds of appeal and heads of argument from both appellants' counsel reveal rather related grievances, except for a few that relate only to the 1st appellant. In order for us to give an all-rounded consideration of the issues raised, we propose to consider the 2nd appellant's grounds of appeal together with those of the 1st appellant to the extent of the latter's relevance to the 2nd appellant's grievances.

As already alluded to, the 2nd appellant's complaint under the first ground of appeal is based on the lower court's holding that section 49(2) of the Anti-Corruption Commission Act is not in conflict with Article 18 (2) (a) and (7) of the Constitution. In its judgment, the lower

court found that under section 49(2) an accused person does not lose his constitutional right to remain silent but is merely required to give a satisfactory explanation once charged with an offence under Part IV of the Act, and that in the absence of such an explanation, the presumption is that the payment was solicitated, accepted or obtained or agreed to be accepted or obtained corruptly. The 2nd appellant further assailed the lower court's reliance on the case of **Zyambo v. The People**[1], submitting that it was irrelevant to the case before us.

The issue raised by the 2nd appellant revolve around the presumption of innocence in its delicate profiles. It is a principle firmly anchored in Article 18 (2) (a) of our Constitution and reads as follows:

> **"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."**

This fundamental fair trial provision goes hand in hand with that set out in article 18 (7), as follows:

> **"A person who is tried for a criminal offence shall not be compelled to give evidence at the trial."**

P. 660

The presumption of innocence embodies the cardinal principle of criminal law jurisprudence that the burden of proof rests squarely on the prosecution; the state must prove the allegation against the accused person beyond reasonable doubt.

We have already reproduced in this judgment the provisions of section 49(2) of the Anti-Corruption Commission Act. It requires a person charged under Part IV of the Act to offer a satisfactory explanation where it is proved that he solicited, accepted or obtained or agreed to accept or obtain goods, in circumstances set out in the Act.

Quiet clearly the contention here is one of interpretation of the provisions of the law. We must resolve whether or not section 49(2) takes away, from the accused person, the presumption of innocence and the right to remain silent as enshrined under Article 18.

Despite that ringing phrase of Viscount Sanky LC in the landmark case of **Woomington v. DPP**[21], regarding that 'golden thread of English criminal law' there are numerous developments that we can point to confirming that the presumption of innocence is not cast

in stone, and it gives away in appropriate circumstances to a 'presumption of culpability' for lack of a better expression. It is an elementary point that parliament has never been averse to creating statutory exceptions that cast the burden on the accused person to disprove his culpability. For example, our penal code has given recognition to the principle of recent possession. In circumstances where a person is found to be in possession of goods reasonably suspected to have been stolen, he or she will be expected to offer an explanation. In other words, there will be a presumption that the goods were stolen by that person unless he proves his innocence. The case of **Zonde & Others v. The People**[22] is instructive in this regard.

Section 49(2) of the repealed Anti-Corruption Commission Act cap. 91, is substantially replicated in the new Act, the Anti-Corruption Act No. 3 of 2012.

More recently in **The People v. Austine Chisangu Liato**[23] we interpreted section 71(2) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 as reversing, to a certain extent, the burden of proof in matters involving forfeiture of proceeds of crime.

P. 662

Bearing in mind the supremacy of the Constitution, it goes without saying that any subsidiary legislation, be it the Penal Code, the Anti-Corruption Act or the Forfeiture of Proceeds of Crime Act, that provides for any shift in the evidentiary burden must still accord with Article 18 of the Constitution, or it will be void for being inconsistent with the constitution.

We have examined the provisions of Article 18(2) which guarantees the presumption of innocence. We agree that the provision entails that an accused person cannot be called upon to incriminate him or herself by volunteering evidence favourable to the prosecution's case on demand. The prosecution must prove the allegations. The requirement under section 49(2) of the Anti-Corruption Commission Act may indeed appear to contravene article 18(2) of the Constitution as the learned counsel for the 2nd appellant perceives it. That perception is however ~~illusive~~ illusory when one considers the provisions of Article 18 (12) of the Constitution which reads-

> **"Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of paragraph (a) of clause 2 to the extent that it is shown that the law in question**

imposes upon any person charged with a criminal offence the burden of proving particular facts."

We must add that the shifting of the evidential burden and the burden of proof in some cases is not a phenomenon peculiar to Zambia. The essence of the presumption of innocence is that the prosecution bears the burden of proving that the accused person is guilty, failure of which would warrant an acquittal. The question therefore is; does the burden of proof shift onto the accused person if he is required to give an explanation? In our considered view, merely being called upon to offer an explanation does not amount to being requested to prove that one is innocent. To begin with the requirement for the accused to give an explanation under section 49(2) emanates from the fact that there is already proof that he had solicited, obtained, or accepted a payment, which creates a presumption that he did so corruptly. The section therefore, creates a presumption that if he fails to give a satisfactory answer, then he must have received, solicited, obtained, or accepted the payment, corruptly. In the face of such an allegation, the accused has the right and not an obligation, to explain his position. The accused person,

thus still maintains his right to remain silent. At this stage the prosecution has not established that the accused person is guilty; the burden to prove so still remains on it to prove beyond reasonable doubt. Therefore, the accused person still is presumed innocent until such a burden has been discharged by the prosecution. In **Kenious Sialuzi v. The People**[24] we said that the appellant's silence did not change the burden of proof cast on the prosecution to prove his guilt beyond all reasonable doubt because there was no burden of proof cast on him to prove any particular fact. But if he does elect to remain silent, which he is entitled to, the court will not speculate as to possible explanations for the event in question. The court's duty is to draw the proper inference from whatever evidence it has before it. In **Simutenda v. The People**[17] we held that-

> **"An accused person is by law entitled to remain silent in Court. If however he wishes to rely on any particular defence, it shall be incumbent upon him to adduce evidence to support such a defence."**

Counsel relied heavily on the High Court case of **Re Thomas Mumba**[2] in which the court found section 53 of the Corrupt Practices Act No. 14 of 1980 to have been unconstitutional. This provision

compelled the accused person who elected to give evidence before court to do so on oath. The constitutional provision which was held to have been contravened gave the accused person the right to remain silent. Clearly section 53 referred to an accused person who, in the first place, has the right to be silent but has opted to give evidence but is compelled to give that evidence on oath. We do not find the case of **Re Thomas Mumba**[2] to be of any assistance to the 2nd appellant's argument. Being of that persuasion, we hold that ground one has no merit and we dismiss it.

We now consider ground two. The 2nd appellant's contention is that the prosecution did not establish all the elements of the offence under counts three and four and that therefore, the lower court misdirected itself in holding that the trial court was on firm grounds in convicting the 2nd appellant on those counts. The two counts relate to the giving by the 2nd appellant and the receiving by the 1st appellant of the two garage doors.

The learned counsel for the 2nd appellant argued that the trial court, in summarizing the points for determination under these

counts, did not state all the ingredients of the offence which the prosecution needed to establish. It was alleged that the trial court was in contravention of section 169(1) of the Criminal Procedure Code. This section states as follows:

> **"The judgment in every trial in any court shall, except as otherwise expressly provided by this Code, be prepared by the presiding officer of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

We have perused the judgment of the trial court. At page 11 of the said judgment the court considered counts three among others, and stated as follows:

> **"To prove the offences under these five counts the prosecution must establish that at the time in question;**
>
> **(1) The accused was a public officer;**
>
> **(2) Who either by himself, or by or in conjunction with any other person;**
> **(3) Corruptly solicited, accepted or obtained or agreed to accept or attempted to receive or obtain;**
>
> **(4) From any person for himself or for any other person;**
>
> **(5) Any gratification;**

(6) As an inducement or reward for doing or forbearing to do, or for having done or forborne to do anything in relation to any matter or transaction actual or proposed;

(7) With which any public body is or may be concered.
The above are the ingredients of the offences in counts 3, 5, 7, 9and 11that the prosecution must establish in order to prove the guilt of the first appellant."

At page 13 of the same judgment, the learned magistrate stated as follows:

"With regard to the second accused who stands charged under counts 4, 6, 8, 10 and 12, the prosecution must establish each and every ingredient of the offences charged. All the counts charged the second accused with corrupt practices with a public officer (arising from different facts) contrary to section 29(2) and section 41 of the Act.....To prove this offence the prosecution must prove each and every ingredient and as such must establish that –

(1) A2 by himself or by or in conjunction with any other person

(2) Corruptly gave, promised or offered

(3) Any gratification to

(4) Any public officer A1 in this case

(5) Whether for the benefit of A1 or any other public officer

(6) As an inducement or reward for doing or forbearing to do anything in relation to any matter or transaction, actual or proposed

(7) With which any public body is or may be concerned."

P. 668

We find that the trial court in its judgment did state the ingredients of the offence to be proved by the prosecution and went further to determine those elements with the facts of the case in arriving at its reasoned decision. We agree with Mr. Masempela that it was unnecessary for the court to replace words in the statute with the words in the facts or the particulars of the offence. The court's analysis of the points for determination was clearly in reference to the respective counts and particulars in the charge sheet. The trial court having stated the particulars of the offence for the charges and ingredients of the offence, and which points it considered in making its decision, satisfied the requirements under section 159(1). We, therefore, cannot fault the lower court for having upheld the trial court's conviction on counts three and four. For the reasons we have stated, this argument has no merit and we dismiss it.

The second grievance raised by the 2nd appellant under this ground, is that the court below misdirected itself in holding that the trial court was on firm grounds in convicting the 2nd appellant. In counsel's view, the lower court in coming to its conclusion

misapprehended the testimonies of the witnesses regarding the acquisition of the garage doors which were found at the premises of the 1st appellant and produced in court as P64. It was argued that as a consequence of this misapprehension, the lower court upheld the trial court's finding that the prosecution established their case beyond reasonable doubt as regards these counts.

The crux of the contention is that the 2nd appellant denied having purchased the garage doors for the 1st appellant as the garage doors which were at the 1st appellant's Kalundu house were purchased by the 1st appellant himself from Greenwood Enterprises on 10th January 2002. According to counsel, the 1st appellant had produced, as proof of the purchase, a receipt dated 10th January 2002 and exhibited as 'D33'.

The evidence of PW13 and PW15, as the investigation officers who interviewed the appellant regarding the purchase of the garage doors, was crucial to the lower court's findings. We do not appreciate counsel's submission that the evidence of PW15 was hearsay as he did not witness the purchase and the installation of the garage doors.

PW15 was testifying in his capacity as an officer who investigated the acquisition, importation and installation of the said doors. His testimony is based on that investigation. In any case, the arguments here are attacking the findings of fact before the trial court. We have on many occasions considered the circumstances under which an appellate court could and should reverse findings of fact of a trial judge. Some of these cases are **Phiri and Others v. The People**[25] and **Director of Public Prosecutions v. Ngandu**[26]. What we said in these cases is to the effect that an appellate court, which only has the transcript of evidence before it, and which does not have the advantage that the trial judge had of seeing and hearing the witnesses, should not lightly interfere with findings of the trial judge. This is the position of the law and we abide by it.

The main contention, as we see it, is on the credibility of the prosecution witnesses as against the defence witnesses. In **Lemmy Bwalya Shula v. The People,**[27] following our holding in **Chizonde v. The People**[28], we held that an adverse finding as to credit is a finding that the witness is not to be believed. Such a finding is in turn one of the

factors which will influence the court in its decision as to which of two conflicting versions of an affair it will accept, and that such a finding as to credit may be based, for instance, on discrepancies in the witnesses evidence or on a previous inconsistent statement or on proved bad character or an evasive demeanor and so on. If a finding as to credit is based on demeanor, such finding cannot be supported in the absence of evidence on record.

We have taken note that in resolving the conflicting evidence before it, the trial court did point out the weaknesses of the appellants' evidence and the reasons for accepting the prosecution witness' evidence. As rightly pointed out by the lower court, the record shows that there was evidence before the trial court that garage doors were purchased from Kirk Wentworth as confirmed in, P74, Kirk Wentworth's witness statement and that evidence was adduced that the company made payments for the purchase of the garage doors for which export documents were invoiced directly to the 1st appellant as Army Commander by a document date 21st May, 2001. In summation the trial court accepted the evidence of the

prosecution witnesses and rejected the evidence of the appellants regarding 'D33'.

It does not seem to us from the record that there was a misapprehension of the evidence of the appellants by the lower court. Its findings were on a proper and well-balanced view of the whole of the evidence on the record before it.

The additional arguments by counsel for 1st appellant equally attack the findings of the lower court on the issue of the garage doors. The twist to the argument here is that the evidence of PW13 was contradictory, hence the court should have resolved the conflict in favour of the appellants. What counsel was referring to was PW13's statement in cross examination as reflected in the record of appeal, when he said-

> **"Wentworth mentioned that he supplied accused 1 with security gates. He said he supplied one garage gate to accused 1 which was paid for by accused 2."**

And at page 201 when he said-

> **"I did not establish that P68 was imported by accused 2 for accused 1. I established this circumstantially"**

P. 673

What is clear is that PW13's investigations revealed to him that the garage doors were supplied by Kirk Wentworth to the 1st appellant, and that the same were paid for by the 2nd appellant through the company and consigned to the 1st appellant. And his conclusion was drawn from the totality of the evidence gathered during investigations, from which the learned trial magistrate drew her conclusions. We see no contradiction in PW13's testimony. We do not see how the argument advanced by counsel assists the 2nd appellant, because, clearly counsel deliberately isolated PW13's statement from the totality of the evidence. As we have already pointed out, there is no dispute that garage doors were purchased by the 2nd appellant. What was in dispute was whether the garage doors found at the 1st appellant's premises by PW13 and PW15 were the same ones purchased by the 2nd appellant through his company and delivered to the 2nd appellant or were otherwise purchased through D33 as evidenced by the appellants. We have already stated that the whole issue is on the credibility of the witnesses, which point we have already determined. Based on our holding earlier, this argument has

no merit. In our view, the lower court had no reason to interfere with the findings of the trial court. We dismiss ground two in its entirety.

We now turn to ground three which attacks the lower court's holding that there was overwhelming evidence to convict the 2nd appellant on count six. The point taken by counsel was that the prosecution did not prove that the milking tank which was retrieved by PW13 and PW15 from the 1st appellant's Makeni farm and produced as P68 was imported by the 2nd appellant for the 1st appellant. He forcefully argued that the milking machines which were imported by the 2nd appellant from Kirk Wentworth did not include a milking tank which PW13 referred to in his testimony, in that by definition the term 'milk machines' is not synonymous to milking tanks.

Having gone through the entire record and seen the documents produced before the trial court, we observe that it is not in dispute that following investigations conducted by PW13 and PW15, milking equipment, including a milking tank marked as P68, were recovered at the 1st appellant's in-laws in Chisamba. The dispute, as we see it,

was whether or not the milking tank retrieved from the 1st appellant was that which was purchased by the 2nd appellant through the company. Hence the question to determine under this ground is whether or not there was overwhelming evidence to support the findings of the trial court that P68 was purchased by the 2nd appellant through the company; and whether or not the lower court was on firm grounds for not interfering with those findings of the trial court.

We remind ourselves again that the appellate court should not lightly interfere with findings of fact. In **Lungu v. The People**[29] we stated that-

> **"when one comes to an inference of fact which is not a matter of the construction of statutory language, but is a question of ordinary logic, the position seems to us to be far clearer; in such cases the inference is a conclusion arrived at from a consideration of the primary facts, and this conclusion is itself one of fact. Such a conclusion will only be set aside by an appellate court if it has been arrived at 'without any evidence, or on a view of the facts which could not reasonably be entertained."**

Further, the trial court which had an opportunity to view the credibility of witnesses has advantage over the appellate court and

would only overturn a decision made by that trial court if such findings were made without any evidence or on the wrong apprehension of facts. In **Enotiades v. The People**[30], it was stated as follows:

> **"When as often happens much turns on the relative credibility of witnesses who have been examined and cross examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them, it is often very difficult to estimate correctly the relative credibility of the witnesses from written dispositions; and when the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is and must be guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not and these circumstances may warrant the Court in differing from the judge even on question of fact turning on the credibility of witnesses whom the Court had not seen."**

We must, therefore, determine if the findings were made without any evidence or on the wrong apprehension of facts or if there were any circumstances apart from credibility of the witnesses that may have warranted the lower court to differ from the trial court's

findings. The evidence before the trial court was that P74 revealed that milk equipment, including milking tanks, were purchased from Greenwood Enterprises on behalf of the 1st appellant by the company sometime in 2001. Further, the invoice for milking machines produced in the record of appeal which is to the value of US$18,875.00 included milking tanks. PW10, the Barclays Bank's Corporation Manager's assistant confirmed the payment of US$18,875.00 made through a bank draft to Greenwood Enterprise by the company. P64 was the Bill of Export, dated 26th June 2001, indicating the exportation of the same equipment to the 1st appellant. In the face of such overwhelming evidence as to the purchase and importation of the equipment, the appellants were placed in a position of defending themselves. According to the 1st appellant's testimony, he bought the milking tank from Kirk Wentworth in 2002, while the 2nd appellant totally denied his involvement in the purchase of the tank. The trial court here was faced with a duty to assess the evidence and draw an inference from the facts before it as well as consider the credibility of all the witnesses before it. We find that

there was no misapprehension of facts by the trial court hence the lower court had no basis upon which to overturn that decision.

The learned counsel further argued that the appellants proved on the balance of probabilities that they did not commit the offences. We do not agree with that submission. The record shows that other than denying the allegations, the 1st appellant sought to persuade the trial court to believe that P68 was bought in 2002, and that the tank found at the 1st appellant's in-laws's premises was not a milking tank. The learned counsel further brought into contention that a milking tank worth US$2,500.00 was not mentioned in the documents before court. However, we note from the evidence of both PW13 and PW15 that in addition to P68 they referred to a number of milking equipment that was found already assembled at the 1st appellant's Makeni farm. The trial court found that the two witnesses were not experts in milking equipment and were thus not expected to give the specific details of such equipment. Thus, the trial court rightly considered that the appellant's testimony fell short of casting any doubt upon the prosecution's evidence. We must state here that

the evidence from both parties is to be weighed against each other. It is evident from the record, and we cannot deny that the trial court thoroughly reviewed and took into account evidence of both parties in arriving at its decision. We are satisfied that the trial court was on firm grounds to have rejected the appellants' defence and convicted them on the basis of the evidence before it. We, therefore, agree with the lower court for having upheld the trial court's findings.

We believe that the trial court meticulously reviewed the evidence before it and found that the 1st appellant failed to give a reasonable explanation of how he acquired the milking tank. In light of the evidence from the prosecution witnesses as we have explained it, we do not find any reason to overturn the lower court's holding under this ground. Ground three, therefore, has no merit.

Given what we have stated already, ground three of the 1st appellant's grounds of appeal as it relates to count five and six equally has not merit.

P. 680

Ground four is closely related to ground two. The learned counsel alleged that the lower court contravened section 169(1) of the Criminal Procedure Code by its failure to adjudicate over the 2nd appellant's grievance that the trial court determined the matter without indicating in its judgment what points were to be proved by the prosecution, and further that it did not give reasons for not accepting the appellants defence with regards to count six. The ground in the lower court was couched as follows:

> **"The court below misdirected itself in law when it failed to state the reasons why the court had elected not to accept the evidence of the 1st accused and 2nd accused in rebuttal to the allegations in count 6."**

In dealing with the issue raised before it, the lower court in its judgment, had this to say-

> **"We find that the learned magistrate's findings were not perverse as she gave reasons on how she arrived at her decision."**

The lower court then went further to quote from the trial court's judgment a portion where it made a finding that the 2nd appellant bought equipment for the 1st appellant through the company. To us this was sufficient to deal with the concerns raised by the 2nd

appellant in this ground and we have no intentions of upsetting the finding. This ground of appeal therefore has no merit.

The arguments under ground five originate from counts five six, eleven and twelve. The learned trial magistrate considered these together as they were from the same transaction; that is; the 2nd appellant giving the 1st appellant a milking tank and milking equipment as gratification for engaging the company's services.

We have already dealt with the 2nd appellant's discontent regarding the trial court's holding in counts five and six, under ground three. Therefore, we will restrict ourselves to counsel's contention in relation to counts eleven and twelve, the gist of which is that the lower court misdirected itself in holding that the trial court's findings were not perverse. Counsel argued that the prosecution did not adduce evidence to prove their case or negative the evidence of the appellants on how the milking equipment was acquired. Furthermore that, the trial court was labouring under the impression that the appellants were obliged to produce all the

relevant documents that were intended to be relied on at trial to the investigations officer.

The record shows various transactions and documents connecting the appellants to the purchase of the milking equipment. These were part of P74 and are in the record of appeal. Among them were; emails exchanged between the company and Greenwood Enterprises between 18th April, and 20th April, 2001 over the purchase of milking equipment which were intended to be consigned to the 1st appellant; an invoice for milking equipment worth US$18,000 which was invoiced to the 1st appellant on 7th May, 2001; a bank draft of US$18,000, P22 dated 18th May 2001 which was signed by the 2nd appellant, being a payment for milking equipment by the 2nd appellant; the Nedbank documents showing the payment of the same amount of US$18,000 as shown on the bank draft; and export documents dated 24th May, 2001 and another dated 26th June, 2001, for milking equipment from Greenwood Enterprises to the 1st appellant in his capacity as Army Commander. Coincidentally, various milking equipment were found at the 1st appellants premises during investigations. Under the weight of such evidence counsel

argued that during their defence the appellants explained how the milking equipment was acquired and that the appellants were not required to give an explanation at the earliest opportune time.

We have already covered this part of the argument and we agree that there is no law that requires an accused person to avail, to the investigation officer, documents which he intends to rely on at trial. But, we wish to emphasise that as much as the appellants had no burden to prove their innocence, their failure to offer a satisfactory explanation was to their own detriment. Moreover, despite the existence of D33 on which the appellant solely relied for their defence, there was overwhelming evidence that milking equipment was purchased prior to 2002. The trial court scrupulously examined these pieces of evidence and came to the conclusion that-

> **"Having said all that, I find that when page 11 and 2 of P74 are read together with P22, P38 and page 7 of P64 there is no doubt that A2 bought the equipment for A1 through Base Chemicals. Upon consideration of the prosecution evidence and having not been provided with reasonable explanation from the defence I am satisfied that the charge under counts 5, 6, 11 and 12 have been established against A1 and A2 beyond all reasonable doubt."**

For our part, we are satisfied that the trial court correctly came to the conclusion that proof beyond reasonable doubt of the appellants' guilt had been attained. We, therefore, have no intention whatsoever of disturbing the finding of the lower court in upholding the trial court's findings regarding counts eleven and twelve. This ground is bound to fail.

We now turn to ground six of the appeal. The learned counsel impeached the lower court's holding that the evidence of PW4 regarding the purchase of the steel structures should not be taken on face value.

We have looked at the reasoning advanced by the lower court for its holding and also the relevant portions of PW4'testimony from the record of appeal. According to the testimony of PW4, between June and October 2001, he constructed a steel structure for a milk parlour at the 1st appellant's Makeni farm and that the steel frames, together with other materials he used were supplied by the 2nd appellant through the company. Throughout his testimony in chief, PW4 repeatedly mentioned the 2nd appellant as having provided the

steel structures and the building materials. He in fact stated that he had been called by the 2nd appellant to inspect the same steel structures at the time they had just been delivered at the company's registered place of business.

From counsel's argument we fathom that the bone of contention is that at some point in cross-examination PW4 stated that the 1st appellant confirmed to him that he paid the 2nd appellant for the steel structures and building materials for his projects. His argument is that this evidence should have been accepted and relied on by the court in support of the appellant's defence.

The learned counsel extracts of PW4's statement are as follows:

> **"I do know whether accused 2 was getting money for supplies from Gen. Kayumba."**

> **"The only time I discussed something with accused 1was when works at his farm were going on slowly and he was concerned. He complained and said accused 2 should bring materials as he had paid for them."**

P. 686

"I do not know whether structures put up at Gen. Kayumba's farm were paid for.....I recall accused 1 being frustrated at pace of work even though accused 2 had been paid."

What we see from these extracts is far from being a confirmation that the 1st appellant paid the 2nd appellant for the steel structures. It seems to us, as we have gathered from the totality of PW4's testimony, that he was not sure if the steel structures which were supplied by the 2nd appellant were paid for. Further that the 1st appellant in complaining about the slow pace of work stated that "the 2nd appellant should bring materials as he paid for them". In re – examination, he stated that he did not know what money the 1st appellant was referring to as being paid. This, in our view, is not the same thing as confirming that the 1st appellant had paid the 2nd appellant for the steel structures.

PW4's testimony also shows that a number of materials were required for the building of the milking parlour and that there was an erratic supply of such materials, hence the 1st appellant's complaints. Our view is that there was nothing favourable to the appellants in the portion of testimony extracted by counsel.

Moreover, PW4's testimony was only but a part of the evidence that the trial court took into account to support its verdict on the charges in counts eight and ten regarding the transactions surrounding the purchase of the steel structures. The evidence as marshaled by the court encompassed evidence from PW4, PW6, PW10, PW13 and PW15. The sequence of events can be traced as far back as May 2001 when PW10 was instructed by the company through the 2nd appellant to issue a bank draft dated 18th May, 2001 to Pick-a- Structure for R150,000.00 and a deal ticket for a receipt dated 21st May, 2001 for the Kwacha equivalent of R150,000.00, that is K66,000,000.00. This ties in with the company's accounts statements, P36 which recorded the company's transaction with Pick-a-Structure to the cost of R150,000.00 as well as indicated various payments to PW4, thereby corroborating his evidence. As we see from PW6's evidence, in September 2001, steel structures had been brought to the Zambia Air force through the 2nd appellant for the construction of classrooms and a gym. However to his knowledge a gym was never constructed. This is the evidence that the pieces of evidence the trial court relied on when it found that-

P. 688

"When exhibit P21, P23 and P24 are read together with page 1 of P36 it becomes clear that Base Chemicals made payments to purchase steel structures for A."

Further P64 showed that the steel structures from Pick-a-Structure were consigned to the Air force Commander. PW13 and PW15's evidence was that the steel structures they saw at Lt. Col Kayumba's farm were similar to those at the 1st appellant's farm and at the Air Force academy in Livingstone.

Counsel contested the trial court's holding, discarding the appellants' explanation for the transactions relating to the charge for the steel structures for being unreasonable. Counsel viewed that as a misdirection. As we have already outlined, the defence was based on the evidence of the appellants themselves, DW1 and DW3, and was to the effect that the steel structures and building materials were paid for by the 1st appellant and Lt. Gen. Kayumba.

It is abundantly clear from the record that the learned trial magistrate did carefully examine the appellants' defence and found

that the appellant had not offered a reasonable explanation for the transactions. Notably, the 1st appellant's defence was through the production of receipts to support the claim that he bought the steel equipment from the company. A perusal of the record shows that the receipts referred to were issued by him to Handyman's Paradise and Kleenline Chemicals Products Limited and not the company.

Since the 2nd appellant's defence in relation to the charges discussed under this ground, was somewhat different from that of the 1st appellant, we will restrict ourselves to the 2nd appellant's version of the defence. This was that in May 2001, Lt. Gen. Kayumba paid for the steel structures through his company Magnvolt and was refunded for the uncollected residue of the structures. Looking at the founding statements which the trial court relied on, we agree with the lower court's finding that the said company was incorporated in August, 2001, after the Pick-a-Structure transaction was done. There was therefore no evidence to support the 2nd appellant's claim. In addition, there was clear evidence, as we have pointed out already,

that the purchase of the steel structures was done by the company. We find that the 2nd appellant's explanation was not plausible. The only reasonable inference to draw from the totality of the evidence was that drawn by the trial court.

We, therefore, uphold the lower court's finding that the inference drawn by the trial court was the only reasonable inference which could be drawn from the facts before it. Consequently, we have no reason to interfere with those findings in this respect.

On a totality of the evidence, we find that the lower court was on firm grounds in upholding the trial court's finding that the prosecution did successfully prove its case beyond a reasonable doubt, and upholding the convictions of the 2nd appellant. We therefore uphold the conviction and confirm the sentence imposed by the learned trial court. For the avoidance of doubt, we confirm the conviction of the 2nd appellant on the five counts of corrupt practices with a public officer contrary to the provisions of the Anti-Corruption Commission Act. We also confirm the sentence of six months on

counts four and six; two years on count eight; three years on count ten and one year on counts twelve. All these sentences shall run concurrently from today.

.....
G. S. Phiri
SUPREME COURT JUDGE

.....
Dr. M. Malila, SC
SUPREME COURT JUDGE