

IN THE SUBORDINATE COURT OF THE SECOND CLASS

2SPB/009/2017

FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

THE PEOPLE

VERSUS

MWANSA MAKUSULI ALIAS ABIGAIL CHIKABILO

BEFORE: HON. A.C.MWEENE

FOR THE STATE: MR. B.SINYENGO

FOR THE DEFENCE: IN PERSON

JUDGEMENT

STATUTES REFERRED TO

1. The Penal Code Chapter 87 Of the Laws of Zambia.
2. The Criminal Procedure Code Chapter 88 of the Laws of Zambia.

CASES CITED

1. Mwewa Murono .v. The People(2004) ZR 206 (SC)

In this case accused person stands charged with one count of theft by agent contrary to section 280(b) of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence are that accused on the 16th January, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did steal 45 cases of assorted beers valued at K7, 095.00 which was entrusted to her by Etaya Sakala to sell on his behalf and return the proceeds thereof.

When called upon to plead, accused denied the charge and thereafter, I entered a plea of not guilty.

I warn myself from the outset that the onus lies on the prosecution to prove their case beyond all reasonable doubt and there is no onus on the accused person to prove ^{her} his innocence. Accused person is entitled to give and call evidence or say nothing at all. If ^{she} he elects to remain silent this does not affect the burden on the prosecution. If after considering all the evidence in this case there is doubt created in my mind as to the guilt of the accused person, this can be resolved in her favour.

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

"The standard of proof must be beyond all reasonable doubt."

The offence as provided for under section 280(b) of the Penal Code Chapter 87 of the Laws of Zambia is as follows;

"If the thing stolen is any of the things following, that is to say:

(b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in

cases, Heineken 5 cases, Red bull 1 case, Windhoek lager 4 cases, Chivas whisky 5 bottles, Glen 12 years 1 bottle, Southern comfort 5 bottles, Amstel lite 1 case, Amstel lager 1 case, Jameson spirit 5 bottles and Absolute vodka all together valued at K18, 745.00. They also agreed that she was going to collect the said beer the following day. On 27/01/17, she phoned him telling him that she was unable to go and collect the beer but that he books a taxi and take the beer to the U.T.H club. At around 11.00 hours together with Erick, they booked a taxi and took the beer to the said club and they found her in the same taxi she was with at Courassel shopping mall the previous day. They offloaded the beer assisted by the waiters. Thereafter, Abigail entered into an office and when she came out, she told them to wait as the manager wasn't there. Later on she went into the office again and she came out with a receipt and that the cash wasn't available but that they would collect a cheque on 30/01/17. They left thereafter and on 30/01/17, he phoned her finding out if the cheque was ready but she told them to go and collect it as she had already spoken to them. They went to the said club but they discovered that the cheque was showing K11, 650.00 instead of K18, 745.00. He asked the manager why the amount was less and he was told that they had returned some beer the same day to Abigail as it was too much. The manager asked him if he wasn't aware to which he responded to the affirmative. He then phoned Abigail telling her that the manager had refused to release the cheque and when she went there, he asked her why the money was less to which she responded that she had supplied the other beer somewhere else but she refused to show him where she took it and told him not to worry as by the time the cheque would mature, even the other money from where she supplied the other beer, it would be ready. He collected the cheque from U.T.H club and it later cleared. He said there was a balance of K7, 075.00 which she promised to give him in 3

days which hasn't been paid to him to date. He said she got the said beers so that she supplies to the said U.T.H club and the proceeds thereof to be given to him. He said he never supplied by himself. He further said they didn't agree on a commission for her and the balance money he wouldn't take it to be the commission.

PW1 identified accused as the said Abigail by pointing as the one she was talking about.

In cross examination by accused PW1 said accused had told him that the payment was going to be by cash and when she later told him that it was going to be by cheque, he had refused but later, she changed again that it was going to be cash as she had talked to the boss. He denied that she informed him that some beer had been returned by the U.T.H club.

In re-examination, PW1 said he learnt of the return of the beer on 30/01/17. He said accused never told him that the payment was going to be by cheque and he only heard of it at U.T.H club.

PW2 was Erick Banda a 25 years old businessman of unknown H/No. in Chawama compound who on oath testified that he sells beer at COMESA market. He recalled on 25/01/17 he was selling beer at the said market with his friend Etaya Sakala(PW1)who told him that there was a lady who supplies goats and chickens who had called him to the effect that that lady wanted a supply of beer. PW1 told him that the lady would call later so that they discuss on the price. On 26/01/17, whilst he was with PW1, that lady called PW1 so that they meet at Couressel shopping mall and they went there. They found that lady in Toyota Furn cargo motor vehicle and she gave them a list of the supplies. She told them that she would call them the following day so that they take the beer where it was needed. On 27/01/17, they took the beer to U.T.H New Sports Club and they found her there and they offloaded the beer. He said the value of the beer they supplied was K18, 745.00. She told them to wait so that they are given a cheque. After a while, she told them that the signatory to the cheque was unavailable and

asked them to go back and collect the cheque on 28/01/17. On 28/01/17, they didn't go there but called her who told them that the cheque would be ready on 29/01/17. On 29/01/17 at around 11.00 hours, they went to the said club but they also found that the cheque wasn't ready and they were told that it would be ready on 30/01/17. On 30/01/17, they were given a cheque Of K11, 650.00. When they realized that the money on the cheque was less, they called her to find out where the other beer went and she told them that it was returned and she had supplied it to other people and that was on the same day of the delivery. He said she didn't tell them the same day they supplied to U.T.H club that she had supplied the other beer somewhere else. She promised them that before the cheque from U.T.H matures, the other money from the other supply would be given to them. He said the cheque matured on 02/02/17 but the money from the other supply haven't been given to them to date. He said even the other beer was never returned to them and she didn't show them where she supplied the other beer.

PW2 identified accused in court by pointing as the lady she was talking about.

There was no cross examination and consequently, no re-examination.

PW3 was Dickson Moyo a 33 years old Club Manager at U.T.H club residing at H/No. 47 U.T.H compound who on oath testified that some of his duties were to ensure smooth operations of the U.T.H club and also supervising workers. On 27/01/17, he recalled they were looking for suppliers of beer and that's when they found Abigail. He gave her a list of the supplies needed but she supplied in excess of what they needed and that's how the excess was returned. He said they recorded all what they received. He said at the first negotiation meeting, he told her that payment was by cheque. He said for the beer they got, they paid by cheque amounting to K11, 650.00.

PW3 said when receiving the beer, a Goods Received Note (GRN) was issued and he could identify it as it has a Football logo, written U.T.H sports club with the address and also the list of the goods that were received.

PW3 identified the GRN and the features mentioned and it was marked as 'ID1'.

PW3 said he was the custodian of the GRN and he wished to tender it into court as part of his evidence. Since there was no objection from accused, 'ID1' was produced and admitted in court and marked as 'P1'.

PW3 identified accused by touching as the person who supplied him with the beers on 'P1'.

PW3 said the beers which were returned were given to accused and they were valued at K7, 000.00.

There was no cross examination and consequently, no re-examination.

PW4 was Febia .K. Sitondo a 40 years old No. 36816 Detective Constable based at COMESA police post under Lusaka Central Division who on oath testified that on 07/02/17 Etaya Sakala (PW1) reported that there was a woman he knew as Chika who had approached him at his liquor stall at COMESA market to the effect that she wanted various types of beer as she had a customer to supply which was the U.T.H sports club. He said the said woman told PW1 to give her the said beer and she was given valued at K18, 075.00. After giving that woman, PW1 wasn't satisfied and requested to accompany her and see where the beer was being taken and they went together to U.T.H where they met Mr. Moyo the manager there. Mr. Moyo accepted only to buy beer for K10, 000.00 which he paid by cheque and the other beer valued at K7, 075.00 was returned to her and she went away with it as he was told so by PW1. He said PW1 was paid by cheque in his name.

PW4 said acting on the report as by then the suspect was already in custody after being brought by PW1, he interviewed her with regard to the subject offence and she admitted the alleged complaint. He then made up his mind to charge and arrest her for the subject offence.

Under warn and caution statement in English, the language she seemed to understand better, she gave a free and voluntary reply admitting the charge.

Accused had objected that the confession was free and voluntary, however, the prosecution dispensed with the confession statement.

PW4 further said since accused was a woman, he asked woman constable Akatama to detain her under his name and she put her

in custody at Misisi police post where there are female cells pending court proceedings. He said her full names are Abigail Chikabilo Mwansa Musukuli.

PW4 identified accused in court by pointing.

PW4 further said following the explanation by PW1, he asked accused to lead him to the U.T.H club which she did and Mr. Moyo (PW3) accepted only getting some beer for K11, 000.00 but not for K7, 075.00 which he returned to accused. When he asked her as to the whereabouts of the other beer, she told him that she sold it ^{to} other passer by people who couldn't be located and they didn't ^{to} make any follow ups or recoveries.

PW4 also said he charged accused for the subject offence because it wasn't her first time to ask traders at COMESA market to give her items. He said even at the time she approached PW1, she told him that she collects the beer and returns the proceeds thereof. In this case, she acted as an agent. He further said at ~~U.T.H~~ club, she supplied beer worth K10, 000.00 and the money was paid to PW1 by Mr. Moyo. He also said she had claimed that she had supplied everything to Mr. Moyo yet not but supplied the other beer to other people who weren't located. However, despite not locating the other people, she collected the beer as an agent.

In cross examination by accused, PW4 said accused never said she took the beer to U.T.H club alone but she was accompanied by PW1. He said PW1 and PW2 told him that they didn't trust her the reason they accompanied her. He said the amount on the cheque was K10, 000.00 in the name of PW1. He said accused didn't show him the other people she supplied the other beer. He denied having gotten a K500.00 and another K300.00 from accused totaling K800.00. He said there were 3 cases of the same nature for accused. He also said if accused had given him K800.00, the case would have been reduced to reconciliation.

There was no re-examination.

This marked the close of the prosecution case.

Having heard the prosecution evidence, I was satisfied that they had adduced sufficient evidence to establish a prime facie case against accused and I consequently, put her on her defence pursuant to section 207 of the Criminal Procedure Code cap 88 of the Laws of Zambia.

Her defence rights were explained and she elected to give sworn evidence but didn't call any witnesses.

Accused in her defence on oath testified that she knew PW1 since 2015. She said she used to own a warehouse in Kamwala where she used to sell energy drinks such as Red bull and Dragon and she would supply PW1 and his friends the said drinks and later in the day, they could call her when the money is ready. In February, 2017, the U.T.H club requested to buy some liquor. She had never sold liquor before hence, asked PW1 through the phone if he had some so that they supply to the said club to which he responded to the affirmative. She said she also sent PW1 the list of the required liquor through phone and PW1 confirmed having them. PW1 asked her what the mode of payment would be and she told him that it would be by cheque. She said PW1 asked her for a credit note to which she told him that it will be availed on the same day of delivery. PW1 told her to go and collect the liquor from COMESA market. Since she had a sick child, she told him that she wouldn't be able to go and collect the liquor but instead she asked him to take them to U.T.H club himself where he would find her. She said they took the liquor to U.T.H club with a friend and they found her there. They did the counting together with the manager (PW3). She told them to wait for the credit note and they were issued with it amounting K11, 000.00 plus though the liquor they had supplied was worth K18, 000.00. This was on a Friday and they were to get the cheque the following Tuesday and they left. She said she asked the manager as to what would happen to the balance liquor and she was told it would be returned. However, she said she had agreed with the boss for the U.T.H who was in Livingstone at that time that the balance of K7, 000.00 would be paid in cash form. She said PW3 then communicated with the boss in Livingstone and they concluded that the surplus liquor should be returned. She then informed PW1 of this development as they had already left at that time. She said she then collected the balance liquor and took them to Courassel shopping mall near COMESA and she called PW1 and the balance liquor was exchanged with Jameson spirits which PW1 had taken there. PW1 asked her where the Jameson spirits would be taken and she told him that she would sell it around to some clients and she took them to Handsworth and sold them at about K7, 000.00. The following day she was paid K500.00 by Handsworth and the same day, the arresting officer (PW4) apprehended her and he asked her how much she had and she told him that she had K500.00. She said PW4 then got that K500.00

and he further asked her to send someone to collect the balance at Handsworth. She said she was told that Handsworth had shared the Jameson spirits with a sister company in Chilenje and that Handsworth was owing her only K3, 200.00 and the other balance by the said sister company. She further said she was put in custody and PW4 had told her to pay PW1 his money but she told him to give her a week to organize herself. She also said whilst in custody, PW4 got another K300.00 from her saying that he was going to ^{give} it to PW1. She also said when she asked for a week to organize herself, PW4 asked for K3, 000.00 so that she can be released on police bond.

In cross examination by the state, accused said her full names were Abigail Chikabilo Makusuli Mwansa and that all these names appear on her National Registration Card except Abigail her Christian name. She said she had known PW1 since 2015. She admitted that she introduced PW1 at U.T.H club. However, she denied being an agent. She said in the manner she was sending PW1, he was more like an agent to her. She said she had the order from U.T.H club but she didn't have the stock ^{to} supply but it was PW1 who had the stock. She said there was no agent between herself and PW1 but that it was an agreement. She said an agent is where someone is sent and told that this is the amount of money he/she is going to bring. She denied there being a go-between between PW1 and U.T.H club. She admitted that PW1 didn't know U.T.H club management. She also admitted that she was the link between PW1 and U.T.H club. She also admitted that PW1 supplied the liquor to U.T.H because of her. She said the liquor PW1 took to U.T.H club was worth K18, 000.00 but K11, 000.00 worth was received by the manager and 2 others and a credit note was issued to that effect and this was in her presence. She also said when PW1 received the credit note, he questioned on the difference and PW3 told him that the said difference would be paid in cash form. She said she recalled PW3's testimony but it wasn't him who rejected the excess liquor but his boss in Livingstone and the said excess was returned to her in the afternoon the same day after PW1 and his friend had already left and she told PW1. She said she had remained at U.T.H as she had a sick child. She said PW1 had asked her where to take the excess and she told him that unless they are exchanged ~~it~~ and PW1 gave her a go ahead and she went to Corrousel mall the following day and PW1 exchanged the liquor and gave her Jameson spirits. She further said PW1 lied when he said they never met after supplying the liquor at U.T.H club. She also said she didn't notice that PW1

never talked about the credit note. She further said PW1 was given the cheque after 3 days.

Accused said she wasn't calling anyone from Handsworth to be her witnesses and she wasn't avoiding to call them but that Handsworth does exist. She said she was arrested on 02/02/17 from town at around lunch hour. She also said PW4 got the K500.00 from her at COMESA police post so that he can give it to PW1 who was outside as there was no space inside. She said the said K500.00 was in her purse and it was supposed to be for the payment of the balance of K7, 000.00. She also said the other K300.00 was collected by PW4 when she was at Lusaka Central Police station after being moved from Misisi Police Post and it was also for the payment towards the balance of K7, 000.00. However, PW4 didn't sign anywhere when he was getting the said money and even PW1 also didn't sign anywhere. She said PW1 had only said that he needed his money and not for the case to proceed to court. She also said she didn't ask PW4 in which capacity he was collecting the said money. She said she challenged PW4 before court on the K800.00 but not on the K3, 000.00 which was such that K1, 000.00 for her to be released on police bond and K2, 000.00 for the docket not to be forwarded to court. She said the K7, 000.00 hasn't paid to PW1 and even the goods haven't been returned back. She also said Handsworth and its sister company haven't paid her except the K800.00.

In re-examination she said she couldn't call witnesses from Handsworth as they were her customers and dragging them to court wouldn't be appropriate. She said the money in issue was the one which could be paid to PW1. She also said the police charge for release on police bond.

This marked the close of the defence case.

This was the whole of the evidence before me in this case. After considering the whole evidence, I found that the following facts are not in dispute;

1. That 45 cases of assorted beer worth K18, 745.00 were supplied to U.T.H sports club on 27/01/17.
2. That the said assorted beer was the property of PW1.
3. That accused person was the one who informed PW1 of the order of the said beer by the U.T.H sports club.
4. That only beer worth K11, 650.00 was paid for by the U.T.H sports club

5. That accused person was the one who was returned the excess beer amounting to K7, 075.00 plus.
6. That PW1 never received the said excess beer.
7. That accused person was apprehended for the alleged theft by agent of the said excess beer and charged at COMESA Police Post.

I also find that the following fact is in dispute;

1. That accused person actually stole as an agent for PW1 the said excess beer worth K7, 075.00.

Having established the facts, I now apply the said facts to the law. I ask myself a question that did accused person commit the alleged offence?

PW1's evidence in brief is that he was contacted by accused on 25/01/17 to the effect that U.T.H sports club wanted a supply of assorted beer. Being a merchant of such assorted beer at COMESA market, he agreed to supply the said beer and he actually supplied the same on 27/01/17 worth K18, 745.00 through accused whom he found at the said club. It's his evidence that accused is the one who did the transactions with the manager for U.T.H club PW3 and he was given a receipt or a Goods Received Note and that payment would be by cheque on 30/01/17. On 30/01/17, he collected a cheque with amount of K11, 650.00 and when he asked PW3 why the amount was less he was told that some beers were returned to accused the same day of delivery, the information he wasn't privy to.

PW2's evidence was basically that he is a friend to PW1 and was privy to the transactions between PW1 and accused and he even escorted him to U.T.H club when the supply of beer was done. He basically confirmed PW1's evidence.

PW3's evidence was that he was the manager at the U.T.H club and he received the supply of beer from accused and he issued a Goods Received Note worth K11, 650.00 which he produced before court and it was marked as 'P1'. He further said the excess beer worth K7, 075.00 was returned to accused on the same day of the delivery.

PW4 was the arresting officer who investigated the matter and apprehended accused. He interviewed her and after being dissatisfied with her response, he made up his mind to charge and arrest her for the subject offence.

Accused in her defence said she together with PW1 supplied the said liquor to U.T.H club and that it was an agreement between them. She denied being an agent to PW1. She said PW1 was the one who was more like an agent to her. She however, admitted having collected the excess liquor from the said club but that she informed PW1 of the development and that's how the excess liquor was exchanged by PW1 and she got Jameson spirits which she supplied to Handsworth at K7, 000.00 plus. She further said she received K500.00 from Handsworth which she was in the process of paying PW1 but at the same time she was apprehended by PW4 the arresting officer. She also said PW4 also collected K300.00 from her which was also for paying PW1 thus, PW4 collected K800.00 from her. She admitted that PW1 hasn't been paid the K7, 075.00 to date.

I have critically analyzed the evidence before me. The first transaction when the beer was supplied, accused and PW1, they were together at U.T.H club. At this juncture, I totally agree with accused that this was an agreement. The principle of principal and agent relationship cannot apply here. However, when the Goods Received note was issued, PW1 was told by accused that the balance or excess beer was going to be paid in cash form as she had talked to the boss for the U.T.H club who was apparently, in Livingstone. That's how PW1 and his friend left and they weren't aware that the said excess beer was returned collected by accused the same day of delivery but only came to learn of it when they went to collect the cheque on 30/01/17. When they asked accused, she told them that she had supplied the excess beer elsewhere.

I must state that on the second transaction of supplying the excess beer elsewhere, PW1 wasn't privy to it. There was no agreement here. Therefore, under the principle of ostensible authority or holding out accused impliedly became an agent for PW1. It is on record that accused hasn't paid PW1 the money for the excess beer which was returned to her. I quoted earlier on the provision of the Penal Code as to what amounts to stealing by an agent being;

'Property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay, or deliver for any purpose or to any other person the same or any part thereof or any proceeds thereof.'

Under the Criminal Law 1803 Justia, an agent is defined as;

'A person who represents someone else in dealing with other people, corporations or entities.'

Accused as found above was impliedly an agent for PW1 in the second transaction for the excess beer and she represented him when she was dealing with other people. The fact that she hasn't returned the proceeds thereof to PW1 and it took PW1 to report her to the police, I have no doubt in my mind that accused acted dishonestly. The assertion by accused that she informed PW1 of the return of the excess beer by the U.T.H club is an afterthought and it cannot be entertained. Due to the foregoing, I hold that the prosecution have proved each and every ingredient of the offence and they have proved their case beyond all reasonable doubt as required by law.

I therefore, find accused **GUILTY** as charged and **CONVICT** her accordingly.

DELIVERED IN OPEN COURT THIS 18th DAY OF May 2017



HON A.C.MWEENE
MAGISTRATE CLASS II

