THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 56/2018**

HOLDEN AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN:

BEATRICE MUTAFELA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: MULONGOTI, SICHINGA, NGULUBE, JJA

On 26th, 29th June and 21st August, 2018.

For the Appellant: C. Magubbwi, Messrs Tembo, Ngulube and Associates.

For the Respondent: C. Sakala, State Advocate, National Prosecutions Authority

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JUDGMENT

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to.

1. ***Moonga vs. The People (1973) ZR 188***
2. ***Madubula vs. The People (1994) S.J 63 (SC)***
3. ***Phiri vs. The People (1973) ZR 47***
4. ***Katebe vs. The People (1975) ZR 13 (SC)***
5. ***Lubinda vs. The People (1973) ZR 43 (SC)***
6. ***David Zulu vs. The People (1977) ZR 151 (SC)***
7. ***Mwelwa vs. The People (1975) ZR 166 (SC)***

Legislation 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***
3. ***The National Parks and Wildlife Act Number 14 of 2016.***

Other works referred to:

1. **Black's Law Dictionary 8th Edition**

The appellant stood charged with three counts of Unlawful Possession of Prescribed Trophy contrary to sections 87(4) and 130(2) of the Zambia Wildlife Act, Number 14 of 2015.The particulars in count one were that, the appellant, on 23rd February, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia had in her possession prescribed trophy, namely, one leopard skin without a certificate of ownership as required by law.

In the second count, the particulars of the offence were that, the appellant, on 23rd February, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia had in her possession prescribed trophy, namely, one lion skin without a certificate of ownership as required by law.

In the third count, the particulars were that the appellant, on the 23rd February 2017, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia had in her possession

prescribed trophy, namely, five pieces of ivory weighing 17 kilograms without a certificate of ownership as required by law.

A full trial was conducted and upon conviction, the matter was referred to the High Court for sentencing in terms of section 217 of the Criminal Procedure Code. The Learned High Court Judge then sentenced the appellant to five years simple imprisonment on each of the three counts, to run concurrently with effect from the date of arrest.

The prosecution evidence was that Muchawa Muchawa, an investigations officer at the department of national parks and wildlife based at Chilanga head office was assigned duties to accompany Bright Nkhoma, Kakoma, Zulu and Manje to Mtendere Compound, Lusaka as information had been received to the effect that some people were suspected of being in possession of wildlife products there. Muchawa Muchawa and his colleagues travelled to Mtendere Compound and upon arrival there, an informer took them to a house where they found three persons, one man and two women in a sitting room. Muchawa Muchawa testified that he saw some bags in the room which included a sack with pieces of ivory in it.

Having introduced himself as a national parks and wildlife officer, Muchawa requested to inspect the bags. He testified that he found a suspected leopard skin in one bag, a lion skin in another and five pieces of ivory in a sack. Upon asking the two women and the man if they had a certificate allowing them to own the pieces of ivory and the suspected leopard skin, they replied that they had none. He identified the lion skin, the leopard skin and the pieces of ivory in court and they were duly marked for purposes of identification.

The evidence of the second witness, Merina Manje who was part of the group of national parks and wildlife officers who went to Mtendere on the material day was essentially the same as that of the first witness, Muchawa Muchawa. She identified the two accused persons in court, one of whom is the appellant herein. She also identified the prescribed trophy that was found at the house.

The evidence of the third witness, Lloyd Kabwela, the principal ranger at the department of national parks and wildlife, Chilanga, was that he examined three packages of prescribed trophy that were taken to him after his officers conducted an operation. He stated that one package contained ivory, the second package

contained a leopard skin and that the third package contained a lion skin.

The evidence of the fourth prosecution witness, Steven Zulu, an investigations officer at the department of national parks and wildlife was that he was part of the team of officers that went to Mtendere Compound where prescribed trophy was recovered and three suspects were apprehended. At the close of the case for the prosecution, the two accused persons were found with a case to answer and were put on their defence.

They both gave evidence in their defence denying ownership of the prescribed trophy that was found in the house where they were apprehended. Particularly, the appellant stated that she did not even know that there were bags that were taken to the house.

Upon considering and evaluating the evidence, the learned trial Magistrate was satisfied that it had been established that the accused persons worked together in the commission of the offence and that the accused persons knew what was contained in each bag. The court referred to Section 4 of the Penal Code which defines "*possession*" as –

'If there are two or more persons and any one or more of them with knowledge and consent of the rest has or having in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

The Court rejected the defence of the accused persons and concluded that each of them was a principal offender in accordance with section 21 of the Penal Code. The trial Court then convicted the appellant and another person of the subject offences.

Dissatisfied with both the conviction and the sentence, the appellant appealed to this Court raising two grounds of appeal couched as follows:

1. That the learned trial Court erred in law and in fact when it held that the accused persons worked together in the commission of the offence when there was a third party that admitted to owning the said prescribed trophies and or in the least knowing the owner thereof.
2. That the learned trial Court erred in law and in fact when it stated that the prosecution had proved all the elements of the offences charged and a conviction would be safe when it

was evident that the accused (now appellant) was not in possession of the prescribed trophies in the legal sense.

In support of the appeal, Learned Counsel for the appellant Mr. Magubbwi, in arguing the 1st and 2nd grounds relied on the appellant's heads of argument. He informed the Court that grounds one and two would be argued together. It was submitted that the trial Court heard the testimony of PW4 who stated that –

"Elia was packing a leopard skin into a bag."

It was further submitted that the Court stated at page 36 of the record that –

"If Elia was the owner of the bags and it was him who picked her, how come she did not see the bags being removed from the car, but only saw them in the morning."

It was submitted that the Court misdirected itself when it made the assumption that the second accused person saw the bags being removed from the car and that even if she saw this, it does not entail that she knew and was aware of their contents.

We were referred to Black's Law Dictionary, 8th edition on page 1201 where *"possession"* is defined as –

"1 The fact of having or holding property in one's power, the exercise of dominion over property

2. The right under which one may exercise control over something to the exclusion of all others, the continuing exercise of a claim to the exclusive use of a material object."

Counsel submitted that the persons that were found exercising physical occupancy or control over the property were Elia and the first accused. It was submitted that the trial Court heard the testimonies of the prosecution witnesses on how they found Elia in possession of the prescribed trophy while the first accused was the owner of the house. He contended that the appellant was merely a visitor who had no control over what was in the house.

Counsel drew our attention to the case of **Moonga vs. The People**[1]**,** a High Court matter, where the court stated that –

" the term possession often gives rise to difficulties of interpretation but in every case, the meaning must depend on the context."

It was submitted that no defacto possession, legal possession or ownership can be attributed to the appellant as no evidence was led to prove the appellant's possession, either defacto or legal of the trophy.

Counsel submitted that Elia was the person in possession of the trophy in the legal sense as he was the one who was found handling one of the bags when the officers arrived at the house. It was further submitted that Elia had defacto possession in line with the case of **Moonga vs. The People.**

We were further referred to the holding in the case of **Madubula vs. The People**[2] on the issue of possession with knowledge, control and power. We were also referred to the case of **Phiri vs. The People**[3] where the court held that if there are gaps in the evidence, courts are not permitted to fill them by making assumptions that are adverse to the accused.

It was submitted that the officers of the department of national parks and wildlife failed to investigate the matter and that this amounted to miscarriage of justice. We were referred to the cases of **Katebe vs. The People**[4] and **Lubinda vs. The People**[5], where the court stated that the evidence of the defence had been seriously prejudiced by a dereliction of duty on the part of the investigating officers and that the prosecution failed to prove all the ingredients of the offence.

Referring to the case of **David Zulu vs. The People**[6], Counsel submitted that the circumstantial evidence had not taken the case out of the realm of conjecture and that the prosecution had failed to proved their case beyond all reasonable doubt, with the appellant giving a reasonable explanation.

We were referred to the case of **Mwelwa vs. The People**[7] where the court stated that if the accused's explanation leaves a doubt in the mind of the court, then he is entitled to an acquittal. Counsel submitted that the key elements of the offence of possession, knowledge and sanction were not proved in respect of the appellant. He accordingly prayed that the conviction be quashed and that the appellant be set at liberty.

On behalf of the State, the Learned State Advocate, Mr. Sakala supported the conviction.

He submitted that the appellant, with two others were found in the house with the prescribed trophy and that they did not have a certificate of ownership. It was Counsel's submission in reference to the case of **Madubula vs, The People** in emphasising the issue of possession that the learned trial Magistrate concluded the appellant was deemed to have been in

possession of the prescribed trophy by being in the room where the wildlife products were found. Counsel accordingly prayed that the appeal be dismissed and that the conviction and sentence be upheld.

We have carefully considered the evidence on record, the Judgment of the trial Court and the submissions by both Learned Counsel.

In our view, the real issue in relation to grounds 1 and 2 is whether the appellant was found in possession of the prescribed trophy to warrant being convicted for the subject offences. From the evidence on record, the three prosecution witnesses who went to the house where the appellant was apprehended testified that they found her in the room where the prescribed trophy was found.

Section 4 of the Penal Code gives guidance on the correct interpretation of the term *"possession"*. The section states that if there are two or more persons and any one of them with knowledge and consent of the rest has in their custody or possession some property, it shall be taken to be in the custody and possession of each and all of them.

A perusal of the trial court's Judgment shows that the court concluded that by the appellant being present in the room where the prescribed trophy was found, she must have known that the prescribed trophy was there and that she consented to having custody of it with the other two people in the room.

The court concluded that the appellant was a principal offender in accordance with section 21 of the Penal Code and that although the appellant did not touch the bags, she knew what was contained in them. In her defence, the appellant stated that on the material day, she went to Mtendere to meet Elia who was supposed to give her money the following day. She testified that she went to Yvonne's house and although there were bags in the house, she and the other two people in the house did not discuss anything about them, nor did she know their contents.

We are of the view that in dealing with the evidence that was led by the prosecution, the court made findings of fact which were not supported by the evidence. The court concluded that the appellant was guilty of the offences as charged by her mere presence in the room. We note the evidence of the prosecution witnesses was clear on what role the appellant played when the three people were found in the room, which was that she merely

sat there. The witnesses stated that Elia was found handling one of the bags where the prescribed trophy was found. We form the view that the learned trial Magistrate's conclusion that the appellant knew what was contained in the bags was not supported by the evidence on record.

The Court went on to state that the appellant could not have been a visitor in Mtendere when she stayed within Lusaka, in Kamwala South. We form the view that this was a mere assumption that the court made without any supporting evidence. It is evident from relevant portions in the Judgment that the learned trial Magistrate misdirected himself in analysing the evidence, leading to the erroneous conclusion that the appellant was in possession of the prescribed trophy.

We are not satisfied with the trial court's evaluation of the evidence on record, particularly, that of the prosecution witnesses who went to apprehend the suspects at the house. We therefore find merit in the two grounds of appeal.

We accordingly quash and set aside the convictions on the three counts of Unlawful Possession of Prescribed Trophy without a certificate of ownership and acquit the appellant for lack of

evidence connecting her to the offences. She is set at liberty forthwith.

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J.Z. MULONGOTI

COURT OF APPEAL JUDGE

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D.L.Y SICHINGA

COURT OF APPEAL JUDGE

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P.C.M. NGULUBE

COURT OF APPEAL JUDGE