

IN THE SUPREME COURT OF ZAMBIA

Appeal No. 64/2005

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

WILLIAM KAMANGA

KISTON KATONGO

V

THE PEOPLE

Coram: Chirwa, Silomba and Mushabati, JSS

on 8th and 10th April, 2008

For the Appellants: Mr. A. C. Nkausu, Director of Legal Aid

For the State : Mr. P. Mutale, Principal State Advocate

JUDGMENT

Chirwa, JS delivered the judgement of the court.

The Appellants, **WILLIAM KAMANGA** and **KISTON KATONGO**, were convicted on one count of **Espionage** contrary to **Section 3(d) of the State Security Act, Cap 111**. The particulars alleged that the Appellants on 13th November, 2001 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together without lawful excuse, did remove (19) nineteen meters of electronic cable from a Zambia Electricity Supply Corporation (ZESCO) power line valued at K1,238,942.12, an act likely to interfere with the necessary service, namely supply of electricity to consumers. Upon their conviction, they were sentenced to 21 years imprisonment with hard labour with effect from 13th November, 2001, the date of their arrest.

They appealed against conviction and sentence. Mr. Nkausu, learned Director of Legal Aid, advanced two grounds of appeal; one against conviction and one against sentence.

The evidence in the court below was that on 13th November, 2001 around 10:00 hours, PW1 was walking along Nalikwanda Road in Woodlands in Lusaka, he observed two people digging cables. He thought they were digging ZAMTEL cables and the manner in which they were digging, he became suspicious and he reported to a ZAMTEL driver who later reported to Zambia Police. PW1 with the help of members of the public managed to apprehend the two Appellants. At the spot where the Appellants were seen digging the cables, they found a pick and a drum in which some cables were found. The cables were identified as ZESCO cables and were valued at K1,238,942.12. The Appellants were arrested for the subject offence and they both denied.

In his evidence, the 1st Appellant told the court that he and his co-accused were on their way to see Pastor Mudenda and they dropped at a bus stop and on their way they met 3 people who greeted them and asked them where they were coming from, they told them they were from Misisi compound but later these people apprehended them and took them to Woodlands Police Station. At the Police Station, they were asked about Sitali who they found at the Police Station. The Police beat up Sitali. They were all detained in Police cells for 2 days. They were then charged with the subject offence and they denied the offence.

The 2nd Appellant's story was the same as of the 1st Appellant adding that as they were drinking some drinks at Woodlands Shopping Complex where some people came and took them to Woodlands Police Station. At the Police Station, Police officers called Sitali from the cells and asked him whether they were the ones that left cables at his working place, he denied. They were

then detained in cells for 2 days and they were later charged with the subject offence.

On considering the evidence the learned trial Judge found as a fact that 19 metres of ZESCO electric cables were dug out and removed at the junction of Nalikwanda and Kawama Roads. He found as a fact that the cut cables were prejudicial to the Republic of Zambia. He further found as a fact that the two Appellants did the digging and cutting of the cables. He believed the prosecution evidence and rejected the Appellants' version as it was not coherent.

The gist of Mr. Nkausu's argument in the ground against conviction, is that there was no evidence to prove that the digging of the cables per se was an act prejudicial to the Republic of Zambia. It was submitted that there was no evidence that the cutting of the cables affected the supply of electricity.

On the ground against sentence, the learned Director of Legal Aid submitted that the learned trial Judge did not seriously take into account that the Appellants were first offenders and as such he should have exercised his discretion by sentencing them to the minimum sentence of 20 years as the sentence of 21 years was excessive.

In response to these arguments, the learned Principal State Advocate, Mr. Mutale, submitted that the learned trial Judge never misdirected himself in finding that the mere digging of cables was prejudicial to the safety or interests of the Republic. He submitted that the mere cutting of the cables was likely to interfere or hinder the supply of electricity to the residents of the area.

On sentence, Mr. Mutale submitted that the sentence of 21 years should not come to the court with any sense of shock and that 21 years imprisonment with hard labour was appropriate even for first offenders.

We have considered the evidence on record, the judgment and submissions before us. **Section 3(d) of State Security Act, Cap 111 of the Laws of Zambia** under which the Appellants were convicted reads: -

“3. Any person who, for any purpose prejudicial to the safety or interests of the Republic –

(a)

(b)

(c)

(d) without lawful excuse damages, hinders or interferes with, or does any act which is likely to damage, hinder or interfere with, any necessary service or the carrying on thereof;

shall be guilty of an offence and liable on conviction to imprisonment for a period of not less than twenty years but not exceeding thirty years.”

Necessary service for the purpose of this appeal is provided in **Section 2(1)(a)** which reads: -

(a) “any service relating to generation, supply or distribution of electricity.”

The evidence on record, and which is not disputed, is that the electricity cables were dug out by the Appellants. What was argued in this appeal was that there was no evidence that the digging out of the cables damaged, hindered or in anyway interfered with any necessary delivery of electricity.

We feel that in making this submission, the learned Director of Legal Aid has left out crucial words in the Section. The Section does not create an offence

only when the service has been interfered with but even where it is likely to damage, hinder or interfere with any necessary service. To emphasize the point we reproduce the *paragraph (d)* with emphasise: -

“(d) without lawful excuse damages, hinders or interferes with, or does any act which is likely to damage, hinder or interfere with, any necessary service or the carrying on thereof;”

The cutting of the cables obviously is likely to interfere with the supply of electricity. It is irrelevant whether at that particular time there was electric power or not but the absence of the cables will interfere with the supply of electricity. We see no merit in this ground of appeal and it is dismissed.

Coming to the ground of appeal against sentence. It is true that the Appellants were first offenders. On sentencing the Appellants, the learned trial Judge was seized of the fact that the offence attracted a minimum sentence of 20 years imprisonment and a maximum of 30 years. He does not say why the minimum sentence should not be imposed. There is periphora of our decisions that unless there are aggravating circumstances in the case, whether in the manner it was committed, the injury inflicted or indeed the prevalence of the offence first offenders should be treated leniently. This is what we stated in the case of **SOLOMON CHILIMBA V THE PEOPLE [1971] ZR 36** and other authorities.

To us the present case seems to have no aggravating circumstances in the manner it was committed, but the offence of espionage involving either electrical cables or communication cables are very prevalent in Zambia and as such, the courts have a duty to send clear message to would be offenders that even if they are first offenders, they will not receive favourable consideration from the courts. These offences are committed because of greed. The offenders want to get a few kwacha for themselves and yet the main beneficiaries are the so called scrap metal dealers. These dealers must have

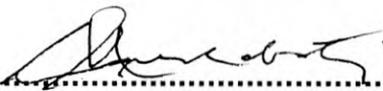
legitimate sources of their raw materials. Taking into account the prevalence of this offence, we feel that the sentence of 21 years imprisonment comes to us with a sense of shock for being lenient. We were inclined to disturb the sentence but we will leave it as it is. The appeal against sentence is also dismissed.



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D. K. CHIRWA
SUPREME COURT JUDGE



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S. S. SIOMBA
SUPREME COURT JUDGE



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C. S. MUSHABATI
SUPREME COURT JUDGE