

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

Appeal No 51/2023

BETWEEN:

WILSON LUNGU

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Muzenga, Chembe JJA
On 22nd August, 2023 and 31st August, 2023

For the Appellant: Mr. G. K. Mwamba, Messrs Gill & Seph Advocates

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

JUDGMENT

MUZENGA JA delivered the Judgment of the Court.

Cases referred to:

1. **The People v Mwiya Lubasi (1981) 310**
2. **Godfrey Miyanda v. The High Court (1984) ZR 62**

Legislation referred to:

1. **Anti-Corruption Act No.3 of 2012 of the Laws of Zambia**
2. **The Criminal Procedural Code Chapter 87 of the Laws of Zambia**
3. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**

1.0. INTRODUCTION

1.1. The appellant was charged with one count of willful failure to follow applicable law or procedure guidelines contrary to **Section 34(2) (b) of the Anti-Corruption Act**. The particulars of offence alleged that the appellant and 5 others, on dates unknown but between the 1st day of July, 2019 and 31st of December, 2019, at Lusaka in the Lusaka province of the Republic of Zambia, being members of the Evaluation Committee jointly and whilst acting with other persons unknown, willfully failed to comply with applicable law and procedure relating to procurement evaluation of Tender Number MOH/SP/032/19 for supply and delivery of 22,500 Health Center Kits, a matter or transaction which concerns Ministry of Health, a Public Body.

2.0. BACKGROUND

- 2.1. The appellant was subject of a complaint under Cause No. 2SPD/027/21, which was filed on 19th January, 2021 and withdrawn on the same day. Following the withdrawal of the complaint, the Learned Magistrate acquitted the appellant. The State did not appeal against the said acquittal.
- 2.2. The appellant was subsequently arrested and jointly charged with others for the offences for which he was acquitted. He then raised a plea in bar of *autre fois acquit*. There was no dispute that an acquittal was entered. The

issue the State raised was that the acquittal was irregular considering the manner in which it was entered.

- 2.3. The trial magistrate found that she could not review the appellant's acquittal as she was of equal jurisdiction with the magistrate who acquitted the appellant. She thus referred the issues to the High Court.
- 2.4. The matter referred to the High Court was under Cause No. SSPD/015/2022.

3.0. FINDINGS AND DECISION OF THE COURT BELOW

- 3.1. The Economic and Financial Crimes Divisional Court heard the matter referred to it by the Subordinate Court under Cause No. SSPD/015/2022 and also called for the record under 2SPD/027/2021. The Divisional Court proceeded to find that it had jurisdiction to review the decision of the court below to acquit the appellant and found that the Order of Acquittal was a nullity as no plea was taken and consequently no criminal proceedings had been instituted.

4.0. GROUNDS OF APPEAL

- 4.1. Embittered with the decision of the Divisional Court, the appellant filed two grounds of appeal couched as follows:

(1) The court below erred in law and fact when it held that it had jurisdiction to review the proceedings under Cause No. 2SPD/027/2021 notwithstanding the fact that there was an order of acquittal in those proceedings

(2) **The court below erred in law and fact when it annulled and declared void an order of acquittal under Cause No 2SPD/027/2021 without due regard to the jurisdictional limit contained in section 338(1) (b) of the Criminal Procedural Code.**

5.0. THE APPELLANT'S ARGUMENTS

- 5.1. The two grounds of appeal were argued simultaneously on the account that they raise one fundamental question of whether in terms of **Section 338(1) (b) of the Criminal Procedural Code (the CPC)**, the court below has jurisdiction to alter or reverse an order of acquittal.
- 5.2. It was contended that the provisions **of Section 338(1) (b) of the CPC** is straight forward and needs no interpretation. According to learned counsel for the appellant, the High Court is vested with jurisdiction to review or revise decisions of the Subordinate Court for purposes, inter alia, of satisfying itself of the correctness, legality or propriety of orders passed by the subordinate court. However a perusal of **Section 338(1) (b) of the CPC** reveals that the revisionary jurisdiction conferred on the High Court is not unlimited as it does not extend to an order of acquittal passed by a Subordinate Court.
- 5.3. It was learned counsel's further contention that **Section 338 (1) (b)** of the **CPC** is clear that the High Court has got jurisdiction to alter or reverse any

other order except or apart from an order of acquittal. It was argued that in going ahead to review proceedings where there was an acquittal and reversing the acquittal order in the face of a clear statutory embargo contained in **Section 338 (1) (b)** supra, the lower court clothed itself with jurisdiction which it did not have. As a result, the court below acted in want of jurisdiction.

- 5.4. We were referred to the case of **The People v. Mwiya Lubasi**¹ where Sakala, J, as he then was, held that:

“It is clear from s. 338 of the Criminal Procedure Code that the High Court can make a number of orders on revision in the case of any proceedings before a subordinate court where there has been a conviction but not where there has been an acquittal.”

- 5.5. We were also referred to several Kenyan cases in which the courts interpreted a provision similar to **Section 338(1) (b)** of our **CPC** in their statute book. We are indebted for the same and we have taken them into consideration.
- 5.6. We were urged to allow this appeal, reverse the ruling of the High Court and give effect to **Section 338(1) (b)** supra.

6.0. THE RESPONDENT’S ARGUMENTS

- 6.1. On behalf of the respondent, learned counsel contended that the High Court was called upon not to review the order of acquittal issued by the

Honourable Magistrate Chiwaula but to determine whether a plea in bar can be raised and sustained where the accused person never appeared before an earlier Court to take plea but was acquitted on withdrawal of the complaint, before the complainant was authorized by the Director of Public Prosecutions to privately prosecute the matter.

- 6.2. It was contended that the High Court was alive to its jurisdiction and rightly determined whether it had jurisdiction to determine the matter before it and the consequential legality of the alleged acquittal. In support of this argument, we were referred to **Sections 337 and 338(1) (b)** of the **CPC** already cited above as well as **Article 134 of the Republican Constitution** which stipulates that:

“The High Court has, subject Article 128-

- (a) Unlimited and original jurisdiction in civil and criminal matters;**
- (b) Appellate and supervisory jurisdiction as prescribed; and**
- (c) Jurisdiction to review decisions, as prescribed.”**

- 6.3. It was further submitted that the lower Court had rightfully exercised its supervisory and revisionary jurisdiction in reviewing the proceedings of the Subordinate Court which resulted in the alleged acquittal of the Appellant when it determined the correctness and legality of the proceedings. Learned

counsel contended that this is particularly so because there were several serious irregularities which the lower Court had to correct as the Honourable Magistrate Chiwaula under **Cause No. 2SPD/027/2021**, acted in breach of **Section 90(4)** of the **CPC** and irregularly acquitted the Appellant and Others pursuant to **Section 201** of the **CPC**.

- 6.4. It was argued that the lower Court did not reverse or alter the order of acquittal but ruled that the order was null and void as it was issued contrary to the provisions of the law because the Honourable Magistrate Chiwaula breached the provisions of the Law by acting contrary to the provisions of **Section 90(4)** and **Section 201** of the **CPC**.
- 6.5. In summation, it was the respondent's argument that the lower court was on firm ground when it ruled that the alleged order of acquittal was null and void and cannot be relied upon by the Appellant as it is a product of void actions of the Honourable Magistrate who acted in breach of the Law and in want of jurisdiction.

7.0. HEARING OF APPEAL AND ARGUMENTS CANVASSED

- 7.1. At the hearing of the appeal, learned counsel for the appellant, Mr. Mwamba, placed full reliance on the documents filed. On behalf of the state, Mr. Zimba informed the court that the state would equally rely on the heads of argument filed before the court.

8.0. CONSIDERATION AND DECISION OF THE COURT

8.1. We have carefully examined the record, the arguments by both counsel and the Ruling of the lower court. We are of the considered view that this appeal raises a question of jurisdiction of the High Court in its exercise of powers of review.

8.2. In the case of **Godfrey Miyanda v. The High Court**², Ngulube DCJ, as he then was, stated inter alia that

"The term "jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends or both".

8.3. It is clear from this decision that jurisdictional limits are provided for in appropriate legislation and such limits may relate to the nature of actions and matters for which a particular court has cognizance or the area over which the jurisdiction extends. Jurisdiction is therefore donated and cannot be acquired by the court's own volition.

8.4. This matter was referred to the High Court by the Magistrate who was of the view that she could not assail the acquittal of the appellant by another Magistrate, who was of equal jurisdiction. Therefore the only way that the

High Court could have dealt with those issues was by exercising its powers of review.

- 8.5. The issue before us as we see it therefore, is not whether the acquittal of the appellant was regular or not. The issue is whether the High Court has jurisdiction to exercise its revisionary powers, where an accused person has been acquitted.
- 8.6. The Constitution, no doubt bestows jurisdiction on the High Court to exercise powers of review, as rightly argued by learned counsel for the respondent. The use of the words "as prescribe" in **Article 134 (c)** of the Constitution entails that parliament through legislation will provide the parameters in which that power must be exercised. Therefore, the context in which that power may be exercised is clearly provided, in terms of criminal matters, in the **CPC**, specifically in **Sections 337** and **338**. We shall reproduce the relevant portions of these Sections for ease of reference.

337. The High Court may call for and examine the record of any criminal proceedings before any subordinate court, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed; and as to the regularity of any proceedings of any such subordinate court.

338 (1) In the case of any proceedings in a subordinate court, the record of which has been called for, or which otherwise comes to its knowledge, the High Court may-
(a) in the case of a conviction-

- (i) confirm, vary or reverse the decision of the subordinate court, or order that the person convicted be retried by a subordinate court of competent jurisdiction or by the High Court, or make such other order in the matter as to it may seem just, and may by such order exercise any power which the subordinate court might have exercised;
 - (ii) if it thinks a different sentence should have been passed, quash the sentence passed by the subordinate court and pass such other sentence warranted in law, whether more or less severe, in substitution therefor as it thinks ought to have been passed;
 - (iii) if it thinks additional evidence is necessary, either take such additional evidence itself or direct that it be taken by the subordinate court;
 - (iv) direct the subordinate court to impose such sentence or make such order as may be specified;
- (b) In the case of any other order, other than an order of acquittal, alter or reverse such order.

8.7. It is clear from **Section 337** that it provides the power of the High Court to call a record from the Subordinate Court and the purpose or reason for doing so. **Section 338** on the other hand provides for what the High Court can do or not do after calling a record for purposes of reviewing the same. **Subsection 1 (a) of Section 338**, clearly empowers the court to exercise powers of review in respect of a person who has been convicted and provides what the High Court can do after review. **Subsection 1 (b) of Section 338** empowers the High Court in the exercise of its revisionary

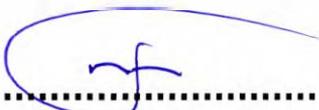
jurisdiction, where any other order has been made by the Subordinate Court, except an order of acquittal, to alter or reverse such order.

- 8.8. It is trite that where the words in a statute are unambiguous or clear, courts must give effect to the clear meaning of the words. This is referred to as the literal rule of interpretation, to give words their ordinary and natural meaning. The role of the court is not enact or amend a statute. Its role is to give effect to the intention of the legislator, which is reflected in the words of an enactment.
- 8.9. We therefore agree with learned counsel for the appellant that **Section 338(1) (b)** is very clear and needs no rigorous interpretation. The learned court below preoccupied itself with the propriety of the appellant's acquittal and ended up bequeathing itself jurisdiction which it lacked. Whether the acquittal is irregular, improper, uncalled for or null and void is not an issue in which the High Court exercising powers of review may declare or pronounce itself on. This can only be done when the High Court is exercising appellate jurisdiction. Therefore, the court below fell in grave error when it exercised jurisdiction that it did not have. Jurisdiction is granted by law and cannot be acquired. Jurisdiction is everything. Had the learned court below properly directed itself, it would no doubt have reached the verdict as ours.
- 8.10. If the state were dissatisfied with the appellant's acquittal, they should have appealed. We find merit in both grounds of appeal. We allow the appeal.

9.0. CONCLUSION

9.1. Having allowed the appeal, we accordingly set aside the Ruling of the Court below. The appellant's acquittal remains undisturbed and as things stand, he cannot be prosecuted for the offence for which he was acquitted.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


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K. MUZENGA
COURT OF APPEAL JUDGE


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Y. CHEMBE
COURT OF APPEAL JUDGE