

IN THE SUPREME COURT OF ZAMBIA Appeal No.140, 141, 142/2021
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

NOSIKU MUBITA

1ST APPELLANT

BRIAN MANGWATO

2ND APPELLANT

HASTINGS BANDA

3RD APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Hamaundu, Kaoma, Chinyama, JJS

On 5th April, 2022 and 7th June 2022

For the Appellant: Mrs. S. C. Lukwesa, Acting Chief Legal Aid Counsel and
Ms. K. C. Bwalya, Legal Aid Counsel

For the Respondent: Ms. G. Nyalugwe, Deputy Chief State Advocate

RULING

Kaoma, JS, delivered the Ruling of the Court.

Cases referred to:

1. **Savenda Management Services v Stanbic Bank Zambia Limited - Selected Judgment No. 10 of 2018**
2. **Natasha Nawa v The People – SCZ/9/2/2019**

Legislation referred to:

1. **Penal Code Act, Cap 87, section 294(1)**
2. **Court of Appeal Act, No. 7 of 2016, s. 13(1) and (3)(b)**
3. **Court of Appeal Rules, Order XI**
4. **Supreme Court of Zambia (Amendment) Act, No. 24 of 2016, s. 17(1) and (2)**
5. **Supreme Court Rules, Cap 25, Rule 37**
6. **Constitution of Zambia (Amendment) Act No. 2 of 2016, Article 118(2) (e)**

1. Introduction

- 1.1 On 17th June, 2019, Lombe Phiri, J convicted the appellants of aggravated robbery contrary to section 294(1) of the Penal Code involving a sum of US\$ 600, which they allegedly stole from Mohammed Panchbnaya on 16th April, 2018 whilst armed with two pistols. The Court sentenced them all to 20 years imprisonment.
- 1.2 They appealed to the Court of Appeal against their convictions and sentence. On 20th April 2021, the Court confirmed the convictions and enhanced the sentence for the 1st and 3rd appellants to 35 years on ground that they were law enforcement officers who engaged in criminality and refused to reduce the sentence for the 2nd appellant because of the trauma they caused the victim as they drove him around during the ordeal. Legal Aid counsel both in the High Court and in the Court of Appeal represented the appellants.
- 1.3 On 4th May 2021, the appellants, purporting to act in person, filed in the Supreme Court, through the officer-in-charge at Lusaka Central Correctional Facility, notices of intention to appeal to this Court without obtaining leave to appeal from the Court of Appeal.
- 1.4 When the appeals came up for hearing on 5th April 2022, we raised a preliminary issue, on our own motion, as to whether the appellants could simply file notices of intention to appeal without first applying for or obtaining leave to appeal from the Court of Appeal or if it had been denied, from this Court.

- 1.5 We invited counsel on both sides, to address us on this issue, especially as regards section 13 of the Court of Appeal Act, section 17 of the Supreme Court of Zambia (Amendment) Act, 2016 and Order XI (5) of the Court of Appeal Rules, 2016.

2. Submissions by learned Counsel

- 2.1 Ms. Bwalya, co-counsel for the appellants was first to submit having perused the above provisions. She acknowledged that the appellants did not seek leave to appeal from the Court of Appeal as provided by section 13(1) of the Court of Appeal Act. However, she argued that the appellants were right to proceed in the manner they did, because that is permissible by Order XI (5) of the Court of Appeal Rules and that section 17(1) of the Supreme Court of Zambia (Amendment) Act refers to Order XI (5).
- 2.2 Alternatively, counsel submitted, if we find that the appellants ought to have strictly applied for leave to appeal, we should apply section 37 of the Supreme Court Act (this is actually Rule 37 of the Supreme Court Rules) and allow the appellants to proceed with their appeals in order to obtain substantial justice. Counsel further referred us to Article 118(2) (e) of the Constitution of Zambia (Amendment) Act, No. 2 of 2016.
- 2.3 Mrs. Lukwesa, also counsel for the appellants agreed that Legal Aid represented the appellants both during the trial in the High Court

and on appeal to the Court of Appeal but insisted that they were unrepresented when they filed the notices of intention to appeal and they complied with Order XI (5) of the Court of Appeal Rules.

- 2.4 When referred to the case of **Savenda Management Services v Stanbic Bank Zambia Limited**¹, where we dealt with Order XI (2) of the Court of Appeal Rules, counsel insisted that the case is distinguishable in view of the fact that it was a civil matter, whilst the current matter is criminal and the appellants are in prison.
- 2.5 However, the learned counsel conceded that where there is a disparity or disconnect between a substantive provision and a rule in a statute, the substantive provision should prevail.
- 2.6 In contrast, Mrs. Nyalugwe, learned counsel for the respondent submitted that both section 13 of the Court of Appeal Act and section 17 of the Supreme Court of Zambia (Amendment) Act, 2016 are couched in mandatory terms and that what guarantees an appeal to be heard by this Court is the obtaining of leave to appeal.
- 2.7 Counsel contended that even where it appears on the merits that injustice was occasioned that in itself would not justify the grant of leave or the hearing of the appeal by this Court. For this reason, counsel argued, where the appellant has not obtained leave to appeal, this Court has no jurisdiction to entertain the appeal. She also relied on the case of **Natasha Nawa v The People**².

3. Our Decision

3.1 We have considered the submissions by counsel on the preliminary issue and we are grateful for the prompt responses by counsel. Firstly, section 13(1) of the Court of Appeal Act clearly provides that an appeal from a judgment of the Court lies to the Supreme Court with leave of the Court and in terms of section 13(2) of the Court of Appeal Act, the application for leave to appeal should be made within fourteen days of the judgment.

3.2 Secondly, section 13(3) gives the conditions that an applicant must meet before the court could grant leave to appeal. It states that the Court may grant leave to appeal where it considers that:

- a) **the appeal raises a point of law of public importance;**
- b) **it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
- c) **the appeal would have a reasonable prospect of success; or**
- d) **there is some other compelling reason for the appeal to be heard.**

3.3 Further, section 17 of the Supreme Court of Zambia (Amendment) Act, 2016 provides as follows:

- (1) A person who intends to appeal against a judgment of the Court of Appeal shall give a notice of intention to appeal within fourteen days of obtaining leave of the Court of Appeal in the manner and form prescribed by rules of the Court of Appeal.**
- (2) If the intending appellant is in prison, the notice of intention to appeal or application, as the case may be, may, within the period of fourteen days referred to in subsection (1) be given to the officer-in-charge of the prison, who shall forward it to the Registrar of the Court of Appeal.**
- (3) The Court may extend the time for giving notice of intention to appeal or of submitting an application for leave to appeal despite the time for giving the notice or submitting the application having already expired ...**

3.4 Coming to Order XI of the Court of Appeal Rules it specifies that:

- (1) An appeal from a judgment of the Court shall be made to the Supreme Court with leave of the Court.
- (2) Leave to appeal to the Supreme Court may be granted or refused by the Court without formal application, at the time when judgment is given and, in that event, the judgment shall record that leave has been granted or refused accordingly.
- (3) Where leave is granted, the appellant shall give notice of appeal as prescribed in these rules and the order granting leave shall be included in the record of appeal.
- (4) Where leave to appeal is refused by the Court, an application for leave to appeal may be made to the Supreme Court.
- (5) If in a criminal appeal, the appellant is in prison and is not represented by a practitioner, that appellant shall be considered to have complied with this rule if that appellant gives the notice of intention to appeal, motion or summons to the officer in charge of the prison within fourteen days from the date of the judgment. (Underlining in both instances is ours for emphasis only).

3.5 What then is the implication of Order XI (5) of the Court of Appeal Rules given that section 13 of the Court of Appeal Act and section 17 of the Supreme Court of Zambia (Amendment) Act, 2016, which provide for leave to appeal are substantive provisions?

3.6 We faced a similar challenge in the **Savenda Management Services**¹ case, where the Court of Appeal had granted leave to appeal in line with Order XI (2) of the Court of Appeal Rules, which we have set out in paragraph 3.4 and we analysed Order XI (2) *vis-à-vis* the provisions of section 13 of the Court of Appeal Act.

3.7 We concluded that where there is a disparity or disconnect between a substantive provision in the Act, and an order in the Rules, the substantive provision prevails and Mrs. Lukwesa has courteously conceded to this principle of law. Although we were dealing with a civil appeal, the principle we expounded is of general application.

- 3.8 As rightly submitted by Mrs. Nyalugwe, section 13(1) of the Court of Appeal Act and section 17 of the Supreme Court (Amendment) Act, 2016 are couched in mandatory terms meaning that it is obligatory to obtain leave to appeal to this Court be it in a civil or criminal appeal. Order XI (1) of the Court of Appeal Rules similarly provides for leave to appeal from a judgment of the Court of Appeal to the Supreme Court.
- 3.9 However, Order XI (5) seems to suggest that if an appellant in custody gives notice of intention to appeal to the officer-in-charge of the prison within fourteen days from the date of judgment, then they have complied with the requirement for leave to appeal. We do not accept this connotation because doing so would be equivalent to abolishing the mandatory requirement for leave to appeal and defeating the very purpose for which section 13 was included in the Statute as most convicted persons are incarcerated in prison.
- 3.10 The case of **Natasha Nawa v The People**² is a clear demonstration that leave to appeal is mandatory even in a criminal matter where the convicted person is in custody. The applicant for leave, whether represented by counsel or not, is required to meet the threshold set out in section 13(3) before the court could grant leave to appeal because only meritorious appeals should be allowed to come to the Supreme Court.

3.11 Thus, we do not accept the argument by counsel for the appellants that it was enough for them to simply file notices of intention to appeal without first applying for or obtaining leave to appeal or that we should interpret Order XI (5) as an exception to section 13 of the Court of Appeal Act. The notice of intention to appeal must be given within fourteen days of obtaining leave to appeal. Neither do we accept that section 17(1) of the Supreme Court of Zambia (Amendment) Act, has permitted the procedure adopted by the appellants. If that were so, sub-section (2) would have been couched in the exact terms as Order XI (5) of the Court of Appeal Rules.

3.12 Furthermore, we do not accept the alternative argument by the appellants that if we were to find that they ought to have applied for leave to appeal, we should apply Rule 37 of the Supreme Court Rules and allow them to proceed with their appeals. Rule 37 refers to a person desirous of appealing or cross-appealing, who may be debarred from doing so by reason of his not having observed some formality or some requirement of the Rules of this Court.

3.13 Clearly, leave to appeal is neither a mere formality nor a requirement of the Rules of this Court as envisaged in Rule 37. As already stated, the provisions on leave to appeal are substantive provisions of the Court of Appeal Act and the Supreme Court of Zambia (Amendment) Act and leave to appeal goes to the jurisdiction of this Court.

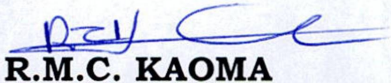
3.14 With regard to Article 118(2)(e) of the Constitution, this refers to undue regard to procedural technicalities. Again, we cannot equate the requirement for leave to appeal to this Court to a procedural technicality. We repeat what is obvious that leave to appeal is what grants this Court jurisdiction to hear an appeal from the Court of Appeal be it civil or criminal.

4. Conclusion

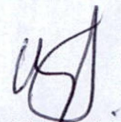
4.1 Since the appellants did not obtain leave to appeal to this Court, we lack the jurisdiction to entertain their appeals. In the event, we dismiss the appeals for want of jurisdiction.



E.M. HAMAUNDU
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE



J. CHINYAMA
SUPREME COURT JUDGE