IN THE COURT OF APPEAL OF ZAMBIA APPEAL 243/2020

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

AGGIE ZIMBA APPELLANT

AND

THE PEOPLE RESPONDENT

CORAM: Mchenga DJP, Kondolo SC and Banda-Bobo, JJA

On 19th October 2021, 20th October 2021 and 23rd March 2022

For the Appellant: M. Matoka-Michelo, Legal Aid Counsel, Legal Aid Board

For the Respondent: B. Mwewa, Senior State Advocate, National Prosecution Authority

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JUDGMENT

Mchenga, DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Clarke v Shepard [1956] R.& N. 542
2. Wina and Wina v The People [1995-1997] Z.R. 137

3. The People v Japau [1967] Z.R. 95
4. The People v Winter Makowela and Robby Tayabunga [1979] Z.R. 290

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Evidence Act Chapter 43 of the Laws of Zambia
3. The Court of Appeal Act, No. 6 of 2016
4. The Federal Supreme Court Act, No. 11 of 1955

1. INTRODUCTION

1.1. The appellant, appeared before the Subordinate Court (Hon. M. L. Phiri), on two charges. The allegation in the first count, was that she committed the offence of forgery, contrary to **section 347 of The Penal Code.**

1.2. In the second count, the allegation was that she uttered a forged document, contrary to **section 352 of The Penal Code.**

1.3. She denied both charges, and the matter proceeded to trial.

1.4. At the close of the prosecution's case, she was acquitted, the trial magistrate having found that a *prima facie* case, had not been made out, against her.

1.5. The State appealed against the acquittal.

1.6. In the High Court (Chitabo J., as he then was), allowed the appeal. He set aside the appellant's acquittal, and ordered that she be arraigned before a different magistrate, on the same charges.

1.7. He also granted, at his own instance, the appellant, leave to appeal against his decision, to this court.

2. GRANT OF LEAVE TO APPEAL AT COURT'S OWN INSTANCE

2.1. Before we deal with the issues that the parties to this appeal have raised, we are compelled to say something, on the propriety of the High Court, granting leave to appeal, in a second appeal, at its own instance.

2.2. There are two provisions that deal with appeals in criminal cases, from the High Court, to the Court of Appeal. These are, **sections 14** and **15 of the Court of Appeal Act**.

2.3. **Section 14 of the Court of Appeal Act,** deals with appeals that are classified as first appeals. According to **section 14(1) and (3)**, these are appeals from the decision of the High Court, sitting at first instance or the decision of the High Court, in a matter where a person was tried in the Subordinate Court, and committed to the High Court for sentencing.

2.4. In such a case, it can be said that one has the "right" to appeal, in the sense that, so long as one is within time, there are no preconditions to be met, before the filling of an appeal from such a decision.

2.5. Coming to second appeals, **section 15 (1) and (2) of the Court of Appeal Act,** provides that it is an appeal from a matter that came to the High Court on appeal; on review; for confirmation of a sentence; or after the case was stated.

2.6. In a second appeal, it can be said that there is no "right" to appeal, because before one can appeal, leave to appeal must be obtained and depending on the circumstances, such leave, can be declined.

2.7. In the case of **Clarke v Shepard**[1], the Federal Court of Appeal for Rhodesia and Nyasaland, considered the import of **section 23(1)(c) of the Federal Supreme Court Act,** a provision which is similar to **section 15(1) of The Court of Appeal Act.** The provision was to the effect that no appeal shall lie from a judgment of the High Court, in the exercise of its appellate or revisionary

jurisdiction, without the leave of the High Court or a judge of the Supreme Court.

2.8. Lewey, Acting Federal Chief Justice, commenting on the implication of there being a requirement for leave, said the following;

> "... it will be seen that where a case has originally been heard in the Magistrate's Court, and thereafter on appeal by a High Court, the Legislature has provided that there shall not be a further appeal as of right, but that the leave to appeal must be obtained. Clearly it was never intended that leave should be granted automatically, and it follows that there must be good reasons if there is to be leave for what is a second appeal."

2.9. The court, went on to point out that the existence of reasonable prospects of the appeal succeeding, on the merits, was a consideration for granting such leave.

2.10. Even though the case of **Clarke v Shepard**[1] dealt with a civil appeal, we are persuaded by the reasoning in that case. It is our view, that where leave to appeal is required, such leave should not be granted automatically. The court, must among other issues, consider the prospects of such appeal succeeding before granting the leave to appeal.

2.11. Ordinarily, we do not foresee a situation where a court that has just delivered a judgment, can on its own motion conclude that there are prospects of an appeal succeeding without being prompted. Such a decision, would in effect, be suggestive that the court doubts its own decision, and is of the view that it can be assailed, on appeal.

2.12. However, we are not saying that leave to appeal, cannot, under any circumstances, be granted by the High Court, at its own instance.

2.13. It is conceivable, that a High Court judge, can on his/her own motion, grant leave to appeal where the decision of that judge conflicts with the decision of another High Court judge. Since one High Court judge, cannot over rule another High Court judge's decision on the interpretation of a point of law, for example, the grant of leave to appeal, may be a way of prompting the parties to appeal, so that a higher court may settle the issue.

3. CASE BEFORE THIS COURT

3.1. The appellant's case, is that the trial court, rightly acquitted her, because it was established that there was dereliction of duty on

the part of the police officers, who investigated the case and that the prosecution evidence, was discredited in cross-examination.

3.2. Reference was made to the case of **Wina and Wina v The People**[2] and it was argued that there was no technical flaw to warrant the High Court to order a retrial.

4. CASE BEFORE THE TRIAL COURT

4.1. The evidence before the trial magistrate, was that the appellant, the widow to one Adrian Mwando Munga, approached the Kafue District Council with a letter of sale, with a view to changing title to a property. The letter indicated that she had been sold the property by one Jack Chilangi, the registered owner of that property.

4.2. She presented the letter to council officials, who started processing the change of ownership.

4.3. The process of changing the ownership of the property, came to the attention of The Administrator of the Estate of her deceased husband. She reported the matter to the police, because she had previously seen documents suggesting that the property, was sold to appellant's deceased husband, by the same Jack Chilangi.

4.4. The police subjected the letter of sale, the appellant had presented to the council officials, to an examination by a handwriting expert. The expert, concluded that the appellant had written the letter of sale, and signed for both the seller and buyer, of the property.

4.5. During the trial, the forged letter was produced in evidence, but the trial magistrate declined to admit, into evidence. He took the view that since the council officials who attempted to produce it, were not the ones who received it, they were not competent to do so.

4.6. The trial magistrate, also declined to admit into evidence, the form that was prepared by council workers when the appellant was processing the change of ownership.

4.7. In his ruling of no case to answer, the trial magistrate concluded that there was dereliction of duty, when the police failed to follow up evidence, suggesting the appellant was given the property by her late husband, before his demise. He dismissed the charges after concluding that the prosecution had failed to prove the charges, beyond all reasonable doubt.

5. CONSIDERATION OF APPEAL IN THIS COURT

5.1. This appeal, in our view, raises three issues. These are the production of documents that are part of public records; the standard of proof at case to answer and when an appellate court can order a retrial.

5.2. **Section 4 of the Evidence Act** provides that:

> (1) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if-
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> (a) the document is, or forms part of, a record relating to any trade or business or profession and compiled, in the course of that trade or business or profession, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; and
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> (b) the person who supplied the information recorded in the statement in question is dead, or outside of Zambia, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.
>
> (2) .....

5.3 From the foregoing, it is clear, that where there is an attempt to produce a document that is part of official records by a public

organisation like Kafue District Council, it is not correct to insist that only the person who received the document or created the document, can produce it.

5.4 A document, can be admitted if the witness intending to produce it, is a council official and it is established that the document is or forms part of a record relating to any function of the council. In addition, it can be admitted if there is evidence that it was produced or received, by a council official during performance of such official function.

5.5 Where the officers who received the information that led to the generation of the document, are unavailable, any council official familiar with the function and keeping of the records, can produce the document.

5.6 This being the case, the trial magistrate erred when, he declined to accept the form the appellant was alleged to have caused to be filled in at the council, despite there being witnesses who confirmed that the document was part of official council records.

5.7 The next issue we will deal with is the standard of proof at the case to answer stage, of a trial.

5.8 In his ruling, on whether the accused person should be found with a case to answer, the trial magistrate made the following observation, before proceeding to assess the prosecution evidence:

> "I reminded myself the fact that the duty to prove the case beyond reasonable doubt lies to the prosecutions and not the accused. If at the close of the prosecutions' case the court is left in doubt the same shall be in favour of the accused person"

5.9 It is apparent, that the trial magistrate used the wrong standard of proof, when assessing the prosecution evidence at case to answer stage. Proof beyond reasonable doubt, is not the correct standard of proof, at that stage of a trial.

5.10 In the case to **The People v Japau**[3] the standard of proof was pointed out as follows:

> **"A submission of no case to answer may properly be upheld if an essential element of the alleged offence has not been proved, or when the prosecution evidence has been so discredited by cross-examination, or is so manifestly unreliable, that no reasonable tribunal could safely convict on it."**

5.11 Further, in the case **The People v Winter Makowela and Robby Tayabunga**[4], it was held that:

> **"A submission of no case to answer may be properly made and upheld where there has been no evidence to prove an essential element in the alleged offence and when the evidence of the**

prosecution has been so discredited as a result of cross examination or so manifestly unreliable that no reasonable tribunal could safely convict on it."

5.12 Our review of the evidence in this case, shows that had the trial magistrate properly assessed the evidence, and applied the correct standard of proof, he would have found that a *prima facie* case, had been made out against the appellant, on both the charges. That is forgery, contrary to **section 347 of the Penal Code, and** uttering a forged document, contrary to **section 352 of the Penal Code..**

5.13 There was evidence that she presented to Kafue District Council officers, a letter of sale, with a view to changing title to a property. That letter purported that one Jack Chilangi, the registered owner of the property had sold her the property.

5.14 Forensic examination of the letter pointed at the fact that it was forged by the appellant.

5.15 That evidence, clearly laid a *prima facie* case against the appellant and it was therefore correct for the judge, in the court below, to find that the appellant was wrongly acquitted at the case to answer stage.

5.16 Regarding the principle set out in the case of **Wina and Wina v The People**[2], on the ordering of a retrial, we are satisfied that the threshold was met and the judge rightly ordered the retrial.

5.17 We have just indicated that there was enough evidence to warrant the placing of the appellant on her defence. In the circumstances, the appellant was wrongly acquitted. The judge in the court below was correct when he ordered a retrial and the allegation that the prosecution will be given "a second bite at the cherry", does not arise.

6 VERDICT

6.3 We find no merit in all the grounds of appeal, and we dismiss the appeal. We direct that the appellant be tried before a different a magistrate, of competent jurisdiction.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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M. M. Kondolo SC
COURT OF APPEAL JUDGE

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A. M. Banda-Bobo
COURT OF APPEAL JUDGE