

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

Appeal No. 65/2022

BETWEEN:

THE PEOPLE

APPELLANT

AND

CLEMENT WONANI

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Muzenga, JJA

ON: 15th August 2022 and 23rd February 2023

**For the Appellant: C. Sakala, State Advocate, National
Prosecution Authority**

For the Respondent: H.M Mweemba, Acting Director, Legal Aid Board

J U D G M E N T

Mchenga DJP, delivered the judgment of the Court.

Cases referred to:

1. Teddy Puta v. Ambindwire Friday, SCZ Judgment No. 43 of 2017
2. Choongo Stanley Mukuma v. David Kangwa Nkonde, SCZ Judgment No. 11 of 2015

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 High Court Act, Chapter 27 of the Laws of Zambia

1. BACKGROUND

- 1.1. The respondent appeared in the Subordinate Court charged with a number of offences in **The Penal Code**, most of which, were theft related.
- 1.2. The appellant called several witnesses and closed their case. Before she could deliver her ruling on whether the case against the respondent had been made out, the trial Magistrate passed away.
- 1.3. By a motion filed pursuant to **Section 78 of The Criminal Procedure Code**, the appellant moved the High Court for an Order that the case be transferred to another magistrate, who should deliver the ruling and continue with the defence.
- 1.4. The High Court (Bah-Matandala, J.), ordered that the case be transferred to another magistrate and that that magistrate, commence hearing the case *de novo*.
- 1.5. The appellant has appealed against the order that the case be heard *de novo*.

2. GROUND OF APPEAL AND ARGUMENTS FOR AND AGAINST

2.1. Although six grounds were advanced in support of this appeal, during the hearing, Mr. Sakala, who appeared for the appellant, argued all the six grounds together. He said that was because they were interrelated.

2.2. In our assessment, the 6 grounds of appeal are in fact, all arguments in support of a single proposition, that the High Court Judge erred when she held that the magistrate to whom the case was to be transferred, should not deliver the ruling on no case to answer, but instead commence hearing the case *de novo*.

2.3. We will therefore deal with that issue as the sole ground of appeal.

2.4. Mr. Sakala pointed out that the power to transfer cases, in criminal matters, is partly covered by **Sections 78 and 79 of The Criminal Procedure Code**. These provisions are complimented by **Section 23 of The High Court Act**.

2.5. He then argued that **Section 78(2) of The Criminal Procedure Code**, makes it clear that a case can be

transferred, whether the evidence has been partly heard or not. This being the case, the magistrate to whom the case has been transferred to, can determine the matter on the evidence that was presented to the magistrate who initially heard the case.

2.6. Mr. Sakala went on to argue that **Section 26 of The High Court Act**, which guides the court on how to proceed when a matter has been transferred using **Sections 23(2) of The High Court Act**, makes it clear that where there is a transfer, the "matter shall be continued, heard and determined by such court or judge".

2.7. Finally, he argued that since **Section 196 of The Criminal Procedure Code**, requires a trial magistrate in a criminal case, to record details including the demeanour of witnesses, the holdings in the cases of **Teddy Puta v Ambindwire Friday¹** and **Choongo Stanley Mukuma v David Kangwa Nkonde²**, are not applicable to criminal cases.

2.8. The reason being that it is possible for a magistrate who has taken over a case, to use the notes on demeanour, taken by the previous

magistrate, to determine the demeanour of the witnesses.

2.9. In his brief response, Mr. Mweemba submitted that a court to which a matter has been transferred has no jurisdiction to continue from where the previous magistrate ended, where it was partially heard. Such continuation can only take the form of the new magistrate commencing the hearing *de novo*.

3. COURT'S CONSIDERATION AND DETERMINATION OF APPEAL

3.1. **Section 26 of The High Court Act**, sets out the effect of a transfer. It provides that:

"Every order of transfer made under this Part shall operate as a stay of proceedings before the court or Judge from which or from whom the proceedings are to be transferred in any cause or matter to which such order is applicable, and the process and proceedings in every such cause or matter, and an attested copy of all entries in the books of the court from which transfer is made shall, where necessary, be transmitted to the court or Judge to which or to whom the same shall be transferred, and such cause or matter shall be continued, heard and determined by such court or Judge"

3.2. We agree with Mr. Sakala, that where a case has been transferred by the High Court on the basis of **Section 23 of The High Court Act**, **Section 26** of the

same Act, sets out the options available to the Subordinate Court.

3.3. However, we do not accept his view that, where such a case has been partially heard, the magistrate to whom the case has been transferred, can continue from wherever the previous magistrate ended. In this case, being the delivery of a ruling on no case to answer.

3.4. Even in civil cases, matters in which the cases **Teddy Puta v Ambindwire Friday¹** and **Choongo Stanley Mukuma v David Kangwa Nkonde²**, were based, judges do routinely take notes on the demeanour of witnesses. This serves to remind them that it is a matter that they may have to consider where the credibility of a witness becomes an issue.

3.5. It is therefore our view that the holdings in the cases of **Teddy Puta v Ambindwire Friday¹** and **Choongo Stanley Mukuma v David Kangwa Nkonde²**, that where an adjudicator has not completed hearing a case before ceasing to hold office, the trial must commence *de novo*, are applicable to criminal cases.

- 3.6. The reason being that even in a criminal case, an adjudicator who has not heard a witness cannot make findings on credit and credibility, using observations and notes made by another adjudicator and in turn resolve disputed facts.
- 3.7. Whether the magistrate to whom a case is transferred continues with the hearing of the case or hears the case *de novo*, is dependent on the stage of the proceedings at the time of the transfer.
- 3.8. Where there has been a trial and the judgment has not been prepared by the trial magistrate, the trial must commence *de novo*. However, where the judgment has been prepared, **Section 158A of The Criminal Procedure Code**, allows the magistrate to whom it has been transferred, to continue with the case and deliver the judgment.
- 3.9. A case may also be continued where the trial Magistrate dies or ceases to hold office after delivering the judgment, but before passing sentence. The new magistrate can continue with the case and pass the sentence, and any other order which

the trial Magistrate could have passed after delivering the judgment.

3.10. In the premises, we find no merit in this appeal and we dismiss it.

4. **VERDICT**

4.1. Having dismissed the appeal for lacking merit, we direct that the trial in this matter do commence *de novo*, as directed by the Judge in the court below.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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F.M. Chishimba
COURT OF APPEAL JUDGE

.....
K. Muzenga
COURT OF APPEAL JUDGE