

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

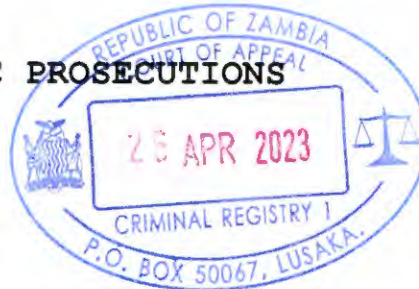
CAZ/09/201/2022

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND



TSHIABU QUIBILA BENOS

RESPONDENT

CORAM: Mchenga DJP, Ngulube and Muzenga JJA

ON: 23rd February 2023 and 26th April 2023

For the Applicant: G. Zimba, Deputy Chief State Advocate, National
Prosecutions Authority

For the Respondent: P. Chavula, Principal Legal Aid Counsel, Legal
Aid Board

R U L I N G

Mchenga DJP, delivered the Ruling of the court.

CASES REFERRED TO:

1. The People v. Emma Kainga Court of Appeal,
Application No.SP/31/2021
2. Attorney General v. Omar Dirie Hirsi, Court of Appeal
Applications No. 57 of 2020

3.D.E. Nkhuwa v. Lusaka Tyre Services Limited [1977]
Z.R. 43.

1. INTRODUCTION

1.1. This is an application for the extension of time within which to file an application for leave to appeal to the Supreme Court.

1.2. The application was filed pursuant to **Section 13 of the Court of Appeal Act No. 7 of 2016.**

2. BACKGROUND

2.1. On the 8th of December 2022, the Court of Appeal allowed the respondent's appeal against sentence in a case where she was convicted of the offence of murder contrary to **section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

2.2. We substituted the sentence of death imposed on her by the High Court, with that of 20 years imprisonment.

2.3. On the 14th of February 2023, the applicant filed in the application which is the subject of this ruling.

2.4. In the affidavit in support of the application, it was deposed that the applicant was unable to file their application for leave to appeal to the Supreme Court within the prescribed period because they "undertook an in depth and comprehensive review of the High Court record of proceedings and judgement" of our Court.

2.5. In addition, at the time we delivered our judgment, the office of the Director of Public Prosecutions was "transitioning", because of a change in the office holders.

2.6. The application was opposed.

2.7. In the affidavit in opposition, it was deposed that the change of office holder at the office of the Director of Public Prosecutions was of no effect, because there was an Acting Director of Public Prosecutions who was in a position to file in the application for leave to appeal.

3. SUBMISSIONS BY THE PARTIES

3.1. The thrust of the respondent's submission in opposition to the application, is that in addition

to failing to provide compelling reasons for not applying for leave to appeal in time, the applicant has not satisfied the threshold set out in **Section 13 of the Court of Appeal Act**, for the grant of leave to appeal to the Supreme Court.

3.2. The cases of **The People v. Emma Kainga¹, Attorney General v. Omar Dirie Hirsi²** and **D.E. Nkhuwa v. Lusaka Tyre Services Limited³**, were referred to in support of the proposition that the applicant should in addition to justifying the delay in applying for leave to appeal, demonstrate that the intended of appeal has prospects of success.

3.3. The applicant's response was that at this point, all the court is concerned with is whether there is sufficient ground for the applicant being allowed to file the application for leave out of time. The question whether the appeal has prospects of success is a matter for deliberation when considering the application for leave to appeal

4. CONSIDERATION OF THE APPLICATION AND DECISION OF THE COURT

4.1. Order 8 rule 3(a) of the Court of Appeal Rules, Statutory Instrument No. 65 of 2016, provides that the court, may for sufficient reason extend the time for making an application for leave to appeal.

4.2. As we pointed out in the case of **The People v. Emma Kainga**¹, in an application for the extension of time within which to file an application for leave to appeal, an applicant must not only justify the delay in the making of the application, the applicant must also demonstrate the intended appeal is meritorious.

4.3. In such an application, the application is meritorious if the intended appeal meets the threshold that is set out in **Section 13 of the Court of Appeal Act**. This is where:

- (i) the appeal raises a point of law of public importance;
- (ii) it is desirable and in the public interest that an appeal by the person

convicted should be determined by the Supreme Court;

(iii) the appeal would have a reasonable prospect of success; or

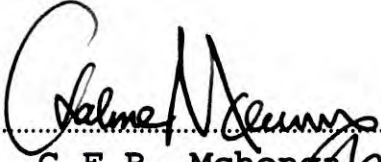
(iv) there is some other compelling reason for the appeal to be heard.

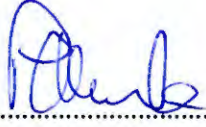
4.4. In this case, the applicant has not demonstrated that the intended appeal meets the threshold set in **Section 14 of the Court of Appeal act.**


4.5. In addition, we agree with counsel for the respondent that the fact that there was no substantive holder of the office of Director of Public Prosecutions at the time we delivered our judgment, cannot be a justification for the applicant's failure to apply for leave to appeal in time.

4.6. There was an acting Director of Public Prosecutions at the time and in any case, an application for leave to appeal need not be personally taken out by the Director of Public Prosecutions to be valid.

4.7. Consequently, we do not find any merit in this application. We dismiss it and decline to extend the time within which the applicant can apply for leave to appeal to the Supreme Court.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE


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