

**JOHN R. NG'ANDU v LAZAROUS MWIINGA  
(1988 - 1989) Z.R. 197 (S.C.)**

SUPREME COURT  
NGULUBE, D.C.J., GARDNER AND CHAILA, JJ.S.  
14TH FEBRUARY, 1989  
(S.C.Z. JUDGMENT NO. 22 OF 1989)

**Flynote**

Civil Procedure - Non appearance of parties on adjourned hearing- Appeal dismissed without proof of service of notice of hearing - Effect of.

**Headnote**

The appellant had appealed to the High Court from the decision of a magistrate. After numerous adjournments the case was fixed for hearing. On the hearing date neither party appeared and the judge dismissed the appeal without proof of service of the notice of hearing, as provided for in the High Court Rules, being proved. The appellant sought a review of the order by the same judge who dismissed the appeal and the judge refused to review the order. The appellant appealed.

**Held:**

The trial judge had no jurisdiction to dismiss the appeal for want of attendance of the appellant's advocate. In the absence of proof of service of a notice of the new hearing date the only course open to the court were to allot a fresh hearing date and to cause notices thereof to be served on the advocated for the parties or to strike the case out of the list and leave it to the parties too make application to restore.

**Legislation referred to:**

1. High Court Rules, Cap.50

For the appellant: D.M. Luywa, & Co.

For the respondent : No appearance.

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**Judgment**

**GARDNER, J.S.:** delivered the judgment of the Court.

This is an appeal from an order of the High Court dismissing an appeal to that court from a magistrate of 1 class at Monze on the grounds that the advocate for the appellant did not attend on the day fixed by the learned appellant judge for the hearing of the appeal.

As a consequence of the dismissal by the learned High Court judge the appellant applied to the same judge to review his order under Rule 39 of

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the High Court Rules. On the application for review the learned High Court judge gave a ruling in which he found that no good reason had been given to reverse his earlier decision to dismiss the

appeal and consequently he refused to review the order.

Mr. Luywa appears before this court today for the appellant in the absence of any advocate for the respondent. In support of his appeal Mr. Luywa has referred to the High Court Rules of this country and specifically to Order 35, Rule 1 which provides that:

" Where a civil cause on the cause list has been called, if neither party appears, the court shall unless it sees good reason to the contrary, strike the cause out of the cause list."

It was argued that this gives no power to the court to dismiss the cause before it. This court, however, drew the attention of Mr. Luywa to Order 47, Rule 15 of the High Court Rules which, in relation to appeals from subordinate courts, provides that "(1) if the appellant fails to appear, in person or by professional representative, when his appeal is called on for hearing, the appeal shall, on proof of service upon him of the notice of the hearing, stand dismissed with costs."

The history of this case is that, after the appeal had been set down for hearing before the High Court, there were numerous adjournments and finally there was an adjournment on the ground that one of the party's counsel had to attend a funeral. That adjournment was granted until a date to be notified to the parties. A new date for hearing was appointed for 17 February, 1988 but neither of the advocates appeared on the return day. In order for the learned trial judge to have had power to dismiss the appeal instead of striking it out of the list, it was necessary in terms of Order 47, Rule 15, for proof of service of notice of the adjourned hearing date to have been produced before the learned judge. It is apparent from the record that no such proof of service was forthcoming.

It follows from what we have said that we agree with Mr. Luywa that the learned trial judge had no jurisdiction to dismiss the appeal for want of attendance of the appellant's advocates. In the absence of proof of service of a notice of the new hearing date, the only courses open to the court were to allot a fresh hearing date and to cause notices thereof to be served on the advocates for the parties, or to strike the case out of the list and leave it to the parties to make application to restore.

In view of the incorrect order made by the learned appellant judge this appeal is allowed. The order dismissing the appeal to the High Court is set aside, and the order that the appellant should pay the costs of the hearing on review is also set aside. The appeal to the High Court is sent back for hearing before another judge of that court. There will be no order as to costs in respect of the hearing on review before the court below but the appellant will have the costs of this appeal.

Appeal allowed.

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