IN THE SUPREME COURT OF ZAMBIA APPEAL NO.102 & 103 of 1997

HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

B E T W E E N :

WILLIAM MULENGA
BRUCE MULENGA APPELLANT

VS.

THE PEOPLE RESPONDENT

CORAM: BWEUPE DCJ., CHAILA AND CHIRWA JJS.
On 2nd December, 1997.

For the Appellant: Mrs. J. S. Kaumba, Principle State Advocate (Legal Aid)

For the Respondent: Mr. James Mwanakatwe, Principal State Advocate

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JUDGMENT

BWEUPE DELIVERED THE JUDGMENT OF THE COURT.

Originally, the Appellants appealed against both convictions and sentences. However, at the hearing of the appeal, Mrs Kaumba, legal aid advocate indicated to the court that the appellants have abandoned their appeal against convictions and were now appealing against sentence only. She urged the court to reduce the sentence from 20 years to 15 years.

We have considered the appeal against sentences and it is our view that although this robbery was committed by a gang we feel that as the appellants have expressed remorse they should be accorded maximum leniency. Accordingly we set aside 20 years and put in its place a minimum sentence of 15 years on each count to run concurrently. We would allow the appeal against sentences to that extent only.

B. K. BWEUPE
DEPUTY CHIEF JUSTICE

M. S. CHAILA
SUPREME COURT JUDGE

D.K. CHIRWA
SUPREME COURT JUDGE

DCJ.

SCZ/8/236/96

SCZ/235/96

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER of application under Article 41 (2) of the Constitution

and

IN THE MATTER of the Electoral Act 1991 and subsequent amendments thereof

and

IN THE MATTER of Article 34 (3) of the Constitution of Zambia

B E T W E E N :

AKASHAMBATWE MBIKUSITA LEWANIKA	**1ST PETITIONER**
HICUUNGA EVARISTO KAMBAILA	**2ND PETITIONER**
DEAN NAMULYA MUNGOMBA	**3RD PETITIONER**
SEBASTIAN SAIZI ZULU (suing as Secretary General of United National Independence Party)	**4TH PETITIONER**
JENNIFER MWABA (suing as the National Secretary of Liberal Progressive Front)	**5TH PETITIONER**

and

FREDERICK JACOB TITUS CHILUBA (a.k.a. TITUS MPUNDU)	**1ST RESPONDENT**

CORAM: Ngulube, CJ., Bweupe, DCJ., Sakala, Chirwa. Lewanika, JJJS.

On 27th May, 1997

For the Petitioners: M.M. Chona, S.C., E.J. Shamwana, S.C., Prof. Mvunga S. Sikota, Mrs. Zaloumis and Mrs. Mutti.

For the 1st Respondent: V. Malambo

E. Silwamba

RULING

Counsel for the petitioners have applied to us to review our decisions on the setting aside of the sub-poena duces tecum issued to the Director of the Examinations Council of Zambia and the disallowance of the evidence of P.W. 83 Rodwell Kasonteka Sikazwe relating to the alleged manipulation of the Constitution of the Zambia Union of Financial and Allied Workers Union by the respondent.

The main thrust of the argument advanced by counsel for petitioners is that the evidence it is intended to adduce will show that the respondent has a propensity for manipulating constitutions and for untruthfulness. They argue that this evidence is relevant and admissible because the respondent's character is in issue in the light of the allegations made against him contained in paragraphs 9 and 18 of the Petition.

The jurisdiction of the Supreme Court is set out in Section 7 of the Supreme Court of Zambia Act, Cap. 52 which provides as follows:-

> 7. "The court shall have jurisdiction to hear and determine appeals in civil and criminal matters as provided in this Act and such other appellate or original jurisdiction as may be conferred upon it by or under the Constitution or any other Law."

We are hearing this matter as a court of first instance by virtue of Article 41 (2) of the Constitution. There is no provision for review in the Supreme Court

Rules but as we are sitting as a court of original jurisdiction I am prepared to accept Mr. Shamwana's argument that we should have the power to review and for that purpose adopt Order 39 of the High Court Rules which provides as follows:-

Order 39 (1).

> "Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him except where either party shall have obtained leave to appeal and such appeal is not withdrawn, and upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision."

It will be observed that the terms of the order are very wide the only question that arises is in what circumstances would a Judge be entitled to review his own decision. In the case of MAYO TRANSPORT -V- UNITED DOMINIONS CORPORATION LTD., 1962, Rhodesia and Nyansaland Law Reports, page 22 Mr. Justice WINDHAM, considered Order 33 which is now Order 39 of the Rules of the High Court. He said that the general rule as to amendment and setting aside orders or judgments after a judgment or order has been drawn is contained in Halsbury's Laws of England (3rd Edition) Vol. 22 on page 785;

> "except by way of appeal, no court, Judge or Master has power to rehear, review, alter or vary any judgment or order after it has been entered or drawnup, respectively, either in an application made in the original action or matter, or in a fresh action brought to review such judgment or order. The object of the rule is to bring litigation to finality but it is subject to a number of exceptions."

Justice WINDHAM then referred to the judgment of MORRIS, L.J. in the case of THYNNE -V- THYNNE (1) 1955, 3 A.E.R. p. 129 at p. 145 and 146 where MORRIS, L.J.

attempted to set out the circumstances in which a court can vary or review its own decision. He set out eight instances but the list is illustrative and by no means exhaustive and I will set out a few which I think are pertinent for our purposes and these are:-

(i) If there is some clerical mistake in a judgment or order which is drawn up there can be a correction under the powers given by R.S.C.O. 28.

(ii) If there is some error in a judgment or order which arises from some accidental slip or omission, there may be correction both under Order 28 r. 11 and under the court's inherent powers.

(iii) If the meaning and intention of the court is not expressed in its judgment or order then there may be variation.

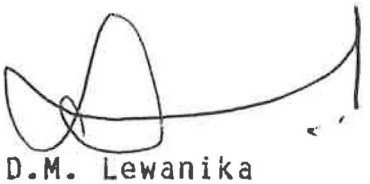
(iv) If it is suggested that the court has come to an erroneous decision either in regard to fact or law then amendment of its order cannot be sought, but recourse must had to an appeal to the extent to which appeal is available.

In the case of ROBERT LAWRENCE ROY -V- CHITAKATA RANCHING COMPANY LTD., 1980 Z.L.P. page 198 cited to us by Mr. Silwamba, the late Commissioner Dere, in considering an application to review referred to the case of RE SCOTT and ALVAREZ CONTRACT, 1895, 1 CH. 596 and quoted with approval the words of KAY, J at p. 767, viz;

> "In this case leave to bring an action in the nature of a bill of review is sought because since the decision of the court of appeal material evidence is alleged to have been found; but such leave is not given unless, first, the evidence is material; secondly, that it has

could not with reasonable diligence have been discovered before."

Now, applying those principles to the matter at hand, the arguments being advanced by counsel for the petitioners are the same arguments that were canvassed before us when we made the decisions which we are now being asked to review. The only difference being, perhaps, that they have been more adequately argued now. But that is not a ground upon which we can review our decision. For my part and speaking for myself only I see no grounds for reviewing our decisions and I refuse to do so.



D.M. Lewanika

JUDGE