IN THE SUPREME COURT OF ZAMBIA **SCZ NO. /9/2/2019**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

NATASHA NAWA **APPELLANT**

08 DEC 2020

V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 1st December, 2020 and 8th December, 2020

For the Appellants : Mrs S.C. Lukwesa, Senior Legal Aid Counsel
For the State : Mrs M. Chipanta- Mwansa, Deputy Chief State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Muyunda Muziba and Another v The People, (2012) 3 ZR 539**
2. **Bidvest Food Zambia limited & Others v CAA Import and Export Limited, Appeal No. 56 of 2017**

The applicant seeks leave to appeal to this court, having failed to obtain it from the Court of Appeal and, subsequently, from a

single judge of this court. The facts of this case have repeatedly been stated by the two previous fora aforesaid. We shall nevertheless state them again, but with emphasis or bias towards those facts on which our decision is based.

The applicant was charged with murder before the High Court (Majula-Mung'omba, J, as she then was, presiding). The applicant is a police officer who, at the time of the trial, was based at Simon Mwansa Kapwepwe police station; somewhere between Avondale residential area and Chainda Township. The offence for which she was charged arose from an altercation that the applicant had with some young men, who included the deceased, in July 2015. The young men were drinking at a place neighbouring the home of the applicant's parents. Both sides decided to report the altercation to the police. The applicant met with the deceased and his friend (PW1) at Simon Mwansa Kapwepwe police station. There, in an apparent fit of anger, the appellant kicked the deceased in the stomach. That was according to the eye-witness account of the applicant's supervisor (PW5). Upon being kicked, the deceased fell down, writhing in pain. Further, according to the account of the deceased's friend and his (deceased's) wife, the deceased did not

stop complaining about the pain until he was taken to the hospital about two days later, where he died.

The learned judge reviewed the testimony of five witnesses, that is, up to PW5. It is not in dispute that there was other testimony from two witnesses, PW6 and PW7, which the judge did not include in her review. PW6 was the pathologist who conducted the postmortem examination. The report thereof was on the judge's record. She actually considered that report in arriving at her decision.

According to the Judge's understanding of the postmortem report, the cause of death was not directly from the kick but that that action precipitated the cause of death. She, therefore, found no malice aforethought on the applicant's part. The learned judge then convicted her for manslaughter and sentenced her to one year imprisonment, a sentence which the applicant served even though she launched an appeal in the Court of Appeal.

Before that court, the applicant's bone of contention was with the trial judge's omission to review the testimonies of PW6 and PW7. For that reason, she referred to that judgment as a defective one which fell short of the standard expected of a proper judgment. From what has been exhibited in this application, it is not clear

what the applicant wanted the Court of Appeal to order should it agree with her. But the applicant combined that issue with the second one where she disputed the trial judge's finding that the kick had some part to play in the deceased's cause of death. She said that if the oral testimony of PW6 were to be taken into account, there was evidence that in fact the pathologist found no evidence of trauma in the area where the deceased was kicked and that the deceased died from an operation wound that had occurred a few years earlier. From the above observations, the applicant argued that, if the court were to agree with her, the appropriate order to make would not be for a re-trial, but an acquittal.

The court below concurred with the applicant that the trial judge omitted to analyse the testimony of PW6 and PW7; but the court pointed out that the trial judge had received the testimony of the two witnesses and it was on the record of appeal. For that reason the court below refused to order a retrial or acquittal, as the applicant would have liked but, in line with our decision in the case of **Muziba and Another v The People**[1], decided to base their decision on the evidence available on record. Taking that approach, the court below examined PW6's oral testimony in explanation of the findings of the postmortem report. The court found that, in fact,

PW6's oral testimony did not link the applicant's kick with the cause of death at all. For that reason, the court set aside the conviction for manslaughter and replaced it with a conviction for common assault, a misdemeanor under **Section 247** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, and whose maximum penalty is one year imprisonment. As punishment for the substituted offence, the court maintained the same one year sentence that was imposed by the trial judge for manslaughter.

Perhaps another appellant would have been satisfied with this turn of events; but not the applicant. She now comes to us on two grounds, couched as follows:

> **"1. The learned court below erred in law and in fact when it applied the principle in the case of Muyunda Muziba and Another v The People to the case in casu as the two cases are not on all fours**
>
> **2. The learned court below misdirected itself in law and in fact when, having allowed the appeal in part, preferred the imposition of a maximum penalty without giving reasons for doing so.**
>
> **More grounds to follow."**

In her affidavit in support of this application, the applicant believes that there is need for this court to make the decision in the *Muyunda Muziba* case clear as to whether it also extends to

situations where a judgment is present on the record but is only defective and situations where a trial court ought to have used the missing evidence to resolve a credibility issue. She also believes that our clarification of that case is not only for the benefit of the development and clarification of the law, but is also for the benefit of the general public and appellate courts.

In skeleton arguments filed by her counsel, the applicant re-iterates her argument that a decision that will be made on her first ground of appeal will be of public importance in that it will determine whether the *Muyunda Muziba* case can be applied in instances such as those prevailing in her case. She submits that, at this stage, this court is not being called upon to delve into the actual application of the *Muyunda Muziba* case; or whether it is on all fours with hers but merely to ascertain whether or not the decision on the first ground of appeal will be of public importance.

Coming to the second ground of appeal, the applicant argues that, it not only has prospects of success but it will also be of public importance, having regard to the applicant's position as a police officer and what she stands to gain or lose in her employment.

The State on the other hand argues that the applicant has not demonstrated how the first ground of appeal or, indeed, the whole appeal raises a point of law of public importance.

The following is our decision:

Section 13 of the **Court of Appeal Act, No.7 of 2016** provides:

> **"13 (1) An appeal from a judgment of the Court shall lie to the Supreme Court with leave of the Court.**
> **(2)_____**
> **(3) The Court may grant leave to appeal where it considers that–**
> **(a) the appeal raises a point of law of public importance;**
> **(b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
> **(c) the appeal would have a reasonable prospect of success; or**
> **(d) there is some other compelling reason for the appeal to be heard"**

The **Constitution of Zambia (Amendment) Act, No.2 of 2016**, created the Court of Appeal as an intermediate appellate court between the High Court and the Supreme Court. This obviously brought in the question as to what the roles of the two appellate courts should be. In **Bidvest Food Zambia limited & Others v**

CAA Import and Export Limited[2], we set out what the role of this court should now be. Hence, we said:

> **"The reason for restricting the granting of leave to appeal to the limited circumstances set out in section 13 is founded on the same basis as the Supreme Court of England and Wales employs to restrict or limit appeals to that court. In that jurisdiction, Lord Bingham explained in** *R V Secretary of State for Trade and Industry, Exp. Eastaway* **in relation to the House of Lords (but which position applies as much to the Supreme Court) that:**
>
> > *'the House [of Lords] must necessarily concentrate its attention on a relatively small number of cases recognized as raising legal questions of general importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist'*
>
> **The learned authors of** *Zuckerman on Civil Procedure; Principles of Practice, (3rd ed. Sweet & Maxwell, 2013 at page 1114 para 24.7)* **articulate the philosophy for the restriction of appeals to the Supreme Court in the following passage:**
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> > *'The policy of restricting appeals to a review of the lower court's decision is founded not only on the need to economise the use of resources. It is also founded on the belief that lower courts should bear the main responsibility for the conduct of litigation*

and its outcome. Appeal courts must defer to lower court's decisions, unless a decision is clearly wrong, in the sense that it is contrary to established principles or that no reasonable judge could have reached the conclusion in question' **"**

Having quoted the above passages, we went on to say:

"When considered in context, therefore, the creation of the Court of Appeal by the Constitution of Zambia (Amendment) Act No.2 of 2016, was not intended merely to add another layer in the structure of the courts or the appellate process. Rather, the Constitution elevated the Supreme Court to a level above an ordinary appellate court. Its original role of hearing appeals from the High Court and other quasi-judicial bodies having effectively been assumed by the newly created Court of Appeal, means that its role in the appellate structure has necessarily changed. In our view, even without the benefit of learning from the experience of other jurisdictions with court structures such as our country has now adopted following the enactment of the amended constitution, it would not have been the intention of the framers of the amended Constitution that the Court of Appeal and the Supreme Court should be performing the same or even a similar function.

Our view is that the role of the Supreme Court is now informed by the restriction of the appeals it will hear in the manner and for the reasons that courts at the equivalent level in jurisdictions such as the United Kingdom do. These restrictions were eloquently articulated by Lord Bingham in the case of *R v Secretary of State for Trade and Industry, Exp.Eastaway* **as we have quoted him earlier, as well as in the**

passage of *Zuckerman on Civil Procedure* **which we have also freely quoted earlier on.**

It is in that spirit that Section 13 of the Court of Appeal Act, restricting access to the Supreme Court by referring to the apex court only weighty issues in the most deserving of cases, should be understood"

It is clear from what we said in that case that, as a Supreme Court, we will not routinely hear appeals on any point that a person is dissatisfied with regarding the judgment of the Court of Appeal. The issue raised must be such as to be of general importance, and not merely restricted to the parties before the court.

Now, the applicant says that she would like this court to clarify the case of **Muyunda Muziba v The People**. That is a case where the trial court's judgment was not available before us, having gone missing. In that case we cautioned appellate courts against rushing to order an acquittal in such instances; we pointed out that that could lead to a proliferation of under-hand methods. We also said that where the evidence that was before the trial court is on record and the question of credibility of witnesses does not arise, then the appellate court is in a good position to evaluate the facts and form its own independent opinion. It is this last holding which the court of appeal employed to resolve the omission in the trial

court's judgment in the instant case; and this resulted in the reduction of the applicant's conviction from that for manslaughter to that for common assault. So, just as the single judge of this court, and the Court of Appeal before him, said there is nothing in that case that requires our clarification.

Coming to the intended ground of appeal against the sentence, there is nothing of general importance in it. The applicant talks about her employment situation, without demonstrating how it is affected. So we cannot consider that issue as a special and compelling ground upon which we can hear her appeal.

In our view, therefore, the intended appeal does not fall into the category of the most deserving cases. We dismiss this motion.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE