

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No. 2/2016

Librarians
Supreme Court

BETWEEN:

RICHARD SAKALA

APPLICANT

AND

THE PEOPLE

RESPONDENT

Coram: Kaoma, Kajimanga and Chinyama, JJS

On 1st December, 2020 and 15th December, 2020

For the Applicant: In Person

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State
Advocate of National Prosecutions Authority

J U D G M E N T

Kaoma, JS delivered the Judgment of the Court.

Cases referred to:

1. Finsbury Investments Limited and Another v Ventriglia - Appeal No. 11 of 2009
2. Trevor Limpic v Rachel Mawere and Two Others - SCZ/8/ 156/2015
3. Christine Mulundika and 7 others v The People (1995-97) Z.R. 20
4. Henry Kapoko v The People - Selected Judgment No. 46 of 2016
5. Abel Banda v The People (1986) Z.R. 105
6. Chibozu v The People (1981) Z.R. 2
7. Access Bank (Zambia) Limited and Group Five /ZCON Business Park Joint Venture (Suing as a firm) - SCZ/8/52/2014
8. Richard Nsofu Mandona v Total Aviation and Export Limited and Others - SCZ/8/199/2008
9. Nyimba Investments Ltd v NICO Insurance (Z) Ltd – Appeal No. 130 of 2016
10. Chibote Limited and Others v Meridien BIAO Bank (Z) Limited (in liquidation) (2003) Z. R. 105
11. George Musongo v The People (1978) Z.R. 266
12. Dar Farms Transport Limited v Moses Nundwe and 3 Others - Appeal No. 46 of 2014

Legislation referred to:

1. Supreme Court Rules, Cap 25, Rules 26, 33(1), 36, 50(2) and 78
2. Constitution of Zambia, Cap 1, Articles 118(2)(e) and 125(3)
3. Criminal Procedure Code Act, Cap 88, sections 207 and 208

1. Introduction and affidavit evidence

- 1.1 This is the applicant's motion for leave to restore a dismissed appeal made pursuant to **Rule 26** of the **Supreme Court Rules, Chapter 25 of the Laws of Zambia**.
- 1.2 The motion is supported by an affidavit deposed to by the applicant, wherein he has given the grounds for seeking to restore the appeal. The applicant accepted that, he acquiesced to the abandonment of his appeal under cause No. 02/2016. However, he averred that at the time, his lawyers prompted him to abandon the appeal; they made him believe that there was heavy national and international public opinion on suspects of corruption generated by the purchase of USD42 million worth of fire trucks by the Government. He was made to believe that the said controversy would prejudice the outcome of his case as it also involved allegations of corruption.
- 1.3 He asserted that he had since realised that his concern of national and international public opinion against any corruption suspect was out of sheer misapprehension of facts.
- 1.4 He further disclosed that apart from his strong belief that his criminal record was unjustified, he has severe restrictions to firstly, his right to freedom of movement, which has been affected severely as he cannot travel to the United States of America, among other jurisdictions, because of his criminal record while the conviction, still stands.

- 1.5 Secondly, that his freedom of association has also been severely affected owing to the fact that people cannot associate with him or his business because he is considered a convict. Therefore, his desire is to prosecute the abandoned appeal, on the merits to meet the ends of justice and to remedy continued injustice.
- 1.6 The respondent opposed the motion and filed an affidavit in opposition deposed to by Monica Chipanta-Mwansa, counsel for the respondent. In essence, the respondent asserted that the appeal was abandoned by notice of abandonment to which the applicant acquiesced, and this Court, therefore, dismissed the appeal.
- 1.7 The deponent also asserted that the dismissal of the appeal was final, there is no interest of justice or any points of public interest, which might prompt this Court to restore the appeal, the applicant has not demonstrated that the motion has merit and that the motion is frivolous and an abuse of court process.

2. Arguments by the applicant in support of the motion

- 2.1 The applicant filed heads of argument in support of the motion. He started by stating that he regretted having abandoned his appeal and that he is seeking an opportunity to be heard for his case to be determined on its factual and legal merits and that until now, the case has been characterised by serious 'evidence suppression' and total misdirection.

- 2.2 He craves an occasion when all the evidence could be adduced for an independent court to make a determination on the merits, to dispel the negative narrative that has been given currency and undeserved cogency by a duplicitous criminal justice process characterised by serious evidence suppression.
- 2.3 He stated that he is alive to **Rules 33 and 78** of the **Supreme Court Rules**, which consign abandoned appeals to a class of cases that are either dismissed, or refused and that abandonment of an appeal in the Supreme Court is considered final and determinative.
- 2.4 According to the applicant, he is fortified in making this application, since our Court of Appeal, a more recent creation, does not stamp abandonment with the finality envisaged in **Rule 33** of the **Supreme Court Rules** though he is cognisant of the fact that this Court is not bound by the rules of the Court of Appeal.
- 2.5 He cited **Order IX, Rule 7(4)** of the **Court of Appeal Rules**, which provides:
- “An appeal, which has been dismissed under this rule may, on the application of the appellant, be restored by leave of the Court, if the Court is satisfied that the notice of abandonment was induced by fraud or mistake and that the interests of justice require that the appeal be heard.”**
- 2.6 He submitted that this provision was meant to cure a lacuna that exposed appellants to serious injustice and he is hopeful that in time this Court would also provide an avenue for cases abandoned by mistake.

2.7 He is also confident that this Court, which has a record and precedent of reopening decided cases to ensure that the cause of justice is served rather than observe strict mechanical adherence to administrative law principles that would have resulted in an injustice; would treat his motion favourably given the circumstances.

2.8 As authority for this proposition, he cited the case of **Finsbury Investments Limited and Another v Ventriglia**¹, where this Court stated that it has unfettered inherent jurisdiction and in appropriate cases, it can reopen its final decision and rescind or vary such decision as it in fact did in **Trevor Limpic v Rachel Mawere and Two Others**².

2.9 The applicant further quoted **Order IX, rule 7(1)** of the **Court of Appeal Rules**, which reads the same as **Rule 33(1)** of the **Supreme Court Rules** and again cited **Order IX, rule 7(4)**, which we have quoted at paragraph 2.5. He submitted that the addition to rule 7(4) was responding to the imperatives of **Article 118(2)(e)** of the **Constitution of Zambia** which provides that justice shall be administered without undue regard to technicalities.

2.10 He further argued that if legislation that is inconsistent with Constitutional provisions were given effect, the result would not favour attainment of justice. In this regard, he relied on the case of **Mulundika and 7 Others v The People**³, where the Court held as

unconstitutional and invalid, legislation which offended the provisions of the Constitution. Furthermore, he cited the case of **Kapoko v The People**⁴, where the Constitutional Court held that:

“Article 118(2)(e) is not intended to do away with the existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to technicality.”

- 2.11 He contended that it would be a grave injustice to him as an individual and to posterity and our democracy if the abandoned appeal is not restored and the judgment is allowed to grace our jurisprudence because it contains fatal flaws against the rule of law.
- 2.12 The applicant also cited several foreign case authorities and constitutional provisions to emphasise his point that other jurisdictions are moving away from strict adherence to principles of *res judicata*, *functus officio* and *stare decisis*, where these would result in injustice. He also contended that the failed Referendum had a provision where these principles were to give way to justice in cases where new evidence was available.
- 2.13 He urged this Court to determine this matter favourably in exercise of its authority as vested by **Article 125(3)** of the **Constitution**, which states that the Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence. He also quoted the case of **Abel Banda v The People**⁵, which overruled the case of **Chibozu v The People**⁶.

2.14 He cited other case authorities that we find unnecessary to restate, as they are not relevant to the issue we have to decide. He argued that his lawyers were very concerned that critical evidence was not adduced in the subordinate court, leaving the record without substantive material to mount a defence; hence, their advice for abandonment as there was general public disquiet against corruption over the purchase of expensive fire tenders by the Government. His lawyers felt that the hostile public atmosphere would injure any prospect of success in a matter already made fragile by the negative narrative surrounding it and no amount of due diligence would have allowed him to gather evidence during trial as he was incarcerated at Kamwala Remand Prison on the charge of theft of motor vehicle.

2.15 The applicant further attacked the High Court decision declining to take new evidence which was not canvassed in the court below, which effectively prevented the production of evidence on appeal to prove that the judgment in the lower court was obtained by fraud. He contended that the new evidence had a bearing on constitutionalism and the rule of law.

2.16 He insisted that he was applying for restoration of the appeal because the abandonment was a mistake and his application is borne from personal bitter experience, thus his effort to gain personal vindication and in the process assist many others suffering

penury on account of their inability to traverse the complexity of legal administrative principles.

2.17 He further alleged that his lawyers had suggested that intelligence in their possession indicated that the Court would be ill disposed in his application due to public disaffection compounded by controversy over the purchase of expensive fire engines. He was unhappy that the appeal was being abandoned based on public pressure but when he tried to address the court he was guided that it was unimportant because his lawyers had withdrawn.

2.18 He claimed that he reluctantly signed the notice of withdrawal long after the court session, only to discover that the concerns could have been addressed by applying for an extension of time in which to table the appeal. He has had time to reflect over the events and felt that though his lawyers acted in his best interests, the decision denied him the opportunity to present his case to this Court.

2.19 The applicant believes that a positive determination of this motion would have far reaching consequences, not only in terms of developing jurisprudence, but would help consolidate democracy by putting on notice, political authorities with a penchant for abuse of authority especially in the abuse of the judiciary.

2.20 At the hearing of the motion, the applicant acknowledged that this Court cannot be swayed by public opinion regarding the procurement of fire engines and submitted that he had come back

to Court because this is a Court of justice and the grounds he has for seeking justice are valid. He agreed that there is no provision in the Supreme Court Rules allowing the Court to restore an abandoned and dismissed appeal but insisted that he is seeking justice under **Article 118(2)(e)** of the **Constitution**.

2.21 He also insisted that this Court could restore an appeal that was abandoned and dismissed or refused, when the Court is confronted with fresh evidence, such as the Mukelebai Report, which the High Court disregarded. On the said fresh evidence, which he did not mention in the affidavit in support, the applicant insisted that he canvassed the issue in his written submissions and his lawyers had filed a notice of motion for leave to adduce fresh evidence, before he abandoned the appeal.

2.22 He contended that there is a technicality in **Rule 33(1)** of the **Supreme Court Rules**, since it does not allow restoration of an abandoned appeal as does **Order IX, Rule 7(4)** of the **Court of Appeal Rules** and that his appeal was technically consigned to dismissal or refusal, without being decided on its merits, which was an injustice.

3. Arguments by the respondent in opposition to the motion

3.1 Counsel for the respondent submitted orally and relied on the affidavit in opposition. It was contended that the applicant exercised

his right to abandon his appeal and the court accordingly dismissed the appeal. Counsel observed that there are rare instances when this Court could restore a dismissed appeal, such as those envisaged in **Rule 36** of the **Supreme Court Rules**. However, a perusal of the applicant's affidavit and submissions does not show that there was coercion, fraud or mistake, which could have led to the abandonment of the appeal. The applicant voluntarily withdrew the appeal; thus his attendance in court when the appeal was abandoned and consequently dismissed.

3.2 Counsel further argued that the circumstances surrounding this matter do not reveal anything that would bring about the development of jurisprudence. If anything, the motion shows lack of confidence in this Court, on the part of the applicant, that his appeal could have been dealt with appropriately regardless of the international and national perception on corruption that was allegedly prevailing at the time. According to counsel, nothing has changed which would favour the applicant's appeal because corruption is still frowned upon.

3.3 Counsel also contended that this motion does not disclose fresh evidence and that in any case; this is not the appropriate point at which fresh evidence would be adduced. Counsel urged us to dismiss the motion, as it was destitute of any merit.

3.4 In reply, the applicant reiterated that the Constitution allows this Court to stand by its decisions but in the interest of jurisprudence, an exception could be made. He believes that rules are important but insisted that justice is more important. He urged us to allow the motion so that his appeal could be heard on the merits.

4. Decision of this Court

4.1 We have considered the affidavit evidence by the parties, the written and oral arguments by the applicant, and the oral arguments by learned counsel for the respondent. The issue we have to determine is whether this Court can restore an appeal, which the applicant abandoned and which, as a result, the Court dismissed.

4.2 The answer, as acknowledged by the applicant, is in **Rule 33(1)** of the **Supreme Court Rules**. It provides:

“An appellant, at any time after he has lodged notice of intention to appeal or notice of application for leave to appeal, or for an extension of time within which such notice shall be given, may abandon his appeal or application by giving notice thereof to the Master substantially in Form CRIMJ5 of the Third Schedule and, upon such notice being given, the appeal or application shall without further order be deemed to have been dismissed or refused by the Court.”
(underlining ours for emphasis)

4.3 The import of this rule is very clear and the applicant understands this. Once an appellant has abandoned his or her appeal, by giving notice thereof to the Master in the prescribed form, such appeal is, without further order, considered dismissed or refused by the court.

- 4.4 This rule is mandatory as far as it relates to the fate of the abandoned appeal since it uses the word '**shall**'. In the present case, the applicant lodged a notice of abandonment of the appeal in the prescribed form and he annexed a copy of the said notice to his affidavit in support of notice of motion. In addition, he confirmed in his affidavit that he abandoned his appeal on 13th October, 2017 under his lawyers' advice and, as rightly argued by learned counsel for the respondent, he acquiesced to file the notice of abandonment.
- 4.5 Clearly, in terms of **Rule 33(1)**, the appeal was without further order, deemed abandoned or refused by the court. However, the matter did not end there because the appeal still came up for hearing before the Court, whereupon counsel for the applicant informed the Court that the appellant was abandoning his appeal. Consequently, the Court formally dismissed the appeal.
- 4.6 The applicant cannot now argue that he abandoned the appeal by mistake or that he was not happy that the appeal was being abandoned because of public opinion or that he signed the notice of abandonment long after the court sitting. The applicant acknowledged in his affidavit in support, and accepted before us that his advocates, acted in his best interests and two advocates ably represented him.
- 4.7 Therefore, we reject his spirited argument that he abandoned the appeal by mistake, particularly that he has not demonstrated how

the controversy generated by the purchase of USD42 million worth of fire trucks by the Government would prejudice the outcome of an appeal that was before this Court simply because it involved allegations of corruption.

4.8 We must, emphatically state that the exercise of executive power by the Government is distinct from the exercise of judicial power by the judicature even in the face of heavy national and international public opinion concerning suspects of corruption. The applicant himself recognises that the Supreme Court, which is a court of justice cannot be swayed by national or international public opinion concerning suspects of corruption or any other matter. He ought to have known that his concerns that this Court would be ill disposed in his application due to public disaffection compounded by controversy over the purchase of expensive fire engines were baseless and borne out of sheer misapprehension of facts.

4.9 The applicant argued that one of the main reasons for asking this Court to restore the dismissed appeal is that he wants to be given an opportunity to adduce fresh evidence, which was suppressed in the trial court and in the High Court. However, he did not allude to this issue in his affidavit in support of notice of motion. He only mentioned it in his submissions.

4.10 Further, while we agree with the applicant that there have been cases where this court has reviewed or revisited its decisions in the

past, because of fresh evidence, and for other reasons, this is rarely done. Besides, there is no motion before us for leave to adduce fresh evidence. Interestingly, the applicant conceded that when he was abandoning his appeal in 2017, his lawyers had filed a motion for leave to adduce fresh evidence but he still went ahead to abandon the appeal. The view we take is that the issue of fresh evidence does not constitute a special or compelling reason for us to restore a dismissed appeal.

4.11 It is also important for us to point out that the allegation that this court would be paying undue regard to procedural technicalities, which is proscribed under **Article 118(2)(e)** of the **Constitution** if we refuse to restore the appeal, is misplaced because the appeal was not dismissed on account of a technicality. We dismissed the appeal because the applicant voluntarily, abandoned it or acquiesced to the abandonment of his appeal.

4.12 Furthermore, the applicant cannot rely on the Court of Appeal Rules or constitutional provisions from foreign jurisdictions to argue that there is a technicality in **Rule 33(1)**. He rightly conceded that the Court of Appeal Rules do not apply to the Supreme Court. When commenting on **Article 118(2)(e)** of the **Constitution**, in **Access Bank (Zambia) Limited and Group Five/ZCON Business Park Joint Venture (Suing as a firm)**⁷, we said that the Constitution never means to oust the obligations of litigants to comply with

procedural imperatives as they seek justice from the courts. We underscored this position in **Richard Nsofu Mandona v Total Aviation and Export Limited and Others**⁸.

4.13 The Zambian Constitutional Court also had occasion to interpret **Article 118(2)(e)** in **Henry Kapoko v The People**⁴ cited by the applicant in relation **sections 207** and **208** of the **Criminal Procedure Code Act, Cap 88**. The Constitutional Court put the matter as follows:

“... While the facts and law in each case will vary, the principle laid out by this Court on the meaning and application of Article 118(2)(e) remains constant. The court's word is clear. Article 118(2)(e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality.

Although the framers of the Constitution did not have a stand-alone rationale to support the inclusion of Article 118(2)(e) which was introduced in the Final Draft Constitution prepared by the Technical Committee Drafting the Zambian Constitution the fact that it was placed with other principles to guide the Judiciary in ensuring that “... justice should be done and seen to be done without discrimination” fortifies our understanding of how Article 118(2)(e) relates to sections 207 and 208.

The third prayer is whether section 207 and 208 of the CPC can continue to exist in view of the provisions of Article 118(2)(e). Read together, are sections 207 and 208 technicalities and if so, have they been accorded undue regard? Our short answer to both questions is 'no'. Sections 207 and 208 cannot be isolated from the rest of the CPC and indeed no such intent is discernible in the Constitutional Court Rules. The two sections are an integral part of the CPC and what we said above about the rules of law and the CPC in particular stand.”

4.14 The above conclusion by the Constitutional Court is in tandem with our view on **Article 118(2)(e)** expounded in **Access Bank (Zambia) Limited and Group Five /ZCON Business Park Joint Venture (Suing as a firm)**⁷ and **Richard Nsofu Mandona v Total Aviation**

and Export Limited and Others⁸. The **Kapoko**⁴ case is not helpful to the applicant but confirms that **Article 118(2)(e)** is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities.

4.15 We do not see any manifest injustice that would be caused in this case by applying the rule under which the applicant abandoned his appeal and there is no unjustifiable regard to a technicality in this case. In conclusion, until such a time that Rule 33(1) is amended, the fate of an abandoned appeal in this Court will continue to be consigned to dismissal or refusal by the court.

4.16 Further still, in the **Richard Nsofu Mandona**⁸ case, we stated that in reopening any case, the interest of justice must be weighed against the equally essential principle of finality. Above all the applicant must bring himself within the parameters justifying the reopening of the decision of the Court dismissing the appeal.

4.17 In the present motion, the applicant has not brought himself within the parameters justifying the reopening of the decision of the Court dismissing the appeal. All of the applicant's arguments revolving around Article 118(2)(e) and alleged fresh evidence are misplaced.

4.18 The applicant also referred to **Finsbury Investments Limited and Another v Anthony Ventriglia**¹. Although, as we said in that case this Court has unfettered inherent jurisdiction and in appropriate cases may reopen its final decision and rescind or vary such

decision as we in fact did in the case of **Trevor Limpic v Rachel Mawere and Two Others**², that power is to be used sparingly and in the most deserving of cases. This is not one of such cases.

4.19 The applicant also referred to **Rule 78** of the **Supreme Court Rules** (the slip rule) to bemoan the fate of his dismissed appeal. We do not understand how this rule is helpful to him. In **Nyimba Investments Ltd v NICO Insurance (Z) Ltd**⁹, we stated that once this Court has entered judgment in a case, the decision is final and will remain so, unless the conditions for its re-opening as we said in the **Finsbury Investment Limited**¹ case are satisfied. We also said that our judgments are final not because we are infallible but in order to avoid the spectre of repeated efforts at re-litigation.

4.20 In addition, in **Chibote Limited and others v Meridien BIAO Bank (Z) Limited (in liquidation)**¹⁰, we said that an appeal determined by the Supreme Court will only be reopened where a party, through no fault of his own, has been subjected to an unfair procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong.

4.21 The applicant has not been subjected to any unfair procedure and both the applicant and this Court complied with **Rule 33(1)** when the appeal was abandoned and dismissed. Therefore, no injustice whatsoever was occasioned to him.

4.22 The applicant also cited the case of **Abel Banda v The People**⁵, which as we have said overruled our decision in **Chibozu v The People**⁶ because it was wrong and it contradicted our earlier decision in **George Musongo v The People**¹¹. That is not the case in the current matter. Therefore, **Abel Banda v The People**⁵ cannot be of any help whatsoever to the applicant.

4.23 In our recent judgment in **Dar Farms Transport Limited v Moses Nundwe and 3 others**¹², we considered whether we could restore and hear an appeal which had been dismissed for failure to comply with a mandatory rule of the court. We held that an appeal dismissed under those circumstances cannot see the light of day again, meaning that such an appeal cannot be restored to the active cause list and heard because this Court becomes *functus officio* after the appeal is dismissed. We also stated that our inherent jurisdiction will never be exercised where the default arises from counsel's ineptitude.

4.24 The applicant cannot rely on **Article 125(3)** of the **Constitution**, as we do not see any jurisprudential or constitutional issues or issues touching on the rule of law in this motion and all the applicant's arguments around *res judicata*, *functus officio* and *stare decisis* are misdirected and are not helpful to his motion.

4.25 Plainly, the applicant wants his appeal to be restored not because the abandonment was a mistake but because as he asserted in his

affidavit, his freedom of movement and association have been restricted because of the conviction and this motion was borne out of personal bitter experience, thus his effort to gain personal vindication. This is not about assisting others suffering penury because of their inability to traverse the complexity of legal administrative principles. He understood the consequences of abandoning his appeal before doing so, particularly that he was represented by counsel.

5. CONCLUSION

- 5.1 The fate of the applicant's motion should follow the fate of his abandoned appeal. We accordingly dismiss it.
- 5.2 We make no order as to costs.


R. M. C. KAOMA
SUPREME COURT OF ZAMBIA


C. KAJIMANGA
SUPREME COURT OF ZAMBIA


J. CHINYAMA
SUPREME COURT OF ZAMBIA