

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

SCZ/9/4/2021

BETWEEN:

MWIYA MUKELEBAI

and

THE ATTORNEY GENERAL



APPLICANT

RESPONDENT

Coram: E.M. Hamaundu, JS

For the Applicant : Mr T.T. Shamakamba, Messrs Shamakamba & Associates

For the Respondent: Col. F. Chidakwa, Principal State Advocate

RULING

HAMAUNDU, JS, delivered the Ruling of the Court

Case referred to:

Zambia Revenue Authority v Jayesh Shah (2001) ZR 60

Laws referred to:

Defence Act, Chapter 106 of the Laws of Zambia

This is an application for leave to appeal to this court. The applicant was a soldier in the Zambia Army, holding the rank of Staff Sergeant. In March, 2021, the applicant was charged with three

offences under the **Defence Act, Chapter 106** of the **Laws of Zambia**. He appeared before a Court Martial and was convicted of the charges. He now wishes to appeal to this court, and makes this application under **Section 137(1) of the Defence Act**.

At the hearing of this application, Mr Shamakamba, counsel for the applicant, submitted that the application should be granted because of the principle that cases should be decided on merits. He referred to the case of **Zambia Revenue Authority v Jayesh Shah**⁽¹⁾ which holds that cases should be decided on their substance and merit; and that, while rules must be followed, the effect of their breach will not always be fatal if the rule is merely regulatory or directory. Counsel further submitted that the intended appeal has prospects of succeeding at the hearing.

Colonel Chidakwa, the learned Principal State Advocate, on behalf of the respondent, submitted that the provision in the **Defence Act** which requires a prospective appellant to seek leave to appeal was put there in order to enable the Supreme Court assess whether the intended appeal has any prospects of success. Counsel pointed out that the applicant in this case has not set out any proposed grounds of appeal and that, while the applicant has had a full transcript of the proceedings in the court below as of the 21st July,

2021, he has completely omitted to exhibit the transcript in this application. Colonel Chidakwa, therefore, argued that in the absence of the proposed grounds of appeal and the transcript of the proceedings in the court below there is no way of assessing the prospects of success of the proposed appeal. Counsel referred to **Order 59 rule 4** of the **Rules of the Supreme Court** (*White Book*) and concluded with the submission that the Attorney General opposes this application.

I am in agreement with the submissions by counsel for the Attorney General. Since under **Section 136** of the **Defence Act** one can only appeal with leave of the Supreme Court, it means that only appeals that show some merit ought to be entertained by the Court. As rightly pointed out by counsel for the respondent, the applicant has neither set out any proposed ground of appeal nor exhibited a transcript of the proceedings in the court below. It is therefore difficult to assess the merits of the applicant's proposed appeal. In the circumstances this application fails, and is dismissed.

Dated theday of2021



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E.M. Hamaundu
SUPREME COURT JUDGE