

IS

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

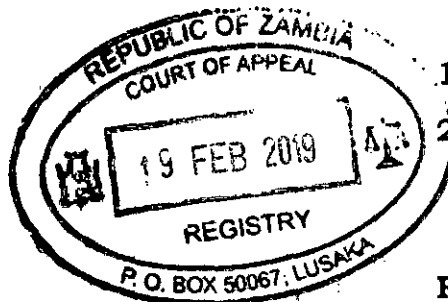
APPEAL NO. 134/2018

BETWEEN:

SYDEN SIMUBALI
NYUNDU KATUKA

AND

THE PEOPLE



1ST APPELLANT

2ND APPELLANT

RESPONDENT

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 19th February 2019

FOR THE APPELLANTS: *Mr. P. Chavula, Senior Legal Aid Counsel*

FOR THE RESPONDENT: *Mr. N. T. Mumba, Acting Deputy Chief State Advocate*

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. White v Brunton (1984) ALL ER 606
2. Zambia Revenue Authority v T & G Transport (2007) ZR 13

Statutes referred to:

1. Court of Appeal Act No. 7 of 2016
2. Order IX Rule 1 (1) and (a) of the Court of Appeal Rules

The Appellant was convicted, along with another, by the Subordinate Court on five counts namely; two counts of fraudulent and false accounting in respect of the Appellant only, two counts of Theft by Public Servant in respect of the Appellant and another and one count of Possession of Property Suspected of being Proceeds of Crime in respect of the other person only. The Subordinate Court convicted both accused persons in all the five counts.

Although there is no notice of appeal exhibited on the record, from the record of proceedings before the High Court, it is clear that both convicts appealed to the High Court. We have therefore noted that what is supposed to be before us is a second appeal in terms of Section 15(1) of the Court of Appeal Act No. 7 of 2016. The Section provides that such an appeal should be with leave of the High Court or this Court if leave is not granted at the time judgment is pronounced.

Order IX Rule 1(1) (a) of the Court of Appeal Rules provides that where leave to appeal is not granted by the High Court at the time the Judgment is pronounced, the intending appellant shall file an application for leave to appeal within thirty days of the date of the Judgment appealed against.

At the close of the proceedings, the learned Judge made the following pronouncement on the record;

“First Appellant; you have a Right to Appeal”.

Considering that this was a decision from a first appeal, the proper statement or pronouncement on the record by the learned Judge should have been;

“I grant you leave to appeal to the Court of Appeal”.

The question then is whether it really matters whether it is one or the other. We hold that at trial stage a convict has an automatic constitutional right of appeal save in few instances where leave of the Court must be obtained to appeal. It is therefore, our firm view that a convict should only be informed of the right of appeal where an appeal is as of right without the requirement to obtain leave of the Court for unrepresented parties.

However, where the law demands that an appeal can lie only with leave of the Court, it is the duty of the Court to pronounce the granting of the leave upon delivery of the Judgment or upon

The rationale is that; whenever the law provides that leave of the Court must be obtained before an appeal can be lodged, there is no right of appeal in such a case. It means that an aggrieved party can only be entitled to appeal if the Court grants its permission. Hence, the duty on the Court to be specific that it has granted its permission to appeal which is quite different from informing a party of a right which they already have just in case they did not know.

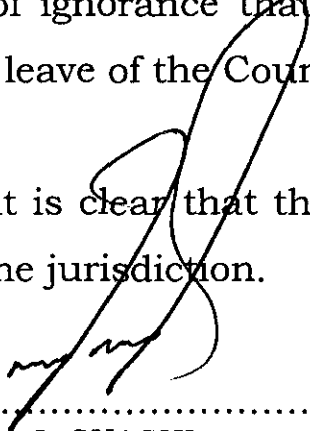
It is for that reason that whenever, there is no evidence that leave to appeal was granted, by the trial Court, Appellate Court lacks jurisdiction to entertain such an appeal for being incompetent.

This is as was held in White v Brunton¹ that; ***“the requirement of leave to appeal goes to the jurisdiction of the Court of Appeal”***.

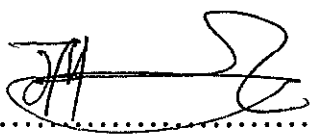
This position was adopted by the Supreme Court of Zambia in the case of ***Zambia Revenue Authority v T and G. Transport***².

It is therefore our considered view that the learned Judge made the statement in error or out of ignorance that the Appellant had no right to appeal but required leave of the Court to lodge an appeal.

In the view we have taken it is clear that there is no appeal before us and we accordingly decline jurisdiction.



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J. CHASHI
COURT OF APPEAL JUDGE



.....
F. M. LENGALENGA
COURT OF APPEAL JUDGE



.....
M. J. SIYVWAPA
COURT OF APPEAL JUDGE