

2016/AR/BA/02

IN THE HIGH COURT FOR ZAMBIA

2016/HK/162

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

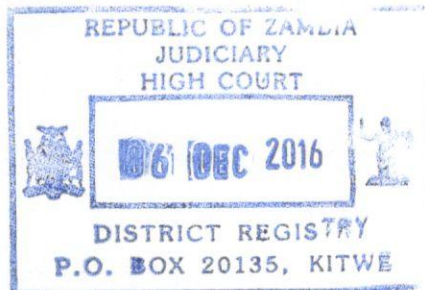
(Criminal Jurisdiction)

BETWEEN:

ERICK KAZENZI

AND

THE PEOPLE



APPELLANT

RESPONDENT

Before: Mrs. Justice C. B. Maka-Phiri on 6th December, 2016.

For the Appellant: Mr. D Mazumba of Messrs Douglas & Partners

For the Respondent: Ms Mutale of National Prosecutions Authority.

J U D G E M E N T

Legislation referred to:

- 1. The Subordinate Court Act, Cap 28 of the Laws of Zambia.**
- 2. The Penal Code, Chapter 87 of the Laws of Zambia.**
- 3. The White Book, 1999 edition.**

Case referred to:

- 1. Nyalungwe v Nyalungwe Z.R (1977) 327.**

This is an appeal against the Subordinate Court's decision to sentence the appellant to 14 days imprisonment with hard Labour for disobeying the Court's order. The order was made following an

application by **New Ming'omba Small Holdings Kasumbalesa**, (Applicant) for contempt of court on 25th February, 2016. I note that the application was made under cause **No.2014/SE/231** though the contempt proceedings emanate from cause **No.2014/SE/186** and specifically the Judgement of the Court dated 11th October, 2014.

The grounds of appeal as advanced by the Appellant were as follows:

- 1. That the Court below erred in both law and fact by convicting the Appellant on the ground that no Leave to commence contempt proceedings was sought by the Applicant.**
- 2. The lower Court erred in both law and fact by convicting the Appellant on the strength of submissions and not evidence.**

The Appellant filed submissions in support of the grounds of appeal on 21st October, 2016. The gist of the submission was that the Appellant was not heard on the charge of contempt of court as the facts upon which the offence was premised were not availed to him. The Appellant further submitted that the Court's order that was breached was not stated in line with section 116(1) (i) of the Penal Code. Further that the Applicant in the contempt proceedings did not seek leave of Court prior to commencing the contempt proceedings. That failure to do so rendered the procedure adopted in the matter irregular. The Appellant submitted that no evidence was adduced at the hearing of the contempt proceedings and as such there was no basis upon which the Appellant was convicted.

The Respondent did not file any affidavit in opposition on account that the contempt proceedings were not on record.

I have considered this appeal and the submissions by the Appellant. I have also perused the record of proceedings from the lower Court. I agree with the observation made by the learned State Advocate that the contempt proceedings are not on record to show what transpired on 4th March, 2016. The only thing on record is the order stating as follows;

“I have heard the submissions by both parties and it is very clear that the Respondent has disobeyed the order of this court and I am therefore sentencing him to 14 days imprisonment with hard Labour.”

The starting point in determining this appeal is to note that the Subordinate Court has powers to punish for contempt of court pursuant to the provisions of section 116(1) of the Penal Code and section 40 of the Subordinate Court Act. Other than these two Act, there are other Acts that give the Subordinate Court powers to punish for contempt of Court. Additionally, the Subordinate Court has inherent jurisdiction to punish for contempt of Court committed in the face of the Court.

The procedure that the Subordinate Court should adopt when dealing with contempt of court is dependent on whether or not the contempt was in the face or view of the court. If the contempt was in the face of the Court, the Subordinate Court’s jurisdiction is to summarily deal with the contempt. If however the contempt is out

of Court or not in the face of the Court, the contempt should be reported to the Police as a complaint and the case will be prosecuted just like any other criminal case. The Subordinate Court has therefore no jurisdiction to summarily deal with contempt committed out of Court.

It should be noted that the procedure on contempt of court as provided in the white book, 1999 edition does not apply to the Subordinate Court. Therefore the requirement to obtain leave of Court prior to commencing contempt proceedings does not apply to contempt proceedings in the Subordinate Court. It should also be noted that according to the provisions of section 38 of the Subordinate Court Act, whenever the Magistrate punishes for contempt of Court under section 40 of the Act, he or she shall make and keep a minute recording the facts of the offence and the extent of the punishment and send it to the High Court. The purpose of this law is to allow the High Court perform its supervisory functions over the Subordinate Court.

In casu, the summons issued by the Applicant dated 26th February, 2016 did not cite any provisions of the law pursuant to which the contempt proceedings were being made. It is however not in dispute that the contempt herein was not in the face of the Court. The contempt could not therefore have been dealt with in the manner in which it was proceeded with in this case. Secondly, as submitted by the Appellant, the order that was allegedly disobeyed was not stated in the affidavit in support. I am equally unable to ascertain the

order that was disobeyed as the contempt proceedings are not on record. In any case there is no evidence on record upon which the Subordinate Court based its decision to convict the Appellant for contempt of Court.

Suffice to note that in the case of Nyalungwe v Nyalungwe⁽¹⁾, the High Court held that casual or accidental or unintended disobedience to an order of the Court is not enough to justify committal. It must be established that the order has been wilfully disregarded. I agree with this holding as it reflects the position of the law. In casu however there is nothing to show that the Magistrate interrogated the aspect of wilful disobedience that is if any order was disobeyed.

I therefore entirely agree with the Appellant's submissions that the Magistrate fundamentally erred in the manner that she dealt with the application for contempt of Court. The right thing to do was for the Subordinate Court to dismiss the application as it was improperly before her. I am therefore satisfied that this appeal has merit and it is hereby allowed. The Subordinate Court's order dated 4th March, 2016 is hereby set aside.

Dated at Kitwe; this 6th day of December 2016.


.....
C. B. Maka-Phiri (Mrs.)
Judge