

BETWEEN:

THE PEOPLE

AND

SOLOMON MTUMAYO



APPELLANT

RESPONDENT

CORAM: MCHENGA, DJP, NGULUBE AND SIAVWAPA, JJA.

ON 20TH AND 23RD APRIL 2021

FOR THE APPELLANT:

*MRS CHIPANTA MWANSA, DEPUTY CHIEF
STATE ADVOCATE*

FOR THE RESPONDENT:

MISS NZALA, LEGAL AID COUNSEL

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Nathan Hakagolo v The People SJ No. 7 of 2016*
- 2. Bruno Chipundu Tembo v The People (2011) 2 ZR 243*

Legislation referred to

- 1. The Zambia Wildlife Act No. 14 of 2015.*
- 2. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

1.0. **INTRODUCTION**

1.1. This is an appeal against the Judgment of the Hon. Mr. Justice E. Mwansa dated 17th October 2019 acquitting the Respondent.

2.0. **BACKGROUND**

2.1. The Respondent was convicted by the Subordinate Court of the offence of unlawful possession of a prescribed Trophy contrary to Section 130 (2) of the Zambia Wildlife Act No. 14 of 2015.

2.2. The trial Magistrate then referred the matter to the High Court for sentencing under Section 217 of the Criminal Procedure Code on 5th February 2019.

2.3. On 25th February 2019, the Respondent applied for bail pending sentencing and the Court granted the application in the Respondent's own recognizance.

2.4. On 6th March 2019, the Respondent filed a summons for bail pending appeal supported by an affidavit. The Court granted the Respondent bail in his own recognizance with two sureties on 18th March 2019.

2.5. This followed the filing of a notice of appeal against conviction on 22nd February 2019 by the Respondent.

3.0. **ARGUMENTS OF THE APPELLANTS**

5.1. The Appellants' argument in ground one is that an appeal can only be lodged after trial is concluded by way of a final decision being a sentence in the case of a conviction as

3.0. **PROCEEDINGS BEFORE THE HIGH COURT**

- 3.1. When the appeal came up for hearing, the learned Judge considered the evidence in the Court below.
- 3.2. Although the record of proceedings before the High Court is not on the record we note that at page 36 paragraph 10 of the Judgment; in the Record of Appeal, the learned Judge recognized that the Subordinate Court had referred the matter to the High Court for sentencing but that the Respondent had appealed against conviction.
- 3.3. The learned Judge then proceeded to hear the appeal without passing sentence and acquitted the Respondent.

4.0. **THE APPEAL**

- 4.1. The People then decided to appeal the Judgment of the High Court on two grounds namely;
1. *That the learned Court erred in law when it proceeded to hear an appeal before the Respondent was sentenced and*
 2. *That the learned Court erred in law when it acquitted the Respondent despite there being sufficient evidence to prove the guilt of the Respondent.*

5.0. **ARGUMENTS BY THE APPELLANTS**

- 5.1. The Appellants' argument in ground one is that an appeal can only be lodged after trial is concluded by way of a final decision being a sentence in the case of a conviction as

prescribed by Section 322 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia.

5.2. It was also argued that it was irregular for the Court below (Subordinate Court) to entertain an application for bail pending appeal before sentence was passed.

5.3. In ground two it is argued that in the absence of a pending appeal, the High Court had the opportunity to exercise its revisionary power under Section 338 of the Criminal Procedure Code.

5.4. However, in view of the purported appeal, the Court below had neither the power to exercise its revisionary power nor proceed as it did for want of jurisdiction.

6.0. **ARGUMENTS BY THE RESPONDENT**

6.1. The Respondent conceded ground one stating that the right thing for the Court below to have done was to review the Judgment of the Subordinate Court pursuant to Section 218 (3) of the Criminal Procedure Code.

6.2. This position was anchored on the guidance given by the Supreme Court in the case of Nathan Hakagolo v The People¹ in which the need for the High Court to satisfy itself of the propriety of the conviction before passing sentence was underlined.

6.3. It is therefore, the Respondent's view that the matter be sent back to the High Court for review of the Judgment of the Subordinate Court.

7.0. **OUR VIEW**

7.1. It is not in dispute that the Respondent was referred to the High Court for sentencing after being convicted by the Subordinate Court.

7.2. As argued by the Appellant, the right to appeal only arises after sentence has been passed pursuant to Section 322(b) of the Criminal Procedure Code which provides as follows;

“No appeal shall be heard unless entered in the case of an appeal against conviction, within fourteen days of the date the sentence is imposed in respect of such conviction.”

7.3. It must also be noted that whenever a matter is referred to the High Court by the Subordinate Court for sentencing, the High Court ought to proceed as though it is the convicting Court.

7.4. This is the more reason the Supreme Court emphasized the need for the High Court to satisfy itself as to the propriety of the conviction before passing sentence. See Section 218 of the Criminal Procedure Code.

7.5. We would like to recognize that the High Court of Zambia had occasion to deal with a similar situation in the case of Bruno Chipundu Tembo v The People².

7.6. In that Judgment; the learned Judge held inter alia that;

“It is not enough that a conviction has been made. The sentence must also be passed for any appeal to be valid”.

7.7. Based on the clear provisions of the Criminal Procedure Code cited in this Judgment and the Supreme Court Authority referred to, we affirm the decision in the Chipundu case (Supra) as a reflection of the correct position of the law.

8.0. **CONCLUSION**

8.1. In view of what we have stated above we find merit in the first ground of the appeal and hold the appeal proceedings and the Judgment thereof handed down by the High Court a nullity for want of jurisdiction.


8.2. We further wish state that we did address our mind to the question whether leave to appeal to us was required since it was a second appeal.


8.3. Our view is that since ground one challenged the jurisdiction of the Court below to proceed as it did; leave was not required as the appeal from the Subordinate Court was premature and


incompetent rendering it null and void ab initio. Ground two is rendered otiose.

8.4. We accordingly allow the appeal, set aside the Judgment and the bail granted pending appeal falls away.

8.5. We order that the record be remitted to the High Court for sentencing before another Judge of competent jurisdiction as the Respondent shall be remanded in custody pending appearance before the High Court.


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C. R. F. MCHENGA
DEPUTY JUDGE PRESIDENT COURT OF APPEAL


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P. C. M. NGULUBE
COURT OF APPEAL JUDGE


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M. J. SIAVWAPA
COURT OF APPEAL JUDGE