

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 243/2020

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

AGGIE ZIMBA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Kondolo SC and Banda-Bobo, JJA

On 19th October 2021, 20th October 2021 and 23rd March 2022

For the Appellant: M. Matoka-Michelo, Legal Aid Counsel, Legal Aid Board

For the Respondent: B. Mwewa, Senior State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Clarke v Shepard [1956] R.& N. 542
2. Wina and Wina v The People [1995-1997] Z.R. 137

3. The People v Japau [1967] Z.R. 95
4. The People v Winter Makowela and Robby Tayabunga [1979] Z.R. 290

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Evidence Act Chapter 43 of the Laws of Zambia
3. The Court of Appeal Act, No. 6 of 2016
4. The Federal Supreme Court Act, No. 11 of 1955

1. INTRODUCTION

- 1.1. The appellant, appeared before the Subordinate Court (Hon. M. L. Phiri), on two charges. The allegation in the first count, was that she committed the offence of forgery, contrary to **section 347 of The Penal Code.**
- 1.2. In the second count, the allegation was that she uttered a forged document, contrary to **section 352 of The Penal Code.**
- 1.3. She denied both charges, and the matter proceeded to trial.

- 1.4. At the close of the prosecution's case, she was acquitted, the trial magistrate having found that a *prima facie* case, had not been made out, against her.
- 1.5. The State appealed against the acquittal.
- 1.6. In the High Court (Chitabo J., as he then was), allowed the appeal. He set aside the appellant's acquittal, and ordered that she be arraigned before a different magistrate, on the same charges.
- 1.7. He also granted, at his own instance, the appellant, leave to appeal against his decision, to this court.

2. GRANT OF LEAVE TO APPEAL AT COURT'S OWN INSTANCE

- 2.1. Before we deal with the issues that the parties to this appeal have raised, we are compelled to say something, on the propriety of the High Court, granting leave to appeal, in a second appeal, at its own instance.

2.2. There are two provisions that deal with appeals in criminal cases, from the High Court, to the Court of Appeal. These are, **sections 14 and 15 of the Court of Appeal Act.**

2.3. **Section 14 of the Court of Appeal Act**, deals with appeals that are classified as first appeals. According to **section 14(1) and (3)**, these are appeals from the decision of the High Court, sitting at first instance or the decision of the High Court, in a matter where a person was tried in the Subordinate Court, and committed to the High Court for sentencing.

2.4. In such a case, it can be said that one has the "right" to appeal, in the sense that, so long as one is within time, there are no preconditions to be met, before the filling of an appeal from such a decision.

- 2.5. Coming to second appeals, **section 15 (1) and (2) of the Court of Appeal Act**, provides that it is an appeal from a matter that came to the High Court on appeal; on review; for confirmation of a sentence; or after the case was stated.
- 2.6. In a second appeal, it can be said that there is no “right” to appeal, because before one can appeal, leave to appeal must be obtained and depending on the circumstances, such leave, can be declined.
- 2.7. In the case of **Clarke v Shepard**¹, the Federal Court of Appeal for Rhodesia and Nyasaland, considered the import of **section 23(1)(c) of the Federal Supreme Court Act**, a provision which is similar to **section 15(1) of The Court of Appeal Act**. The provision was to the effect that no appeal shall lie from a judgment of the High Court, in the exercise of its appellate or revisionary

