

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

SP/31/2021

BETWEEN:

THE PEOPLE

AND

EMMA KAINGA



APPLICANT

RESPONDENT

CORAM: Makungu, Siavwapa and Muzenga JJA
On 3rd March, 2022 and 12th April, 2022

For the Applicant: Mrs. M. Chipanta-Mwansa, Deputy Chief State
Advocate, National Prosecution Authority

For the Respondent: Mrs. L. Z. Musonda & Mrs. L. T. Tindi, Legal Aid
Counsel, Legal Aid Board

R U L I N G

Muzenga, JA, delivered the Ruling of the Court.

Cases referred to:

- 1. Natasha Nawa v the People – SCZ No. 9/2/2019**
- 2. Kenya Plantation and Agricultural Workers Union v the Kenya Export Floriculture, Horticiculture and Allied Workers Union (KEFHAWU) represented by its promoters David Benedict Omulama and 9 Others – Civil Application No. SUP. 5 of 2017**

3. **Benwa and Another v The People (1975) ZR 1**
4. **Bidvest Food Zambia Limited & Others v CAA Import and Export Limited – Appeal No. 56 of 2017**

Legislation referred to:

1. **The Court of Appeal Act, No. 7 of 2016.**
2. **The Court of Appeal Rules, Statutory Instrument No. 65 of 2016.**
3. **The Penal Code, Chapter 87 of the Laws of Zambia.**

1.0 INTRODUCTION

- 1.1 On the 16th of November 2021, we delivered judgment in favour of the respondent in which we acquitted him, following his conviction and sentence by the lower court of the offence of defilement, on account that age of the prosecutrix was not established, being a fundamental ingredient of the offence.
- 1.2 On the basis of our decision above, the applicant has sought leave to appeal to the Supreme Court by way of motion.

2.0 THE NOTICE OF MOTION

- 2.1 According to counsel, the notice of motion was made pursuant to **Section 13 of the Court of Appeal Act No. 7 of 2016** (hereinafter referred to as "**the Act**") and **Order IX Rule 1 of the Court of Appeal Rules, 2016 (CAR)**.

- 2.2 The intended ground of appeal as exhibited in the affidavit in support is couched in the following terms:

“The learned court below erred in law when it flouted the provisions of Section 181 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia and acquitted the respondent in the abundance of evidence of a lesser charge of abduction which the court had in fact accepted.”

3.0 APPLICANT’S ARGUMENTS IN SUPPORT

- 3.1 Learned counsel for the applicant, Mrs. Chipanta-Mwansa, made oral arguments in support of the application. At the outset Counsel submitted that it is not in all matters that dissatisfied parties should be granted leave to appeal to the Supreme Court. This, according to counsel, is what the Supreme Court stated in the case of **Natasha Nawa v the People**¹. It was counsel’s submission that leave should only be granted if one or more of the requirements in **Section 13 of the Act** are met.
- 3.2 Counsel argued firstly that the intended appeal raises a point of law of public importance in terms of **Section 13(3)(a) of the Act**. On this score she contended that the intended ground of appeal seeks to challenge the specific provisions of the law, in particular Section 181 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia. It was her argument that the foregoing point transcends

the interests of the parties to the case. Reliance was placed on the Kenyan case of **Kenya Plantation and Agricultural Workers Union v the Kenya Export Floriculture, Horticulture and Allied Workers Union (KEFHAWU) represented by its promoters David Benedict Omulama and 9 Others²**, where the Court of Appeal held that: **"the intending appellant had met his obligation to identify and concisely set out the specific elements of general public importance when he attributes to the matter for which certification is sought."**

- 3.3 It was counsel's submission that similar sentiments were expressed in the **Natasha Nawa Case** *supra* and she concluded that the intended appeal raises matters of public importance.
- 3.4 Counsel proceeded to argue secondly, that the Director of Public Prosecutions is covered by Section 3(b) of Section 13. She argued that it is desirable that an appeal be determined by the Supreme Court as the appeal touches on public interest, hence leave should be granted.
- 3.5 Counsel moved to **Subsection 3(c) of Section 13** and contended that the appeal has high prospects of success.

3.6 It was her argument under **Subsection 3(d) of the Act** that there are compelling reasons for the appeal to be heard by the Supreme Court.

3.7 In conclusion, counsel prayed that leave be granted as the threshold was met.

4.0 ARGUMENTS FOR THE RESPONDENT

4.1 Learned counsel for the respondent Mrs. Musonda and Mrs. Tindi made oral arguments in opposition.

They submitted that the intended ground of appeal does not satisfy the threshold in **Section 13 of the Act**. It was their argument that a court can only find one with a lesser offence if the original offence they were charged with and the elements of a lesser offence are similar.

4.2 Counsel argued that the respondent was charged with defilement and the ground of appeal suggests that he should have been convicted of the offence of abduction. It was counsel's contention that abduction is not in the same category as defilement though it carries a lesser sentence.

4.3 Counsel contended that the respondent was acquitted on the basis that there was no evidence of the prosecutrix's age and the evidence on the record does not reveal evidence of abduction.

That it was not possible for the court to have found the respondent guilty of a lesser offence because he could not have been given a reasonable opportunity to defend himself against the charge of abduction. For this argument, we were referred to the case of **Benwa and Another v The People.**³

4.4 Counsel concluded by arguing that there is no point of law of public importance in the ground of appeal and prayed that the application be dismissed.

5.0 APPLICANT'S ARGUMENTS IN REPLY

5.1 Counsel argued in reply that it is the whole appeal rather than the ground of appeal which raises a point of law of public importance. That there was no prejudice to a lesser charge being considered as the respondent had an opportunity to answer. The prayer for leave to be granted was reiterated.

6.0 DECISION OF THE COURT

6.1 We have pedantically considered the affidavits, arguments for and against the notice of motion. The issue is whether the motion meets the threshold for granting leave to appeal as provided under **Section 13(3) of the Act.**

6.2 We note that the notice of motion filed by the applicant did not state the grounds upon which the application is based. We also note that

it was wrongly made under **Order IX of CAR instead of Order XI**. This is contrary to the requirements of the rules. In an ordinary situation the motion should have collapsed for noncompliance with the Rules. We will nonetheless proceed to consider the application on its merits.

6.3 The applicant in the affidavit in support seems to rely only on the argument that the intended appeal raises points of public importance. We note that at the hearing, learned counsel for applicant argued all the points for consideration of whether to grant leave to appeal or not.

6.4 **Section 13 of the Act** provides:

- "13. (1) An appeal from a judgment of the Court shall lie to the Supreme Court with leave of the Court.**
- (2) An application for leave to appeal, under subsection (1), shall be made within fourteen days of the judgment.**
 - (3) The Court may grant leave to appeal where it considers that—**
 - (a) the appeal raises a point of law of public importance;**
 - (b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
 - (c) the appeal would have a reasonable prospect of success; or**
 - (d) there is some other compelling reason for the appeal to be heard."**

6.5 The apex court has on a number of occasions pronounced itself in respect of the foregoing section. In the case of **Bidvest Food Zambia Limited & Others v CAA Import and Export Limited⁴**, the Supreme Court had *inter alia* the following to say:

"It is in that spirit that Section 13 of the Court of Appeal Act, restricting access to the Supreme Court by referring to the apex court only weighty issues in the most deserving of cases, should be understood."

6.6 In the case of **Natasha Nawa** *supra*, the Supreme Court after extensively referring to its earlier decision in the **Bidvest case** *supra*, said the following:

"It is clear from what we said in that case, as a Supreme Court, we will not routinely hear appeals on any point that a person is dissatisfied with regarding the judgment of the Court of Appeal. The issue must be such as to be of general importance, and not merely restricted to the parties before the court."

6.7 What is abundantly clear from the apex court's decisions, is that it is only in very well deserving cases where leave to appeal to that court should be granted and the threshold is high.

6.8 Learned counsel for the applicant has argued that the intended appeal raises points of law of public importance. We have perused the affidavit in support of the application. We have not seen any demonstration by the applicant of facts in support of this argument. We have also looked at the intended ground of appeal. We hold the

view that it does not in any way reflect or raise any issue of public importance. This argument thus lacks merit.

6.9 The argument by the respondent that **Subsection 3(b) of Section 13** is applicable to the applicant is misplaced as its wording is very clear as it refers to a convicted person and not the State. This argument too lacks merit.

6.10 It was learned counsel for the applicant's submission that the appeal has reasonable prospects of success. This argument is based on the fact that this court did not find the respondent guilty of a minor offence of abduction when the record had overwhelming evidence of the minor offence. Even though counsel did not state specifically which offence of abduction she had in mind, both in the ground of appeal and in her oral arguments, we have looked at all the abduction or abduction related offences.

6.11 Under the offences against liberty in **Part XXV of the Penal Code**, abduction is clearly defined, particularly in **Section 253** as:

"Any person who by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

6.12 We agree with learned counsel for respondent that in order for a person to be convicted of a minor offence, he or she must have had an opportunity to defend themselves on the alternative charge. This

ensures fair trial, which is a hallmark of the criminal justice system. The offences against liberty are totally unrelated offences to the offence of defilement. The respondent can certainly not be said to have had an opportunity to defend himself against this minor offence.

6.13 Be that as it may, abduction under this part denotes lack of consent or where the same is obtained by deceit. The evidence herein clearly shows that the prosecutrix consented and willingly went with the respondent and stayed at his house. The issue was about the age of the victim which was not established, especially that this was a borderline case. A conviction for abduction is thus not tenable on the evidence.


6.14 We also found two offences which are kindred with the offence with which the respondent was charged under **Chapter XV, Offences Against Morality**. The first one is an offence of abduction under **Section 135 of the Penal Code**:

"135. Any person who with intent to marry or carnally know a woman of any age, or to cause her to be married or carnally known by any other person, takes her away, or detains her, against her will, is guilty of a felony and is liable to imprisonment for seven years."

6.15 The second one is the offence of abduction of children provided for under **Section 136 of the Penal Code**:

"136. Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanour."

- 6.16 It is clear that for the offence under **Section 135** to be established, absence of consent is material. As we have already stated above, the prosecutrix consented. An alternative conviction under this section is not tenable. The offence under **Section 136** relates to children, hence consent was immaterial. However, since age was the bone of contention, leading to the acquittal, a conviction under this section is also unsustainable. The intended appeal has absolutely no iota of reasonable prospects of succeeding.
- 6.17 We find no compelling reasons for the appeal to be heard by the Supreme Court. For the foregoing reasons, we find the notice of motion to be bereft of merit and accordingly dismiss it.



.....
C. K. MAKUNGU

COURT OF APPEAL JUDGE



.....
M. J. SIAVWAPA

COURT OF APPEAL JUDGE



.....
K. MUZENGA

COURT OF APPEAL JUDGE