**IN THE COURT OF APPEAL** **APPEAL NO. 09/2018**

**HOLDEN AT KABWE**

(Criminal Jurisdiction)


BETWEEN:

**JAMES SIKAPENDE** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

**CORAM : CHISANGA JP, MAKUNGU, KONDOLO SC, JJA**

**On 22nd May, 2018 and on 2018**

*For the Appellant : H.M. Mweemba, Senior Legal Aid Counsel- Legal Aid Board*

*For the Respondent : F.M. Sikazwe Senior State Advocate -National Prosecution Authority*

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# J U D G M E N T

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**Kondolo SC, JA delivered the Judgment of the Court**

CASES REFERRED TO:

1. **Walusiku Lisulo v Patricia Anne Lisulo (1998) Z.R. 75**
2. **Jonathan Mwinga v The People (1981) Z.R. 243**
3. **Alubisho V The People (1976) Z.R. 11.**
4. **Kenneth Chisanga Vs The People (2004) Z.R. 93**

LEGISLATION REFERRED TO:

1. The Constitution of Zambia, Chapter 1, Laws of Zambia as amended by Act No 2 of 2016

2. **The Environmental Management Act No. 12 of 2011, Laws of Zambia**
3. **Fees and Fines (Fee and Penalty Unit Value) (Amendment) Regulations S.I No. 41 OF 2015, Laws of Zambia**

The Appeal is against the conviction of the Appellant for the offence of unlawful possession of biological resources contrary to **Section 120 of the Environmental Management Act No. 12 of 2011**.

The Appellant and another were alleged to have been in unlawful possession of biological resources commonly known as the Mukula Tree valued at K22,015.23 in a motor vehicle namely Hino Truck ALT 9685 without authority or excuse. The Appellant was accordingly convicted by the Subordinate Court. The Respondent, in the Subordinate Court, applied under **Section 129(1) of the Environmental Management Act** to have the Truck and Tent used in the transportation of the Mukula forfeited to the State because the Appellant was the owner of the vehicle. The application was denied by the trial Magistrate who stated that the cited **Section** was couched in discretionary terms by the use of the word 'may' and for that reason alone, he ordered that the truck and tent be restored to the Appellant. The Respondent displeased with the finding of the Subordinate Court, assailed the Ruling on appeal to the High Court.

The Respondent, in the High Court, submitted that the discretionary powers conferred on the Court must be exercised judiciously and that in the Ruling the Magistrate did not state why he had denied the application to have the vehicle forfeited to the State. The lower Court found as an undisputed fact that the legal owner of the truck was the Appellant and also held that the Magistrate

Ground two suffers a similar fate as the ill-conceived ground three because it rests on facts that were not raised in the High Court on Appeal. The appeal before the High Court was by the State and the Appellant herein was the Respondent and he did not appeal against conviction. The issue raised in ground two that the Appellant was a mere transporter of the seized goods was not argued before the High Court. Ground two shall therefore not be considered and is accordingly dismissed.

Ground one remains as the sole ground of appeal. Learned counsel for the Appellant filed written arguments contending that **Section 129 of the Environmental Management Act** does not require a magistrate Court to provide any reasons to justify how it has exercised its discretion under the section and that the order given by the court should not strike anyone with a sense of shock.

Counsel for the Appellant argued that the case before us could be distinguished from the case of Jonathan **Mwiinga v The People** cited by the learned judge in the lower court and the consequent order of the learned judge thus erroneous and misconceived and should be quashed. That this court should order that the learned trial Magistrate's discretion was judicially exercised and that the motor vehicle be given back to the Appellant.

It was further asserted that the lower Court did not address the issue of whether or not the appeal was on a point of law. It was also argued that because the learned trial magistrate did not give a reason for granting an order

of forfeiture of the Mukula Tree to the State, the same standard should have been applied with regard to the motor vehicle and, according to counsel for the Appellant, the vehicle should have been released to the Appellant.

Counsel for the Appellant further asserted that articles 16 (1) and 18(1) of the Constitution provide protection to ownership of private property and in that regard the Appellant should have been heard on the issue and that the learned judge should have sent the matter back to a competent tribunal to accord the Appellant an opportunity to show cause why the motor vehicle should not be forfeited.

In response to this ground, the Senior State Advocate Mr. Sikazwe relied on his written submission in which he agreed with the finding of the High Court that the Magistrate did not exercise the powers conferred by **Section 129 of the Environmental Management Act,** judiciously. He argued further that it was incumbent upon the Court to give reasons for refusing to exercise its discretionary power and in aid of this argument, Counsel cited the case of **Walusiku Lisulo v Patricia Anne Lisulo** [1]. It was not disputed that the Appellant was the owner of the truck which was used during the commission of the offence for which the Appellant was convicted. The Magistrate therefore had sufficient grounds on which to order forfeiture of the vehicle to the State. He submitted further that the Court fell into grave error when it refused to order forfeiture of the vehicle without giving any reason and therefore did not exercise its discretionary power judiciously. Counsel called in aid the case of

**Jonathan Mwinga v The People** [2] in which it was held that discretion must be exercised judiciously and not capriciously

We have considered ground one and the arguments in support. The Appellants counsel raised issue that the learned judge did not specify whether this appeal was on a point of law. In our view it is crystal clear that the entire appeal is with regard to the exercise of discretion under section 129 of the Environmental Management Act, which is a point of law. The Appellants own arguments state as much.

**Section 129(1)(2)** of the **Environmental Management Act** which reads as follows;

> ***129. (1) subject to the provisions of this Act, where a person is convicted of an offence under this Act, the court may, on application by an inspector or police officer, in addition to any other penalty imposed, declare any matter, article, vehicle, aircraft, boat or any other conveyance used in the commission of the offence to be forfeited to the State.***
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> ***(2) the Court may, where an inspector or a police officer makes an application under subsection (1), make an order, hereinafter referred to as a conditional order, to the effect that unless any person other than the convicted person claims any right of ownership in the matter, article, vehicle, aircraft, boat or any other conveyance within a period of three months from the date of the order, the matter, article, vehicle, equipment, aircraft, boat or other conveyance shall be forfeited to the State.***

**Subsection 1** above appears to confer discretionary power on a court to order forfeiture, in addition to any other penalty imposed. Following an application by an inspector or police officer under **subsection 1**, the court can issue a conditional order of forfeiture which provides a three-month window for parties other than the convicted person to claim any right of ownership in the forfeited item and the court may exercise its discretion to release the item. If no claim of ownership is made, the item will be forfeited to the state.

We disagree with counsel for the Appellants submission which is to the effect that section 129 empowers a magistrate to make any decision he feels like with regard to whether or not to order that seized property be forfeited to the State. A careful reading of **Section 129** shows a seamless connection between the subsections. When **subsection 1** is read together with the other subsections it is quite clear that the Magistrate's discretion to release items seized during enforcement of the Environmental Management Act is not unfettered. The power to release seized items is with respect to third parties, other than the convicted person, who satisfy the Court that the seized item belongs to them and that they were not privy to the commission of the offence and had no knowledge that the item was to be used for that purpose[1]. The purpose of **Section 129** is clear and that is to ensure forfeiture to the State of vehicles, vessels etc whose owners have allowed them to be used in the commission of offences under the Act.

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[1] *Section 129 (8) Environmental Management Act (supra)*

Judicial discretion is not exercised in a vacuum but must be sensitive to the particular legislation which provides the latitude and must be sensitive to the facts and circumstances surrounding a particular case. It is never to be exercised whimsically and must be reasoned and judicious. Appellate courts do not interfere lightly with the exercise of discretion by lower Courts except where the discretion was exercised without reason or capriciously. We would borrow the words of Viscount Simon, L.C., in **Charles Osenton and Company v Johnson**[2] when he said as follows;

> ***" The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order may be justified."***

In *casu*, the trial Magistrate appears to have been under the impression that he had unfettered discretion and released the seized vehicle to the convict without due regard to the relevant considerations and above all, without providing any reasons at all. These, we dare state, are the hallmarks of discretion exercised capriciously. The High Court was therefore on firm ground

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[2] *Charles Osenton and Company v Johnson [1941] 2 ALL E.R. 245. at page 250*

when it overturned the said the trial Magistrate's Order and, in its place, ordered that the vehicle be forfeited to the State thereby giving effect to the objectives of the **Act**.

Counsel for the Appellant presented the argument that the learned trial magistrate didn't provide reasons as to why he ordered the Mukula Tree to be forfeited to the State and the same standard was applied to the Appellants vehicle. We are quite surprised at the proposition and wonder whether counsel is suggesting that his client should have been allowed to keep the Mukula which was unlicensed and illegally in his possession and illegally being transported by him. Neither the Appellant nor anybody else claimed ownership of the Mukula. It therefore follows that it would automatically be forfeited to the State from whose forest it was illegally harvested.

With regard to the constitutional provisions cited by the Appellant, our response is that no arguments were presented to the lower court in that regard. In any event, the issue of ownership was not in dispute, the only issue before the court was, in terms of section 129 of the Environmemtal Management Act, what should happen to the vehicle owned by the convict and in which he was illegally transporting Mukula.

The Record shows that the trial Magistrate sentenced the convicts to each pay a fine of ZK3,000.00 and in default, two years imprisonment. We must make mention of the fact that the sentence was wrong at law because the

Appellant and his co accused were charged under **Section 120** of the **Environmental Management Act** which reads as follows;

***120. A person who —***

***(a) trades in any component of biological resources contrary to the provisions of this Act or any other written law;***

***(b) unlawfully possesses any biological resources; or***

***(c) unlawfully disturbs the habitat of a biological resource in contravention of this Act;***

***commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both.***

The High Court should have commented on this aspect because the sentence imposed by the trial magistrate in default of paying the fine was in contravention of section 28 (d) of the Penal Code which is reproduced;

***28. Where a fine is imposed under any written law, then, in the absence of express provisions relating to such fine in such written law, the following provisions shall apply:***

***(d) The term of imprisonment ordered by a court in respect of the non-payment of any sum of money adjudged to be paid by a conviction or in respect of the default of a sufficient distress to satisfy any such sum shall be such term as, in the opinion of the***

***court, will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale:***

| | *Amount* | *Maximum Period* |
|---|---|---|
| *1.* | *Not exceeding 15 Penalty Units* | *14 days* |
| *2.* | *Exceeding 15 penalty units but not exceeding 30 penalty units* | *1 month* |
| *3.* | *Exceeding 30 penalty units but not exceeding 150 penalty units* | *3 months* |
| *4.* | *Exceeding 150 penalty units but not exceeding 600 penalty units* | *4 months* |
| *5* | *Exceeding 600 penalty units but not exceeding 1500 penalty units* | *6 months* |
| *6* | *Exceeding 1500 penalty units* | *9 months* |

***(e) The imprisonment which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.***

**Section 120 of the Environmental Management Act** imposes the option of a maximum fine of 500,000 penalty units and in terms of **section 28 (d) of the Penal Code** the fine imposed on the Appellants, i.e. K3,000 could not have attracted a custodial sentence in excess of 9 months in default. We note from the above-mentioned scale the maximum period of imprisonment in default of

payment is 9 months. We therefore set aside the default sentence of two years imprisonment imposed by the trial Court and in its place, we sentence both convicts to 9 months imprisonment in default of paying the ZK3,000 fines.

This Appeal is dismissed.

**Dated this day of 2018**

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**F.M. CHISANGA**
**JUDGE-PRESIDENT**

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**C.K. MAKUNGU**
**COURT OF APPEAL JUDGE**

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**M.M. KONDOLO SC**
**COURT OF APPEAL JUDGE**