IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE   CRIMINAL APPEAL CASE NO.28/17

In the matter between:

DOCTOR VICTOR MKHABELA   **Appellant**

and

REX   **Respondent**

Neutral Citation: *Doctor Victor Mkhabela vs Rex [28/2017][2019]*
                        SZSC 59 (28 November 2019).

Coram: S.B. MAPHALALA, JA, J.M. MAVUSO, AJA, M.J. MANZINI
         AJA

Date Heard: 19 SEPTEMBER 2019
Date delivered: 28 NOVEMBER 2029

SUMMARY

Criminal Law – failure to apply for leave from the High Court in a cause or matter where the case was commenced in a Court lower than the High Court, appeal removed from the roll for failure to comply with Section 147 1 (b) of the Constitution of the Kingdom of eSwatini.

RULING

J. Mavuso AJA

[1]   This matter was enrolled for hearing before the above honourable court on the 19th August 2019.   In the file there were two matters pertaining to the Appellant. To distinguish each case from the other, for ease of reference, they were categorized into Volume one and two, under the same case number, it being 28/17.

[2]   When the Court questioned the filing of documents in this manner, it was advised that the Appellant had lodged two appeals. It was further advised that Volume 1, pertained to an appeal on conviction on two counts of rape, two counts of robbery and one count of assault. For these offences Appellant was convicted by the High Court of eSwatini, it having heard the matter in exercise of its original jurisdiction. On the other hand,   Volume 2 pertained to a Criminal Matter which was heard by the Manzini Magistrate Court as the Court of first instance.

[3]   On the date of hearing, the Director of Public Prosecutions argued the point of law as raised in his notice dated the 21st June 2019, filed with this Court

[4]   In his notice the Director of Public Prosecutions stated that;

> **"Appellant was tried convicted and sentenced by the Magistrate's Court under case No. B26/08. He noted an appeal at the High Court**

against both conviction and sentence. The High Court dismissed his appeal against both conviction and sentence as fully appears in High Court case No. 74/14…"

He went on further to state that;

"The Appellant has now filed an appeal against conviction and sentence before this honourable court."

In raising this point of law the Director of Public Prosecutions, argues as follows;-

"In terms of Section 147 (1) (b) of the Constitution of the Kingdom of Eswatini Act 2005 where a cause or matter arose in a Court below the High Court, an appeal against the decision of the High Court is with leave of the High Court. The Appellant's Criminal trial commenced in a Court below the High Court. The Appellant did not apply for leave to appeal from the High Court…"

The Director of Public Prosecutions submitted that the appeal was improperly before the above honourable court and prayed that it be struck off the roll.

[5]   When given the opportunity to argue his case, the Appellant who appeared in person simply requested that the court hears his case. As a result of the omission to apply for leave as directed in section 147 (1) (b) of the Constitution, the Court had no alternative but to strike off, the application from the roll.

[6](i) Section 147 (1) (b) of the Constitution of the Kingdom of eSwatini is clear on

the steps to be taken by an Appellant who desires to have a matter which began and or arose or was tried by a Court lower than the High Court of eSwatini. Before this Court can hear such a matter the Appellant has to seek leave to appeal from the High Court of eSwatini.

[7] With Volume 1 having been kept in the same file with Volume 2 under the circumstances mentioned above, it also was removed from the roll to enable the
Registrar to separate the documents and have them properly filed to avoid any confusion of the matters, at a future hearing of these matters.

[8] It hereby ordered that the matters are removed from the roll.

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J.M. MAVUSO
ACTING JUSTICE OF APPEAL

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I concur   **S.B. MAPHALALA**
JUSTICE OF APPEAL

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I concur   **M.J. MANZINI**
ACTING JUSTICE OF APPEAL

For Appellant: In person

For Respondent: L. Hlophe (DPP's Chambers)