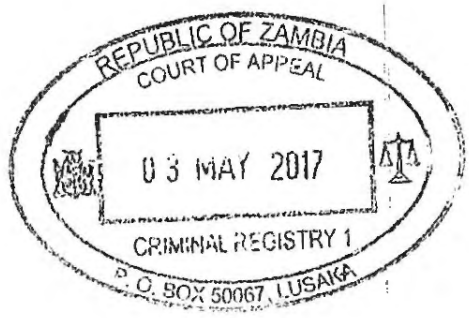
DJP

IN THE COURT OF APPEAL
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL No. 59 of 2016



Between:

THE PEOPLE — APPELLANT

AND

ALPHONSIOUS CHEELO HAMASUKU — RESPONDENT

CORAM: Mchenga, DJP, Chishimba and Kondolo, JJA

On 7th February 2017, 8th February 2017, 10th April 2017 and 3rd May 2017

For the Appellant: A.K. Mwanza, State Advocate with E. Mulele, State Advocate, National Prosecution Authority
For the Respondent: M.K. Liswaniso, Legal Aid Counsel, Legal Aid Board

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JUDGMENT

Mchenga, DJP delivered the Judgment of the Court

Cases referred to:

1. Benai Silungwe v The People [2008] 1 ZR 123
2. Philip Mungala Mwanamubi v The People (SCZ 9/2013)
3. Jutronich v The People (1965) Z.R. 9
4. Kalunga v The People (1975) Z.R. 72.
5. Alubisho v The People [1976] Z.R. 11

6. **Benua v The People [1976] Z.R. 13**
7. **Solomon Chilimba v The People [1971] Z.R. 36**
8. **Gideon Hammond Millard v The People 1998 S.J. 34**
9. **Katongo v The People [1969] Z.R. 30**
10. **Stanley Kasungani v The People [1978] Z.R. 260,**
11. **Katongo v The People [1969] Z.R. 30.**
12. **Josepei Masiye Phiri v The People (1977) Z.R. 251**
13. **Kaambo v The People [1976] Z.R. 122**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **The criminal Procedure Code, Chapter 88 of the Laws of Zambia**
3. **The Court of Appeal Act, Act No. 7 of 2016**

Works referred to:

1. **Black's Law Dictionary, 10th Edition, Thomson Reuters**

Alphonsious Cheelo Hamasuku, the respondent, appeared before the High Court sitting at Livingstone charged with one count of the offence of Causing Grievous Harm contrary to **section 224 (a) of the Penal Code.** He admitted the charge. The particulars of offence alleged that on 20th August 2015, at Pemba, in the Pemba District of the Southern Province of the Republic of Zambia, he caused grievous harm to Beauty Mukuni.

According to the facts read out in court, the respondent had for a long time suspected that his girlfriend, Beauty Mukuni, was having an affair with another man. On 20th August 2015, he invited her to visit his house but she refused. This annoyed him and he followed her to her house with the intention of confronting her on the issue. He forced his way in to the house and got into her bedroom where he woke her up. An argument broke out between the two, in the course of which he struck her on the head with an axe handle. She was unconscious when he left the house. Beauty Mukuni was admitted to Monze Mission Hospital and found to have suffered a bilateral haematoma and deep scalp laceration. She was later transferred to Lusaka Trust Hospital where she underwent a craniotomy surgical procedure.

Dr. Henry Mulenga, a Consultant Physician, prepared a medical report that was available during the hearing. He reported that a CT brain scan revealed that Beauty Mukuni suffered **linear fractures in the right temporal bone, left posterior zygomatic arch and lateral wall of the right orbit. She also suffered acute subdural hematoma in the left temporal occipital and the junction of the left frontal parietal region with multiple focal hemorrhagic contusions in the cortex of the left occipital and temporal areas.** During the craniotomy 120 milliliters of dark blood was drained from her left cranium.

Following his admission of the charge and the facts, the trial Judge found the respondent guilty as charged and convicted him. He was sentenced to 2 years imprisonment with hard labour. Dissatisfied with that sentence, the Director of Public Prosecutions has appealed to this court.

Two grounds of appeal have been advanced and these are as follows:

1. **That the trial court erred in law when it sentenced the respondent to a term of two years imprisonment for a felony with a maximum life sentence.**
2. **That the trial Judge erred when he misapplied the principles of sentencing relation to the gravity and nature of the offence committed as stated in the statement of facts.**

At the hearing, Mrs. Mwanza, who appeared on behalf of the Director of Public Prosecutions, indicated that she would rely on the appellant's heads of arguments filed on 28th of March 2017. Mrs. Liswaniso, who appeared for the respondent, equally relied on the respondent's heads of arguments filed on 10th April 2017, which she complimented with oral submissions.

Though the two grounds of appeal were argued as one by both parties, we find it convenient to first deal with Mrs. Liswaniso's submission that this appeal is not competent because the Director of Public Prosecutions can only appeal on a point of law.

In support of her preliminary objection, Mrs. Liswaniso submitted that **section 321A(1) of the Criminal Procedure Code** only allows the Director of Public Prosecutions, to appeal on a point of law. She cannot appeal on a point of fact or fact mixed with law. She submitted that this appeal is not on a point of law because the Director of Public Prosecutions has not argued that sentence imposed by the trial Judge was in error of law or was in excess of or contrary to the sentence lawfully provided by the laws. She has instead questioned the trial Judge's discretion by pointing out that the sentence was inadequate.

Though Mrs. Liswaniso referred to **section 321A of the Criminal Procedure Code** in her arguments, we find that this provision is not applicable because it relates to appeals from the Subordinate Courts to the High Court. The provision applicable to this case is **section 14 of The Court of Appeal Act.** The relevant parts of this provision read as follows:

> **(1) This section applies to the exercise of the jurisdiction of the Court to hear appeals in criminal matters from a judgment of the High Court sitting as a court of first instance.**
>
> **(2) ...**
>
> **(3) ...**
>
> **(4) If the Director of Public Prosecutions is dissatisfied with the judgment of the High Court in the exercise of its original jurisdiction on a point of law, the Director of Public Prosecutions may appeal to the Court from such judgment.**

Notwithstanding our finding that Mrs. Liswaniso has referred to the wrong provision, we find that her arguments are still valid because under section **14 (4)**

of the Court of Appeal Act, the Director of Public Prosecutions can similarly only appeal on a point of law.

In **Black's Law Dictionary, (1)** the word or term "law" is defined as follows:

> **law. 1.** ..... **2.** The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., **the body of rules, standards and principles that the courts of a particular Jurisdiction apply in deciding controversies brought before them**< the law of the land>. **3.** The set of rules or principles dealing with a specific area of a legal system< copyright law>. **4.** ..... **(the underlining is ours for emphasis)**

From these definitions, it is clear that the "law" includes rules and principles that are used to determine any issue that is before the court. Though **section 224 (a) of the Penal Code** gives a Judge who has convicted an offender for the offence of causing grievous harm the discretion to impose an appropriate sentence, the imposition of such sentence is subject to the principles of sentencing that the courts have enunciated over years in their Judgments. It follows, that an appeal that is premised on the failure of a court to apply the principles of sentencing, which are part of the law, is an appeal on a point of law.

In this matter, the Director of Public Prosecution contends that the trial Judge failed to apply the principles of sentencing when he imposed a 2 years sentence for an offence that carries a maximum sentence of life imprisonment. Since the appeal is premised on the application or misapplication of the principles of sentencing, which is a point of law, we find that it is competent and we have the jurisdiction to hear it.

In the support of the two grounds of appeal, Mrs. Mwanza submitted that even if the respondent was entitled to leniency for pleading guilty, the sentence of 2 years imprisonment was inadequate because of the injuries that Beauty Mukuni suffered and the prevalence of the offence. She also submitted that the facts established that the respondent forced his way into her house and hit her with an axe handle. She was then required to undergo a craniotomy, brain surgery, as a result of the injuries she suffered.

Mrs. Mwanza also submitted that consideration should have been given of the fact that the attack was an act of gender based violence, which is on the increase in this country. There is need for the courts to impose sentences that will deter others from committing this kind of offence. She then referred to the cases of **Benai Silungwe v The People (1), M. Syakalonga v The People (2)** and **Philip Mungala Mwanamubi (3)** and submitted that the injuries the respondent

inflicted and the prevalence of the offence were aggravating factors that the trial Judge should have considered when imposing the sentence.

Finally, Mrs. Mwanza referred to the cases of **Jutronich v The People (4)** and **Kalunga v The People (5)** and submitted that the sentence of 2 years, must in the circumstances of this case, come to this court with a sense of shock to warrant its substitution with a more severe sentence that takes into account the factors that aggravated the assault.

In response, Mrs. Liswaniso referred to **section 6 of the Criminal Procedure Code** and the case of **Alubisho v The People (6)** and submitted that it was within the discretion of the trial Judge to impose a 2 years sentence because the offence did not provide for a mandatory minimum sentence. She also referred to the case of **Benua v The People (7)** and submitted the sentence of 2 years imprisonment should not come to this court with a sense of shock because the respondent was a first offender who readily admitted the charge.

Mrs. Liswaniso also referred to the case of **Solomon Chilimba v The People (8)** and submitted that since there were no aggravating factors. The respondent only struck his girlfriend once with an axe handle and the trial Judge was in the

circumstances entitled to impose the 2 years sentence. She also argued that there was nothing extraordinary that aggravated the circumstances in which the offence was committed.

Finally, Mrs. Liswaniso submitted that the two years sentence should not come to us with a sense of shock. She referred to the case of **Gideon Hammond Millard v The People (9)** and submitted that this court should be slow to interfere with the trial court's discretion to impose sentences unless they come to it with a sense of shock.

We have considered the evidence on record, the medical report and the submissions by counsel.

We agree with Mrs. Liswaniso that since the offence of causing grievous harm, under section **section 224 (a) of the Penal Code,** does not provide for a mandatory minimum sentence, it was within the discretion of the trial Judge to impose a sentence that he found to be appropriate. But as we have indicated earlier on, in the exercise of such discretion, the trial Judge was required to take into consideration the established principles of sentencing that include both mitigating and aggravating factors.

In a charge of causing grievous harm, mitigating factors can include the fact that the offender has no previous conviction; the offender has plead guilty; the injury suffered was minor or not serious; the victim was the aggressor and the offender rendering assistance to the victim after committing the offence. On the other hand, aggravating factors can include the gravity of the injury suffered, the use of an offensive weapon, the offender being the aggressor and the prevalence of the offence.

Mrs. Liswaniso has submitted that there were no aggravating factors in this case because Beauty Mukuni was only struck once. In addition, the respondent is a first offender who readily admitted the charge. In the case of **Stanley Kasungani v The People (10)**, an assault case in which there was need to assess the sentence, the Supreme Court held, *inter alia*, that:

> **Medical evidence as to the nature and severity of the injuries sustained by a victim of an assault is essential to a proper consideration of the question of sentence, and may in some cases be essential also on the question of verdict.**

While we agree with Mrs. Liswaniso that the respondent's single strike goes to his credit, to determine the appropriate sentence, there is need to consider it in the light of the medical report and the general circumstances surrounding the assault.

In this case, the respondent was the aggressor and he attacked Beauty Mukuni in her bedroom after forcing his way in on the basis of a flimsy grievance against her. He struck her with an axe handle, an offensive weapon, and she suffered serious injuries resulting in loss of consciousness and the need for brain surgery in which 120 milliliters of blood where extracted. Having examined the medical report, we find that the respondent must have used an extremely high amount of force for that single blow to cause the injuries that Beauty Mukuni suffered. This was a vicious and unwarranted attack on a defenseless person. In the face of these facts, it cannot be seriously argued that there were no aggravating factors.

The trial Judge did not indicate the factors he considered before imposing the sentence, which was within his right; see the case of **Katongo v The People (11).** However, it is our view that had he considered the facts of the case, the medical report, factors that mitigated or aggravated the respondent's situation, he would not have arrived at a sentence of 2 years imprisonment.

In the case of **Josepei Masiye Phiri v The People (12),** the Supreme Court held that:

> (i) **An appellate court should not lightly interfere with the discretion of the trial court on the question of sentence, particularly when the issue is whether or not to enhance that sentence; it is not a sufficient ground for interfering that the**

appellate court considers that the sentence imposed by the trial court was lenient or even very lenient.

(ii) Before the appellate court is entitled to interfere and substitute an enhanced sentence it must regard the sentence imposed by the trial court as totally inadequate to meet the circumstances of the case.

Further, in the case of **Kaambo v The People (13),** that court also held that:

(i) The basis of sentence must always be the proper sentence merited by the offence itself, after which the court considers whether the accused person is entitled to leniency.

(ii) It is not proper for an appellate court to increase a sentence unless the sentence imposed by the trial court is totally inadequate.

(iii) For an appellate judge to substitute his own view as to an appropriate sentence for that of the trial court is an error of principle.

First of all, the charge that the respondent faced was more serious than the charge of causing grievous harm under **section 299 of the Penal Code.** Under **section 224 (a) of the Penal Code,** the offender, in addition to causing grievous harm, does so with the intention to maim, disfigure or disable. This is the reason why the maximum penalty is higher than the former. In view of this distinction and the aggravating factors that we have outlined, the sentence of 2 years imprisonment in this case comes to us with a sense of shock. It is totally inadequate.

We agree with Mrs. Mwanza's submission that assaults that can be classified as being gender based, are on the increase and deterrent sentences must be imposed to stem them out. The impunity that is associated with such attacks, as

can be seen from this case, must be condemned by the imposition of appropriate deterrent sentences.

This appeal succeeds and the 2 years sentence that was imposed by the trial Judge is set aside. In its place, we impose a sentence of 10 years imprisonment with hard labour and it will run from the day the respondent was arrested.

C.F.R. Mchenga SC
DEPUTY JUDGE PRESIDENT

F.M. Chishimba
COURT OF APPEAL JUDGE

M.M. Kondolo SC
COURT OF APPEAL JUDGE