

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

APP/166/2022

BETWEEN:

LEMMY SOLOCHI

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: MCHENGA DJP, MUZENGA AND CHEMBE JJA

on 14th June, 2023 and 24th August, 2023

For the Appellant: Mr. M. M. Shiwanga – Messrs Kabesha and Co.

For the Respondent: Mr. N. Munkombwe – National Prosecution Authority

J U D G M E N T

CHEMBE, JA delivered the judgment of the Court

Cases referred to: -

1. *Lungu v The People* (1977) ZR 208,
2. *Wilson Chamoto v The People* (1980) ZR 20
3. *Verfeen Fofana Alias Mutombo wa Mutombo v The People* (1990-1992) ZR 167
4. *Matongo v The People* (1974) ZR 164
5. *Ndonda Daka v The People* CAZ Appeal No 24/2022
6. *Evaristo Bwalya v The People* CAZ Appeal No 106 of 2021

Legislation referred to:

1. *The Road Traffic Act No 11 of 2002 of the Laws of Zambia.*

1.0 INTRODUCTION

- 1.1 This is an appeal against the sentence imposed by Limbani J. following a conviction on a plea of guilty on a charge of causing death by dangerous driving contrary to section **161 (1) of the Road Traffic Act No 11 of 2002 of the Laws of Zambia.**

2.0 MATTER IN THE COURT BELOW

- 2.1 The Appellant was charged with one count of Causing Death by Dangerous Driving contrary to section 161 of the Road Traffic Act No 11 of 2002.
- 2.2 The particulars of offence were that on 10th November 2021 in Kabwe the Appellant did cause the death of Danny Habeenzu by driving a motor vehicle namely Jaguar S Type Registration No. BAF 7837 on a Public Road in a manner that was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which was actually at the time or might reasonably be expected to be on the road.
- 2.3 The Appellant pleaded guilty and admitted the facts as presented by the prosecution.

- 2.4 According to the statement of facts, on 9th November, 2021 at about 14:20 hours, the Appellant was driving a motor vehicle being a Jaguar S Type Registration No BAF 7837 along the Great North Road from the Northern to the Southern direction.
- 2.5 When he approached Gonde Lodge, he overtook 4 vehicles without due regard to other road users and collided with a Toyota Harrier which was indicating and executing a right task.
- 2.6 The Appellant lost control of the vehicle and hit into three pedestrians including the deceased, who were walking off the road. The deceased, who sustained a deep cut at the back of the head, was taken to the University Teaching Hospital where he later died.
- 2.7 On 11th November 2021 a postmortem examination was conducted on the body of the deceased by Dr Musakanov who established the cause of death to be subarachnoid haemorrhages due to fatal traumatic blunt force head injury.
- 2.8 The Appellant was charged and arrested for the offence of causing death by dangerous driving.

3.0 TRIAL COURT VERDICT

3.1 The Appellant was convicted of the subject offence.

4.0 MITIGATION

4.1 Counsel submitted that the Appellant was a first offender who had readily admitted the charge and therefore deserved leniency. She also submitted that he was remorseful.

5.0 SENTENCE BY THE COURT BELOW

5.1 The Court below sentenced the Appellant to four months simple imprisonment after considering the mitigatory factors. The Court also ordered the suspension of the Appellant's driver's licence for nine (9) months.

6.0 GROUND OF APPEAL

6.1 Dissatisfied with the sentence imposed by the High Court, the Appellant appealed to this Court. He raised one ground of appeal as follows:

The trial Court erred in law and fact in convicting the Appellant to 4 months imprisonment as the sentence was too harsh considering that he is a first offender who readily admitted the charge and there were no aggravating factors.

7.0 ARGUMENTS

- 7.1 Counsel for the Appellant submitted that the offence for which the Appellant was convicted prescribed a sentence of a fine, imprisonment or both. She contended that the general practice in our jurisdiction, where the legislature prescribed a sentence of fine or imprisonment or both, was to impose a fine on a first offender who had pleaded guilty. We were referred to the cases of ***Lungu v The People*¹**, ***Wilson Chamoto v The People*²** and ***Verfeen Fofana Alias Mutombowa Mutombo v The People*³**.
- 7.2 It was submitted further that the Court was only justified in imposing a custodial sentence where there were aggravating circumstances. The learned Counsel contended that in the present case there were no aggravating circumstances to warrant a custodial sentence.
- 7.3 Counsel also challenged the trial Court's statement that the Appellant was speeding to the extent of flying as it was not part of the agreed statement of facts.
- 7.4 She prayed that the appeal be allowed and a sentence of a fine be imposed.

8.0 RESPONDENT'S ARGUMENTS

- 8.1 Counsel for the Respondent supported the sentence imposed by the lower Court. He relied on the cases of ***Matongo v The People***⁴ and ***Lungu v The People (supra)*** where the Supreme held that a custodial sentence could be imposed on a first offender where there has been recklessness or willful disregard for the safety.
- 8.2 He submitted that the trial Court found that it was aggravating that the Appellant overtook 4 vehicles at a junction which warranted a departure from the usual practice of imposing a fine. We were also referred to the cases of ***Matongo v The People (supra)*** and ***Mulizwa v The People***⁵.
- 8.3 Counsel referred to the case of ***Jutronich Schutts and Luking*** and submitted that this Court could only interfere with the sentence if it was wrong in principle or manifestly excessive. It was contended that the sentence of 4 months imprisonment was neither wrong in principle nor excessive so as to induce a sense of shock.
- 8.4 He prayed that the appeal be dismissed.

9.0 THE HEARING

9.1 At the hearing, both parties relied on their written heads of argument.

10.0 CONSIDERATION OF APPEAL AND DECISION

10.1 We have carefully considered the record and the sentence imposed by the Court below. The appeal is against sentence and the issue we need to resolve is whether the sentence was appropriate in the circumstances of the case.

10.2 The position of the law on sentencing where the statute provides for an option of a fine is to impose a non custodial sentence on a first offender unless there are aggravating factors.

10.3 In the case of ***Lungu v The People (supra)***, it was held that:

“where the legislature has provided for a fine as well as imprisonment, it is traditional to impose a fine on a first offender rather than to inflict a custodial term especially where the offender has come to Court for the first time and he has pleaded guilty.”

10.4 We are alive to the case of ***Matongo v The People (supra)*** where the Supreme Court guided that a custodial sentence is justified where there has been recklessness or willful disregard for the safety of others. However, this position was

clarified in later authorities as applying only if there were aggravating factors.

10.5 In the recent past, this Court has not hesitated to set aside custodial sentences in offences of a similar nature where the convict was a first offender and the law provided an option of a fine.

10.6 In the cases of ***Ndonda Daka v The People***⁶ and ***Evaristo Bwalya v The People***⁷, it was stated that a first offender should ordinarily be ordered to pay a fine where the law provides for an option of a fine unless there are aggravating factors.

10.7 In the present case, the statement of facts presented before the Court below, which was admitted by the Appellant, revealed that the cause of the accident was overtaking at a junction. In our view, this is what constituted the offence of causing death by dangerous driving. That the Appellant overtook four vehicles at a junction is what made his driving to be dangerous. It was therefore merely an ingredient of the subject offence and not an aggravating factor.

10.8 In considering the appropriate sentence to impose, the Court below made a perverse finding at page 7 of the record that:

“It is clear from the facts and the sketch plan that you were speeding to an extent of flying which in my view is reckless”

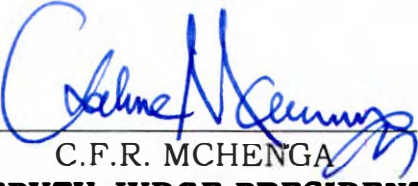

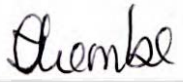
This finding was not supported by the statement of facts which made no reference to the speed at which the vehicle was moving.

10.9 We hold the view that overtaking at a junction alone cannot warrant a custodial sentence. The statement of facts did not reveal any aggravating factors and it is telling that the trial Court did not find any. There is nothing to suggest that the Appellant was racing another vehicle or that he was driving under the influence of alcohol or drugs which could have been aggravating factors.

10.10 We therefore agree with the submission by Counsel for the Appellant that the custodial sentence was unwarranted in the circumstances. We find that the sentence of four months imprisonment was wrong in principle and we set it aside.

11.0 CONCLUSION

11.1 We therefore allow the appeal and set aside the sentence. In its place we impose a fine of Three thousand kwacha (K3,000.00), in default the Appellant will serve four months simple imprisonment.


C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT
K. MUZENGA
COURT OF APPEAL JUDGE
Y. CHEMBE
COURT OF APPEAL JUDGE