

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

**HJS/01/2011**

BETWEEN:

**THE PEOPLE**  
**AND**  
**FRACKSON BANDA**

*Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 18<sup>th</sup> day of February, 2011.*

*For the People: Ms. C. C. Soko State Advocate, Director of Public Prosecutions.*

*For the Defence: Mr. K. Banda, Legal Aid Counsel, Legal Aid Board.*

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**RULING**

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**Case referred to:**

1. *Tembo v The People SCZ Appeal No. 56 of 2006 (unreported).*

**Legislation referred to:**

1. *Penal Code, Cap 87, as amended by Act No. 15 of 2005 s. 138 (1) and 200.*
2. *Criminal Procedure Code, Cap 88, ss. 81 and 217.*

Frackson Banda, a convict in this matter was charged with the offence of Defilement of a child under the age of 16 years, contrary to section 138 (1) of the Penal Code, Chapter 87 of the Laws of Zambia as amended by Act Number 15 of 2005.

The particulars of the offence are that on 29<sup>th</sup> October, 2010, at Lundazi, in the Lundazi District of the Eastern Province of the Republic of Zambia, Frackson Banda unlawfully had carnal knowledge of W. C., a girl under the age of 16 years. On 15<sup>th</sup> November, 2010, when Frackson Banda was called upon to plead to the offence charged, he admitted the charge as alleged. Thus the lower Court found Frackson Banda guilty and convicted him. And the matter was later referred to me for sentencing pursuant to section 217 of the Criminal Procedure Code, chapter 88 of the laws of Zambia.

The matter was scheduled for sentencing on 10<sup>th</sup> February, 2011. During the hearing, I was however, informed by Ms. Soko, a State Advocate in the Director of Public Prosecutions Chambers, that Frackson Banda had since died. To augment her report, Ms. Soko called sub inspector Arnold Kasobo, to confirm the death and to produce a copy of the Medical Certificate of the Cause of Death. After the Medical Certificate of the Cause of Death was produced in Court, a question arose regarding the status quo of the proceedings before the Court. At that juncture, Ms. Soko made an application to Court for an adjournment, to enable her reflect on the matter, and make an appropriate application the following day. I allowed the application for an adjournment.

On 11<sup>th</sup> February, 2011, when the hearing resumed, Ms. Soko filed written submissions. In the written submissions, dated 11<sup>th</sup> February, 2011, Ms. Soko in essence submitted that s. 335 of the Criminal Procedure Code provides that:

*“Every appeal from a Subordinate Court (except an appeal from a sentence of fine) shall abate on the death of the appellant.”*

Ms. Soko submitted that the preceding provision is however not applicable to the instant case because it is not an appeal. Ms. Soko argued that there is a *lacuna* in the Criminal Procedure Code. Be that as it may, Ms. Soko drew my attention to the case of *Tembo v The People SCZ Appeal No. 56 of 2006* (unreported). According to Ms. Soko, the Supreme Court in the *Tembo case* held that whenever an accused person dies, other than of course when a matter is on appeal, the State should enter a *nolle prosequi*. In view of the foregoing, Ms. Soko indicated to Court that following the decision in the *Tembo case*, the People would enter a *nolle prosequi* in the instant matter.

In response, Mr. Banda intimated to me that he also preferred to file written submissions in response to the submissions by Ms. Soko. Accordingly, Mr. Banda applied that the matter be adjourned. And also made an undertaking to file his written submissions on 14<sup>th</sup> February, 2011. I allowed the matter to be adjourned, and directed that Mr. Banda should file his submissions on 14<sup>th</sup> February, 2011. And I would thereafter render my ruling on 18<sup>th</sup> February, 2011. Mr. Banda eventually on 15<sup>th</sup> February, 2011, submitted a very terse written submission simply stating that the defence concurs with the State's submission.

I am indebted to counsel for their submissions in this matter. The issue that falls to be determined in this matter is very narrow. Wit, whether or not it is competent for the State to enter a *nolle prosequi* in view of the demise of Frackson Banda. The answer to the preceding question is, as submitted by Ms. Soko, and conceded to by Mr. Banda, to be found in the *Tembo case* referred to above. The facts in the *Tembo case* in so far as they are relevant to the instant matter were that Matthews Tembo appealed against the judgment convicting him of the charge of murder contrary to section 200 of the Penal Code. Matthews Tembo was the first accused. And was sentenced to death after the conviction. However, Levy Zimba, the second accused died

before the completion of the trial. When the trial judge was informed of the death of Levy Zimba during the trial, he ordered that the case against Levy Zimba abate by reason of his death. Thus on appeal the Supreme Court when hearing the appeal by Matthews Tembo, found it necessary to comment on the trial judge's Order, albeit *obiter dicta* in a judgment delivered by Mushabati, JS. Mushabati, JS, observed as follows at J 11:

*"Finally, we wish to address one issue regarding the proceedings against a deceased person before completion of a trial. In this case the Court after being notified that the then second accused had died said:*

***Order: Case against 2<sup>nd</sup> Accused Levy Zimba abates by reason of his death."***

Mushabati JS, went on to observe that:

*"Whereas our Criminal Procedure Code provides for abating of proceedings when an appellant dies, it is silent on the death of an accused person. Section 335 of the Criminal Procedure Code Cap 88 states "Every appeal from a Subordinate Court (except on appeal from a sentence of fine) shall finally abate on the death of the appellant."*

Mushabati, JS, concluded that:

*It says [section 335] nothing about the death of an accused person during trial. The only provision under which a charge against a deceased accused can "abate" is by invoking the provisions of section 81 of the Criminal Procedure Code Cap 88 i.e. a nolle prosequi must be formally entered against him."*

In light of the observation by the Supreme Court in the *Tembo* case, Ms. Soko was therefore on firm ground when she entered a *nolle prosequi* on behalf of the People.

**Dr. P. Matibini, SC  
HIGH COURT JUDGE**

