IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

Appeal No. 139/2018

B E T W E E N:

STANLEY MWAZI SIMBAYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Kaoma and Chinyama, JJS
on 5th November, 2019 and 9th December, 2019

For the Appellant: Ms. E.I. Banda, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate, National Prosecution Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Mwewa Murono vs. The People (2004) Z.R 207**
2. **Saluwema vs. The People (1965) ZR. 4**
3. **Solomon Chilimba vs. The People (1971) Z.R. 31**
4. **Jutronich and Others vs. The People (1965) Z.R. 9**
5. **David Zulu vs. The People (1977) Z.R. 151**
6. **Saidi Banda vs. The People SCZ No. 30/2015**
7. **Ilunga Kalaba vs. The People (1981) Z.R. 102.**
8. **Bwalya vs. The People (1975) Z.R. 125**
9. **Machipisha Kombe vs. The People (2009) Z.R. 282**
10. **Alubisho vs. The People (1976) Z.R. 11**

11. **Francis Kamfwa vs. The People Appeal No. 125 of 2017**
12. **Ngosa Banda vs. The People Appeal No. 138 of 2017**
13. **Kennedy Mbao vs. The People Appeal No. 119 of 2018**
14. **Emmanuel Simfukwe vs. The People Appeal No. 122 of 2018**
15. **Richard Kasonde vs. The People Appeal No. 139 Of 2018**

Legislation referred to:

1. **The Anti-Human Trafficking Act No. 11 of 2008**

The appellant was convicted of one count of Smuggling of persons contrary to Section 9 (1) of the Anti-Human Trafficking Act No. 11 of 2008.

On 24th September, 2014 Zambian Immigration authorities at Nakonde impounded two vehicles after receiving information that they were carrying illegal immigrants. The Immigration officers could not apprehend the drivers of the said vehicles as they managed to escape their hands. However, in one of the vehicles, a Toyota Noah registration No. AIB 1139, they found two mobile phones and through call records from Airtel, they were able to trace one of the mobile phones to the appellant. The prosecution led evidence to the effect that the appellant had hired the Toyota Noah on the pretext that he was going to use it for a funeral.

In his defence, the appellant admitted having hired the vehicle but that at the time it was intercepted with the illegal immigrants, he had given his mobile phone to the person he had hired to drive the Toyota Noah for communication purposes. He strongly denied being involved in the smuggling of persons.

The trial magistrate after considering all the evidence before him rejected the appellant's defence and found that the appellant's mobile phone which was found in the impounded vehicle carrying the illegal immigrants connected the appellant to the offence. Further, the trial magistrate noted with disdain that the appellant, while on bail, had even travelled to Isoka Remand Prison to deliver receipts to show that the illegal immigrants had paid the fine for entering the country illegally thereby facilitating their release. The trial court concluded that the appellant obviously had some financial gain from all these activities. He found him guilty and committed him to the High Court for sentencing.

The sentencing judge, the late Hon. Mr. Justice Chali sentenced the appellant to the maximum sentence of 20 years imprisonment with hard labour with effect from 20th December, 2014 because of the high number of illegal immigrants involved.

Before this court, the appellant through his Counsel Ms. Banda has raised two grounds of appeal couched in the following terms:

1. **The learned trial judge erred in law and fact when he convicted the appellant on insufficient evidence which fell below the standard required by law.**
2. **In the alternative, the sentence of 20 years imprisonment with hard labour did not reflect the fact that the appellant was a first offender.**

Ms. Banda relied on her filed heads of argument. In arguing ground one, which is against conviction, she submitted, *inter alia*, that the prosecution failed to prove their case to the required standard which we guided in the case of **Mwewa Murono vs. The People.**[1] Counsel submitted that apart from the evidence that the appellant hired the vehicle, there is no direct evidence connecting him to the commission of the offence. She argued that the fact that his mobile phone was found in the hired motor vehicle was not sufficient to connect him to the transportation of the illegal immigrants. Counsel contended that the appellant gave a reasonable explanation which was that he had given his mobile phone to the driver he had hired to drive the hired motor vehicle for

communication purposes. In support of her argument, she cited the case of **Saluwema vs. The People**[2] where we stated that:

> **"If the accused's case is reasonably possible although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof."**

Counsel submitted that the ingredients of the offence of smuggling were not satisfied going by the facts of this case. Based on the definition of smuggling under the Act, Ms. Banda opined that for the prosecution to prove the offence, they must prove, *inter alia,* that the appellant smuggled the illegal immigrants into Zambia and also procured the illegal immigrants in order to obtain a financial gain or material directly or indirectly. It was submitted that the prosecution failed in their duty and she implored us to quash the conviction, set aside the sentence and set the appellant at liberty.

In ground two, which is against the sentence of 20 years, Counsel submitted that this sentence is severe and does not reflect the leniency due to a first offender. Ms. Banda relied on the case of **Solomon Chilimba vs. The People**[3] where the Court of Appeal (the forerunner of this Court) held that unless the case has some extraordinary features which aggravate the seriousness of the

offence, a first offender ought to receive the minimum sentence. The case of **Jutronich and Others vs. The People**[4] also by the Court of Appeal was relied on. Counsel accused the sentencing judge of ignoring the mitigation offered on the appellant's behalf and went on to impose a severe sentence. We were urged to set aside the sentence and instead impose the statutory minimum sentence.

At the hearing, Ms. Banda in her brief augmentation in relation to ground one submitted, *inter alia,* that there was evidence that the mobile phone was used by other people and, therefore, it could not link the appellant to the offence. Regarding ground two on the sentence, she argued that there was nothing preventing the sentencing court from imposing the minimum sentence and emphasised the fact that the appellant derived no benefit from the offence and was a first offender.

Mrs. Chipanta-Mwansa filed heads of argument in response. She submitted that although there was no direct evidence against the appellant, the circumstantial evidence was cogent so as to take the case out of the realm of conjecture in line with the cases of **David Zulu vs. The People**[5] and **Saidi Banda vs. The People.**[6] She contended that the conduct of the appellant of going to seek the

release of the illegal immigrants when the court had ordered that they should be deported to their country of origin confirms the appellant's guilt and the **Saluwema**[2] case cannot apply as his explanation was not reasonable and probable. She argued that the appellant would not have risked going to the extent of procuring the fines receipts to facilitate the release of the illegal immigrants from prison if he had no benefit in the case.

Mrs. Chipanta-Mwansa in her *viva voce* reply to her learned friend's submissions maintained that the conviction was proper as all the elements of the offence were satisfied beyond reasonable doubt. That the appellant was properly connected to the offence as his mobile phone was found in the vehicle and his explanation was unreasonable and should be considered as no explanation at all in line with the case of **Ilunga Kalaba vs. The People.**[7]

According to Mrs. Chipanta-Mwansa, the benefit can be inferred from the appellant's conduct and the number of people involved especially that the appellant went to the extent of going to attempt to have the illegal immigrants released. That, if there was no benefit, he would not have risked his liberty in such a manner. Counsel argued that this conduct cannot be ignored.

As to the sentence, Counsel submitted that the number of people involved was an aggravating circumstance as well as the appellant's conduct of attempting to disobey a court order. Mrs. Chipanta-Mwansa opined that the aggravating circumstances far outweigh the merits of the appellant getting the minimum sentence. Counsel contended that smuggling of persons is organized crime and we should hold hands with the international community and uphold the conviction and sentence.

We have considered the judgment appealed against, the ruling by the sentencing judge as to sentence and the submissions on behalf of the appellant and the State.

It is not in dispute that the appellant had hired the vehicle carrying the illegal immigrants; his mobile phone was found in the impounded vehicle; and he had attempted to have the illegal immigrants released from prison against the trial court's deportation order. In his defence, the appellant explained that he gave his mobile phone to one of the drivers for communication purposes, hence it being found in the vehicle carrying the illegal

immigrants. Basically, he denied any knowledge of how the illegal immigrants found themselves in the hired vehicle. We find it incredible that a person can hire a vehicle and not know how the illegal immigrants got onto the vehicle. For him to plead ignorance and leave it at that is unacceptable and unreasonable. As submitted by Mrs. Chipanta- Mwansa, his explanation was no explanation at all. The appellant's explanation reminds us of our observations in the case of **Bwalya vs. The People**[8] where the appellant had merely told the police that "I was in Kabwe" and we held that, that alibi could not stand as the police were unable to carry out investigations as it lacked detail. In this case, the appellant knew the person he gave his mobile phone, which was found in the impounded vehicle, but he did not give any details of this person to the investigations officer. The appellant cannot hide behind the **Saluwema**[2] case as his explanation was unreasonable and was no explanation at all. In fact, the discovery of his mobile phone in the vehicle, which he had hired was an odd coincidence which constituted evidence of 'something more' in terms of our holding in **Ilunga Kabala and Another vs. The People**[7] and **Machipisha Kombe vs. The People**[9] that odd coincidences

represent an additional piece of evidence which the Court is entitled to consider.

Another odd coincidence was the fact that the appellant sought the illegal immigrant's release from prison pending their deportation. We agree with Mrs. Chipanta-Mwansa that the trial court was entitled to infer from his conduct of attempting to circumvent the deportation order that he had benefitted from the smuggling of persons. Surely, the appellant could not undertake to smuggle such high number of people for nothing. For Ms. Banda to argue that he did not benefit financially from the deal is to bury one's head in the sand. Having considered the evidence, we are of the firm view that the appellant was a participant in the commission of the offence and the circumstances of this case point to the fact that he hired the vehicle with the sole purpose of smuggling the Ethiopian nationals into Zambia.

All in all, we find that the conviction was proper as there was overwhelming evidence against the appellant. Ms. Banda's spirited arguments that the prosecution failed to prove the case cannot be entertained. Ground one must fail.

Turning to the second ground of appeal, the learned sentencing judge had this to say:

> **"As for the sentence I have considered the submission by Mr. Katazo in mitigation of sentence. I have treated the convict as a first offender who is entitled to leniency. However, the convict ought to realise not to take advantage of the apparently porous boundaries around Zambia. People especially the authorities, watch those boundaries and do capture those who offend against customs or immigration laws.**
>
> **Further, the legislature enacted stiff penalties under the Anti Human Trafficking Act to discourage human trafficking. Under the circumstances of this case I am sentencing the convict to a term of twenty (20) years imprisonment with hard labour with effect from 20th December 2014 because of the high number of illegal immigrants involved."**

The main bone of contention in this appeal is that the sentencing judge did not treat the appellant as a first offender despite stating so in his ruling. We have held in a plethora of cases that as an appellate court we cannot lightly interfere in a sentence imposed by a lower court. In **Alubisho vs. The People**[10] we held that:

> **(i) With the exception of prescribed minimum or mandatory sentences a trial court has a discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate court does not normally have such a discretion.**

(ii) In dealing with an appeal against sentence the appellate court should ask itself three questions:

(1) Is the sentence wrong in principle?

(2) Is it manifestly excessive or so totally inadequate that it induces a sense of shock?

(3) Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?

Only if one or other of these questions can be answered in the affirmative should the appellate court interfere.

From the outset we agree that the sentencing judge misdirected himself by imposing the maximum sentence of 20 years on a first offender. The minimum sentence provided for is 15 years imprisonment and for the learned trial judge to impose the maximum is certainly extreme. We agree that the fact that the number of illegal immigrants involved was high and that the appellant sought to interfere with the deportation order were aggravating factors. However, this cannot justify the imposition of the maximum sentence. By imposing the maximum sentence, the sentencing judge overlooked the fact that the appellant was a first offender who deserved leniency.

We have given guidance to lower courts regarding the issue of sentencing recently in the cases of **Francis Kamfwa vs. The**

People;[11] **Ngosa Banda vs. The People;**[12] **Kennedy Mbao vs. The People;**[13] **Emmanuel Simfukwe vs. The People;**[14] and **Richard Kasonde vs. The People.**[15] Of course, there are numerous other cases where we have dealt with the same issue.

In short, the sentence is wrong in principle; it is excessive and has come to us with a sense of shock. Had the learned trial judge applied his mind to the pronouncements made by this court in various cases, he would not have imposed the maximum sentence. In the circumstances, justice demands that we interfere with the sentence. We set aside the sentence of 20 years and instead we impose a sentence of 18 years imprisonment having regard to the aggravating circumstances which take it out of the realm of the mandatory minimum sentence. To that extent, ground two has merit and the appeal against sentence succeeds.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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R.M.C. KAOMA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE