IN THE SUPREME COURT OF ZAMBIA Appeal No. 125/2018
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:

RICHARD KASONDE **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: Mr. F.M. Sikazwe, Senior 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. **Jutronich and Others vs. The People (1965) Z.R. 9**
2. **Solomon Chilimba vs. The People (1971) Z.R. 36**
3. **Ngosa Banda vs. The People Appeal No. 138 of 2017**
4. **Francis Kamfwa vs. The People Appeal No. 125 of 2017**
5. **Moses Mwiba vs. The People (1971) Z.R. 13**
6. **Alubisho vs. The People (1976) Z.R. 11**
7. **Adam Berejana vs. The People (1984) Z.R. 19**
8. **Noah Kambobe vs. The PeopleSCZ judgment No. 13/2002**
9. **Michael Coetzee vs. The People Appeal No. 135 of 1995**
10. **Phiri J.W. vs. The People (1973) Z.R. 3 (Reprint)**

This is an appeal from the judgment of the late Hon. Mr. Justice Chali.

The appellant, on his own plea of guilt and admission of facts was convicted of the offence of manslaughter and was sentenced to 35 years imprisonment with hard labour. The deceased in this matter is a one year six months old baby, the appellant's son.

The statement of facts revealed that on Christmas day of 2015 the appellant went drinking. His wife also went drinking with the baby on her back. She returned around 17:00 hours and found the appellant at home. A quarrel erupted and the appellant assaulted his wife who still had the baby on her back and he ended up kicking the baby who sustained serious injuries and subsequently died. The postmortem examination revealed that the cause of death was abnormal neck mobility and flexibility, fracture of the neck.

In mitigation, learned Counsel for the appellant stated, *inter alia,* that the appellant regretted his actions especially that he was aware that his son was unwell at the time and that the quarrel was over the fact that his wife went home late with the sick child.

After considering the mitigation offered, the learned trial judge sentenced the appellant to 35 years imprisonment. Aggrieved by the sentence, the appellant has now come before us with one ground of appeal in which he contends that the sentence is excessive and that it does not reflect the fact that he is a first offender deserving leniency.

On behalf of the appellant Ms. Banda filed heads of argument which she relied on. Relying on the cases of **Jutronich and Others vs. The People**[1] and **Solomon Chilimba vs. The People**[2] it was submitted that there were no aggravating features necessitating the imposition of a harsh sentence. Counsel contended that we should not lose sight of the fact that the appellant had been drinking on that day and that as the father of the deceased child, he will live with the fact that he caused the death of his own child which will haunt him for the rest of his life. Counsel opined that the appellant's action of fighting with his wife who arrived home late and drunk showed the level of love and care he had for his son.

Counsel also referred us to the cases of **Ngosa Banda vs. The People**[3] and **Francis Kamfwa vs. The People**[4] in which we dealt with the question of sentence for the offence of manslaughter and

both appeals were successful in that the sentences were reduced. We were reminded that in the two cases, we spoke to the question of the need for consistency when it comes to sentencing. Counsel urged us to exercise maximum leniency and follow what she termed as our emerging principles on sentencing. We will revert to these two cases later in our judgment.

In her brief augmentation, Ms. Banda submitted that the appellant readily pleaded guilty thereby showing remorse. She argued that 35 years for someone who readily pleaded guilty must come to us with a sense of shock. That the mitigating factors in this case far outweigh whatever can be termed as aggravating. Ms. Banda urged us to interfere with the sentence and impose an appropriate sentence.

Mr. Sikazwe the learned Senior State Advocate conceded that the sentence of 35 years imprisonment was excessive and should come to us with a sense of shock. This is in view of the position we took in **Francis Kamfwa vs. The People**[4] where we reduced the sentence from 15 years to 7 years. However, he submitted that in considering the appropriate sentence, we must bear in mind the appellant's behaviour and send a message that this court does not

condone gender-based violence. Mr. Sikazwe pointed out that the victim was one year six months old, and this ought to be viewed as an aggravating circumstance.

We have considered the arguments advanced by learned Counsel.

The issue before us is whether having regard to the circumstances of the case and considering our previous decisions, the sentence of 35 years imposed by the trial judge was excessive.

The learned trial judge had this to say when sentencing the appellant:

> **"...However, the convict wanted to blame only the wife for going out to drink while their child was sick. He therefore sought to punish her for that behaviour. He thought she should have stayed home to nurse the child.**
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> **He forgot that it was equally his responsibility to stay with the child and to nurse him with his wife. His conduct of turning in anger at his wife while he was drunk is unacceptable to me. It is an aggravating circumstance in my view as his wild kick ended up on an innocent sick child, instead of on the wife who was equally to blame as himself for going to enjoy alcohol while the child was sick. In the circumstances, I hereby sentence the convict to a term of thirty-five (35) years with effect from 29th December 2015 the day of his arrest. ..."**

We agree with the learned trial judge that it was reckless of the appellant to assault his wife who was carrying the sick baby on her back, and we agree with the learned trial judge that this was an aggravating circumstance.

However, we are of the view that the learned trial judge, in sentencing the appellant should have given him due allowance as he had readily pleaded guilty to the charge, was a first offender and had shown contrition. This is in line with the guidance given to trial courts by the Court of Appeal, our forerunner in the case of **Moses Mwiba vs. The People**[5] Further, in **Solomon Chilimba vs. The People**[2] it was 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. These considerations should have reflected in the sentence imposed by the trial court.

As an appellate court, we have given guidelines as to when it is necessary for us to interfere with the sentence imposed by the lower court. Starting with **Jutronich and Others vs. The People**[1] (dealt with by the Court of Appeal the forerunner of this court); **Alubisho**

vs. The People[6] and **Adam Berejana vs. The People**[7] we held that an appellate court will not lightly interfere with a sentence unless it is wrong in principle, excessive and induces a sense of shock and there are exceptional circumstances which would render it an injustice if the sentence were not reduced.

We have addressed our minds to our recent decisions in **Ngosa Banda vs. The People**[3] and **Francis Kamfwa vs. The People**[4] where we found merit in the appeals against sentence.

In the case of **Ngosa Banda vs. The People**[3] the appellant was appealing against the sentence of 25 years imprisonment for manslaughter. The statement of facts revealed that the appellant, the deceased and her husband were all drinking at a bar. As the deceased and her husband decided to leave, one of the appellant's friends made a remark directed at the deceased. The deceased's husband was angered by the remark and a fight ensued between the appellant and his friends and the deceased's husband. The deceased tried to intervene and in the process, she was kicked in the abdomen by the appellant and she suffered a rapture to the large intestine due to the trauma.

We found that the trial judge misapprehended the facts and considered issues that were not part of the statement of facts admitted by the appellant. We guided that the trial judge should have taken into account that the appellant had readily pleaded guilty and was a first offender who had shown contrition and after considering the cases of **Noah Kambobe vs. The People,**[8] **Michael Coetzee vs. The People**[9] and **Phiri J.W. vs. The People**[10] **(Reprint)** we stated that:

> **"...What we distil from the three cases above although by no means indicating the sentencing trends in cases of this nature over the four or so decades since those decisions is that a plea of guilty and the fact that a convict is a first offender are taken seriously in mitigating the gravity of sentence where the nature of the case allows it. In the particular circumstances of this case, we find that the sentence of 25 years imprisonment is without doubt excessive, wrong in principle and comes to us with a sense of shock. We feel bound to interfere with it. ..."**

We reduced the sentence from 25 years to 5 years imprisonment.

In the case of **Francis Kamfwa vs. The People**[4] the appellant together with the deceased, his colleague had carried out some piece work together and payment was made directly to the

deceased. The two went carousing during which an altercation developed between them when the deceased refused to share the balance of the proceeds with the appellant which led to a fight between the two. In the process, the deceased was fatally injured. The appellant, a first offender pleaded guilty to the charge of manslaughter. The trial court sentenced him to 15 years imprisonment. We stated that:

> **"...Generally, the principles of sentencing are well settled; and so too is the need for the exercise of prudence, consistency and fairness by the sentencing judge, among many other justifiable considerations. All these attributes are found in numerous decisions which this court has made in the past and which it will continue to make now and in the future. It is with these thoughts in mind that we agree with the approach taken by Mr. Muzenga when he suggested to us that in deciding this appeal we ought to look at our recent decisions.....With this approach, we are certain that a decent level of consistency can be achieved. It is in this light that we have equally found value in our pronouncements in the cases of Edom Lwela and Kelvin Kabwe,.....Applying the sentencing policy which we adopted in those two cases to the present case, we feel duty bound to state that the sentence of 15 years imprisonment with hard labour comes to us with a sense of shock for being excessive. We so hold because in the present case the appellant and the deceased were close companions, they worked together, they drunk together, and the deceased was much older than the appellant. Over and above these**

facts, the appellant was a first offender and he never used any weapon or object during the fight in which the deceased was the aggressor by rejecting the appellant's right to the portion of the money which the two had jointly worked for. We do not think that all these relevant issues were accorded proper consideration by the learned trial judge before imposing the sentence of 15 years. ..."

We reduced the sentence to 7 years imprisonment.

In **Francis Kamfwa vs. The People**[4] and **Ngosa Banda vs. The People**[3] we stated that as courts, we must maintain a certain level of consistency while exhibiting fairness and predictability. This will be of great help to Counsel when advising accused persons and even to accused persons appearing in person in our courts.

As earlier indicated in this judgment, in the case before us, the appellant pleaded guilty to manslaughter and in mitigation showed contrition. We take the view that the sentence of 35 years did not reflect the leniency which should be afforded to a first offender who has readily pleaded guilty. Further, we cannot ignore the fact that the deceased is the appellant's own biological son and as passionately pleaded by Ms. Banda, the fact that he caused the death of his own son is in itself the greatest punishment which he

has to live with. He acted without thinking and hence the grave consequences which he must face. We find that the sentence of 35 years comes to us with a sense of shock and we are inclined to interfere with it. We set it aside and instead we impose a sentence of 10 years imprisonment with hard labour with effect from the date of arrest.

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