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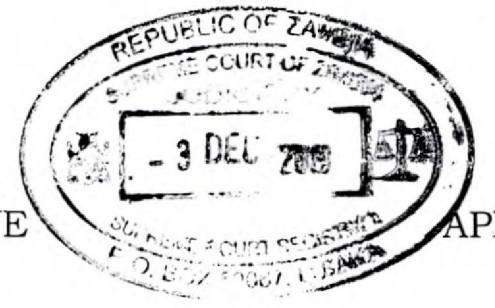
IN THE SUPREME COURT OF ZAMBIA Appeal No. 122/2018
HOLDEN AT KABWE
(Criminal Jurisdiction)



BETWEEN:

EMMANUEL SIMFUKWE APPELLANT

AND

THE PEOPLE RESPONDENT

Coram: Muyovwe, Kaoma and Chinyama, JJS.
On 5th November, 2019 and 3rd December, 2019

For the Appellant: Mr. M. Mankinka, Legal Aid Counsel
For the Respondent: Mrs. M. Chipanta Mwansa, Deputy Chief State Advocate

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JUDGMENT

Kaoma, JS delivered the judgment of the Court.

Cases referred to:

1. **Adam Berejena v The People (1984) Z.R. 19**
2. **Moses Mwiba v The People (1971) Z.R. 131**
3. **Alubisho v The People (1976) Z.R. 11**
4. **Kennedy Mbao v The People – Appeal No. 119/2018**
5. **Jutronich Schutte and Lukin v The People (1965) Z.R. 9**

Legislation referred to:

1. **Penal Code, Cap 87 of the Laws of Zambia, section 328(1)(a)**

1. Background facts

1.1 This is an appeal against sentence only. The Subordinate Court at Mbala convicted the appellant of arson contrary to section 328(a) of the Penal Code upon his own unequivocal plea of guilty and committed him to the High Court for sentence.

1.2 In sentencing the appellant, late High Court judge Chali, J., treated him as a first offender although he said nothing in mitigation of sentence in the trial court. The judge also considered the seriousness with which the legislature views this type of offence whereby it has provided a minimum prison sentence of ten years and maximum of life. He further considered the value of the property lost in the fire, which he said the poor victim may never recover and that the offence was unprovoked. He sentenced the appellant to twenty years imprisonment with hard labour effective from the date of arrest.

2. Appeal to this Court and arguments by the parties

2.1 The appellant has argued one ground that the trial court erred at law and fact when it meted out a harsh sentence on him in the absence of aggravating circumstances.

2.2 The kernel of the arguments by Mr. Mankinka, his learned counsel, is that the prison sentence of twenty years was manifestly excessive for a first offender who had pleaded guilty. He cited the case of **Adam Berejena v The People**[1], which dealt with when an appellate court may interfere with a lower court's sentence.

2.3 Counsel argued that the sentence was inappropriate and should come to us with a sense of shock as the mitigating factors outweighed any aggravating factors and the value of the property was on the lower side of the scale. Further, that this was an ordinary case of arson, thus the appellant ought to have received the minimum sentence.

2.4 Mr. Mankinka contended that although the appellant did not offer any mitigation before the trial court, this does not mean that he was not remorseful because a guilty plea is an offspring of penitence. Therefore, it was an error in principle for the judge not to have considered such contrition.

2.5 Besides, counsel argued, the record is silent on whether the judge allowed the appellant by his counsel to mitigate before sentence so that he could show that he was remorseful. He cited the case of **Moses Mwiba v The People**[2] and urged us to set aside the sentence and impose one that resonates with the facts of the case.

2.6 In his oral submissions, learned counsel conceded that a plea of guilty does not necessarily signify remorse. On the undisputed fact that the appellant burnt two houses

belonging to the complainant, counsel insisted that the mitigating factors outweighed any aggravating factors.

2.7 Mrs. Chipanta-Mwansa contended in her oral submissions, on behalf of the respondent, that the learned judge was right to sentence the appellant to twenty years imprisonment after considering the factors on record. She disputed as trivial the value of the property or that it falls on the lower side of the scale.

2.8 According to her, this offence on a poor victim in a village, who lost two houses in the inferno, was unprovoked, aggravating, and amounted to violence against a woman who may not recover her lost property. Moreover, the appellant's conduct of setting fire to another house even when the children shouted for help removed this case out of the category of ordinary cases of arson.

2.9 Counsel further submitted that the sentence was not wrong in principle or so manifestly excessive as to induce a sense of shock or were there any exceptional circumstances that would render it an injustice if the sentence is not reduced. She cited the case of **Alubisho v**

The People[3], which also dealt with when the appellate court can interfere with sentence.

2.10 Counsel disputed that there were any mitigating factors in this case and argued that the appellant, inadvertently, got away with one count. She urged us not to interfere with the sentence.

3. Consideration of the matter by this Court and decision

3.1 We have considered the evidence on record and the arguments by learned counsel. In the case of **Alubisho v The People**[3], which we have also quoted in **Kennedy Mbao v The People**[4], this Court referred to the case of **Jutronich, Schutts and Lukin v The People**[5], where Bladgen, C.J., (as he then was) set out the questions the appellate court should ask itself in dealing with an appeal against sentence as follows:

1) **Is the sentence wrong in principle?**
2) **Is it manifestly excessive so 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?**

3.2 It is clear from the above case, that it is only if one or other of the above questions could be answered in the affirmative that the appellate court should interfere with the sentence.

3.3 In the present case, the appellant was a first offender who as rightly submitted by his counsel readily admitted the charge, thereby saving the court's time. Therefore, the starting point, as we have said in **Kennedy Mbao v The People**[4] is that the appellant was liable to the mandatory minimum sentence of ten years. However, he got a sentence of twenty years imprisonment.

3.4 The question that arises is whether that was a proper sentence given the circumstances of this case. In **Moses Mwiba v The People**[2], it was held that the court must give due allowance to accused persons who plead guilty and show contrition as their action saves the time of the court and investigating officers.

3.5 A question arose at the hearing of this appeal, whether the appellant was remorseful since he had said nothing in mitigation of sentence in the trial court. Mr. Mankinka's submission on behalf of the appellant was that a plea of guilty is the offspring of remorse.

3.6 Indeed, our courts accept the use of remorse or its absence as a mitigating or aggravating factor during

sentencing in criminal matters and a judge may alter a sentence or punishment because of remorse.

3.7 We hold the view that while a guilty plea amounts to acceptance by the accused that he committed the offence, it is a simple act of contrition, genuinely felt and communicated that can alter the sentence because an accused can commit a heinous act or even a less serious offence without feeling remorse. The only difficult may be how to determine whether the accused is expressing remorse and whether those expressions are sincere.

3.8 In this case, as submitted by Mr. Mankinka, there is nothing on record to show that the learned judge had invited the appellant by his counsel to mitigate before sentence. Hence, we cannot conclude that the appellant was not remorseful at the time of sentencing.

3.9 While the judge considered that, the appellant was a first offender he failed to consider that he had pleaded guilty and may well have been contrite. Therefore, we find the sentence of twenty years imprisonment with hard labour to be wrong in principle and to be manifestly excessive as to induce a sense of shock and we set it aside.

3.10 However, as stated by the learned judge this offence was unprovoked and the appellant did not explain his conduct. In addition, he set two houses on fire although the charge related to one offence. In our view, this took the case outside the mandatory minimum sentence. For that reason, we impose a sentence of eleven years imprisonment with hard labour with effect from the dateof arrest.

4. Conclusion

4.1 This appeal succeeds and we allow it.

E. C. MUYOVWE
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE