IN THE COURT OF APPEAL FOR ZAMBIA APPEAL No.78/2023

HOLDEN AT LUSAKA AND NDOLA

(Criminal Jurisdiction)

JAIKO HAMWEENZU APPELLANT

AND

THE PEOPLE RESPONDENT

Coram: Mchenga DJP, Muzenga and Chembe, JJA

On 22nd May 2024 and 22nd August 2024

For the Appellant: S.F. Bwalya, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: S. Mainza, State Advocate, National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Moses Mwiba v. The People [1971] Z.R. 131
2. Teddy Mukuka v. The People, CAZ Appeal No. 25 of 2020
3. Francis Kamfwa v. The People, SCZ Appeal No. 125 of 2017
4. Kelvin Kabwe v. The People, SCZ Appeal No. 123 of 2017
5. Edoni Lwela v. The People, SCZ Appeal No. 124
6. Adam Berejena v. The People [1984] Z.R. 19
7. Chimbofwe v. The People, CAZ Appeal No. 33 of 2019

7. Chimbofwe v. The People, CAZ Appeal No. 33 of 2019
8. Patrick Hara v. The People, SCZ Appeal No. 162 of 2011
9. Chilimba v. The People [1971] Z.R. 36
10. Benua v. The People [1976] Z.R. 13
11. Regina v. Evans [1958] R&N 432
12. Jonas Nkumbwa v. The People [1983] Z.R. 103

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia

1.0 INTRODUCTION

1.1 The appellant appeared before the High Court (C. Zulu, J.), charged with the offence of murder contrary to **Section 200 of the Penal Code.** He denied the charge and the matter was adjourned for trial.

1.2 On the day it was scheduled for trial, the charge was amended and substituted with the lesser offence of manslaughter, contrary to **Section 199 of the Penal Code.** The appellant readily admitted the reduced charge.

1.3 He was convicted following his admission of the facts in support of the charge, and sentenced to life imprisonment.

1.4 He has appealed against the sentence.

2.0 FACTS BEFORE THE TRIAL JUDGE

2.1 According to the facts admitted by the appellant, on 17th March 2017, in the evening, the appellant returned to the house where he was temporarily residing, in Kapiri Mposhi's Matiliyo Compound. He was in the company of an unknown woman.

2.2 The owners of the house refused to permit him to enter the house with that woman. He went away with the woman but returned alone not long thereafter. He then lured a young girl aged eight years, who stayed in the house where he was temporarily residing and took her into the bush.

2.3 He had anal penetration of the young girl. During the act, he held her by the mouth to prevent her from screaming. She lost consciousness and died. The appellant was caught while in the act.

2.4 When a post-mortem examination was conducted on the body of the young girl, the cause of her death was found to be asphyxia due to closure of upper airways. It was also discovered that she had suffered a rapture of the sphincter (a muscle in the anus), as a result of the anal penetration by the appellant.

2.5 When sentencing the appellant, the trial Judge described his conduct as "inhuman and devilish". He then proceeded to impose a sentence of life imprisonment.

3.0 GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

3.1 The sole ground of appeal is that the trial Judge erred when he imposed the maximum sentence for the offence, when the appellant was a first offender who had readily admitted the reduced charge.

3.2 In support of the sole ground of appeal, the cases of **Moses Mwiba v. The People**[1], **Teddy Mukuka v. The People**[2] and **Francis Kamfwa v. The People**[3], were referred to and it was submitted that had the trial Judge considered the principles of sentencing, and in particular, that the appellant was a first offender who readily admitted the charge, he would not have imposed the maximum sentence of life imprisonment.

3.3 Our attention was also brought to the case of **Kelvin Kabwe v. The People**[4], where the Supreme Court reduced a sentence of 40 years imprisonment for manslaughter, to 4 years, following a plea of guilty; and the case of **Edoni Lwela v. The People**[5], where the Supreme Court

reduced a sentence of life imprisonment to 7 years imprisonment, following a plea of guilty to a charge of manslaughter, by a first offender.

3.4 Finally, the case of **Adam Berejena v. The People**[6] was referred to and it was submitted that there is a good reason for us to interfere with the sentence that was imposed on the appellant, because it is manifestly excessive.

3.5 We were urged to impose a sentence lower than life imprisonment.

4.0 **ARGUMENTS AGAINST THE SOLE GROUND OF APPEAL**

4.1 It was argued on behalf of the respondent that the trial Judge was on firm ground when he imposed the sentence of life imprisonment.

4.2 The cases of **Chimbofwe v. The People**[7] and **Patrick Hara v. The People**[8], were referred to and it was submitted that the general principal is that we should not interfere with a sentence unless it comes to us with a sense of shock for being excessive.

4.3 Counsel then referred to the cases of **Chilimba v. The People**[9] and **Benua v. The People**[10], and submitted that even if the appellant is a first offender who was

entitled to leniency, the circumstances in which the offence was committed in this case, warranted the imposition of a life sentence.

5.0 **CONSIDERATION OF APPEAL AND DECISION OF THE COURT**

5.1 In this case, other that state that the appellant's conduct was "inhuman and devilish", the trial Judge did not indicate what other factors informed the imposition of the sentence of life imprisonment.

5.2 This raises the possibility that he did not take into account the fact that the appellant was a first offender, who had readily admitted the reduced charge.

5.3 The options that this court has in an appeal against sentence, are set out in **Section 16(5) of the Court of Appeal Act.** It reads as follows:

> **"The Court may, on an appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such other order as the trial court could have imposed or made, except that—**
>
> ***(a)* in no case shall a sentence be increased by reason of or in consideration of evidence that was not given at the trial; and**
>
> ***(b)* the court shall not interfere with a sentence just because if it were a trial court it would have imposed a different sentence,**

> **unless the sentence is wrong in principle or comes to the Court with a sense of shock."**

5.4 **Section 16(5)(b) of the Court of Appeal Act**, makes it clear that we can only interfere with the sentence imposed on the appellant if we find that the sentence was wrong in principle, or if the sentence comes to us with a sense of shock for being excessive.

5.5 In the case of **Benua v. The People**[10], the Supreme Court considered the import of a plea of guilty on the sentencing process. The court held as follows:

> **"The appellant appeals against his sentence on the grounds that the learned trial judge did not take into account the fact that he pleaded guilty. This court has said before that a plea of guilty must be taken into account in considering a sentence unless there are circumstances such as a man being caught red-handed when he has no alternative. Failure to take into account a plea of guilty is an error in principle"**

5.6 Further, in the case of **Jonas Nkumbwa v. The People**[11], having noted the entitlement of first offenders to leniency, the Supreme Court went on to point out that:

> **"The robbery in this case was staged by a large group of men and in particular, any sentence to be passed should reflect the disapproval of society of the use, by bandits, of police and army uniforms. The society is entitled to rely on the confidence and protection that**

can be expected when dealing with police and army personnel. But all too frequently cases come up where bandits have staged robberies disguised as policemen, or as soldiers. We intend to deal harshly with bandits who make use of uniforms in this manner"

5.7 From the two cases we have just referred to, it is clear that there are situations where the failure to take into account the fact that an accused person pleaded guilty, will warrant tempering with the sentence by an appellate court.

5.8 On behalf of the appellant, and in aid of the desire to have the sentence reviewed downwards, the cases of **Kelvin Kabwe v. The People**[4], **Edoni Lwela v. The People**[5] and **Francis Kamfwa v. The People**[3], were referred to.

5.9 As pointed out earlier on, in the cases of **Kelvin Kabwe v. The People**[4] and **Edoni Lwela v. The People**[5], sentences of four years and seven years, were respectively imposed by the Supreme Court in cases where there were pleas of guilty to charges of manslaughter. It has been submitted that in keeping with the decision in **Francis Kamfwa v. The People**[3], a similar sentence should be imposed in this case.

5.10 In the case of **Regina v. Evans**[12], it was held that the primary or predominant determinant of a sentence in

any case, are the circumstances of that particular case.

5.11 The cases of **Kelvin Kabwe v. The People**[4] and **Edoni Lwela v. The People**[5], were concerned with the killing of spouses in the course of domestic disputes. On the other hand, the case of **Francis Kamfwa v. The People**[3], was concerned with a person who killed a friend after a difference, following a drink.

5.12 The circumstances of this case are totally different. The appellant caused the death of an eight years old girl during the course of a very violent sexual assault. The fact that the sexual assault was very violent is confirmed by the medical report that indicates that the victim suffered a raptured sphincter muscle as a result of the appellant's penetration of her anus.

5.13 Moments before this fatal assault, the appellant attempted to bring a woman into the house and he was stopped. It is not farfetched to conclude that the young girl became the alternative for his sexual desire.

5.14 Ordinarily, a plea of guilty, particularly for a serious offence where there is a possibility of a lengthy sentence, does point to remorse warranting leniency in sentencing. But in the case of **Benua v. The People**[10], it was pointed out that it may not be the case in a matter where the offender is caught red handed.

5.15 In this case, the appellant was caught red handed. In the circumstances, we find that pleading guilty may not necessarily have been a sign of contrition but because there was really no way out for him.

5.16 We take judicial notice of the prevalence of sexual offences in this country, particularly against young girls. Even if the appellant was not charged with a sexual offence, he caused the death of a young child in the course of a sexual assault.

5.17 It is our view that the causing of the death of a child in the course of a sexual assault, was an aggravating factor which outweighed the fact that the appellant was entitled to leniency on account of being a first offender who had readily admitted the charge.

5.18 In our view, the depressing circumstances of this case, warranted the imposition of a very severe sentence, even if the appellant was a first offender who had readily admitted the charge.

5.19 This being the case, the sentence of life imprisonment does not come to us with a sense of shock as being excessive. The circumstances of this case, warranted the imposition of the maximum sentence for life imprisonment even if the appellant was a first offender who has readily admitted the charge.

5.20 Consequently, we find no merit in the appeal against the sentence.

6.0 **VERDICT**

6.1 The appeal against the sentence is unsuccessful and we dismiss it. We uphold the sentence imposed by the trial Judge.

.....

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....

K. Muzenga
COURT OF APPEAL JUDGE

.....

Y. Chembe
COURT OF APPEAL JUDGE