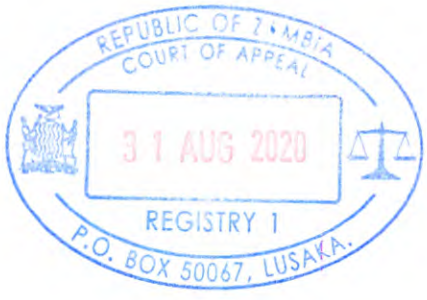
IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL NO. 33/2019**

HOLDEN AT NDOLA

(Criminal Jurisdiction)



BETWEEN:

JAMES CHIMBOFWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: KONDOLO SC, CHISHIMBA, MULONGOTI JJA

On 26th August 2020 and on 31st August, 2020

For the Appellant : Mrs. L.Z Musonda, Legal Aid Counsel -Legal Aid Board;

For the Respondent : Mr. C.K. Sakala, State Advocate – National Prosecution Authority

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J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Francis Kamfwa v The People SCZ Appeal No. 125/2017**
2. **Kaambo v The People (1976) Z.R. 122**
3. **Emmanuel Simfunke SCZ Appeal No. 122/2018**
4. **Alubisho v The People (1976) Z.R. 11.**

LEGISLATION REFERRED TO:

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

The Appellant James Chimbofwe stood charged with the offence of manslaughter contrary to **Section 199 of the Penal Code**. He is alleged to have unlawfully caused the death of Howard Chansonso on the 2nd day of October, 2018 at Mpongwe in the Copperbelt Province of the Republic of Zambia. He pleaded guilty to the charge and was convicted accordingly. The trial Judge sentenced him to 12 years imprisonment with hard labour.

The facts upon which he was convicted were that the deceased was beating up his daughter and after he was stopped by his brother-in-law, the deceased told his son, the Appellant, that he was next. The deceased then head butted the Appellant causing him to stagger. The Appellant retaliated by punching the deceased who fell to the ground. While the deceased was still on the ground, the Appellant picked up a firelog and used it to hit him on the ribcage and on his head. The strike to the head caused a deep wound and the deceased fell unconscious.

The postmortem report was produced in Court and it showed that the deceased died of a fracture of the temporal bone plus extra & subdural hematomas. The body had bruises on the forehead, upper limbs and knee and three clear black marks on

the scalp showing that the deceased was cut several times. There were also signs of a strangulation attempt.

The Appellant was dissatisfied with the sentence of 12 years with hard labour handed down to him by the learned Judge and has filed a sole ground of appeal as follows;

1. **The sentence of 12 years imprisonment with hard labour imposed on the Appellant is manifestly excessive and did not reflect the fact that the Appellant was a first offender nor take the circumstances of the case into consideration.**

The Appellant filed heads of argument dated 13th June, 2019 in which it was submitted that when weighed against the mitigatory factor, the sentence of 12 years is severe and does not reflect the leniency due to a first offender. It was also argued that the Court should have considered the fact that the deceased was the aggressor and the Appellant would be haunted by having killed his father thus depriving the family of the breadwinner and leaving them destitute. It was further submitted that the Appellant was only 21 years old and in grade 8 and the sentence had effectively destroyed his educational prospects.

Counsel cited the case of **Francis Kamfwa v The People** [1] where the Supreme Court said as follows;

"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 made in the recent past. 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 Edoni Lwela and Kelvin Kabwe which are not reported as yet, to the present appeal. 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."

Counsel submitted that in the cited case, the Supreme Court interfered with the sentence and the Appellant was given 7 years imprisonment with hard labour from the date of his arrest. We were implored to interfere with the sentence handed down to the Appellant and in its place impose a more reasonable sentence.

At the hearing Counsel for the Appellant relied on the filed heads of argument while Mr. Sakala responded *viva voce.*

Mr. Sakala in response, directed us to the case of **Kaambo v The People** (2) where it was held that it is a misdirection for an appellate court to substitute the sentence imposed by the lower court with its own view as to what the appropriate sentence should have been.

He agreed with the defence and submitted that looking at the circumstances that led to death of the deceased the sentence in this case was excessive. Mr. Sakala however admitted that the instrument used was a firelog but was unable to comment on the force that was exerted or might have been exerted by the Appellant.

We have considered the record of appeal, the heads of argument and the oral submissions by Counsel. In considering this appeal, we thought it prudent to look at the facts admitted to by the Appellant in the cited case as well as the postmortem report.

The case of **Francis Kamfwa** cited by the Appellant was decided on its own facts and even though the deceased in that case was the aggressor, there was no weapon involved.

In casu, even though the deceased was the aggressor, he found himself in a helpless position when he fell to the ground after being punched and it was in that moment that the Appellant, his own son, picked up a firelog and hit him with it. The use of the firelog on a man he had already punched to the ground was aggravating and the postmortem report shows the extreme aggression involved in the beating. The facts of this case are distinguishable from those in the **Francis Kamfwa case (supra**).

We appreciate and defer to the position taken by the Supreme Court and agree that there must be constituency in sentences relating to offences of this nature. However, the

Supreme Court also noted that there is no clear cut or settled formula that judges must follow. It is therefore the position that in as much as there must be consistency in sentences handed down on similar offenders, the law on the extent to which an appellate Court can interfere with or disturb sentences imposed by inferior courts still stands firm.

In the recent case of **Emmanuel Simfunkwe v the People**[3], though a case dealing with arson, the Supreme Court cited the case of **Alubisho v the People** [4] resounding the holding in **Jutronich, Schutts** and **Lukin v The People** where the principles on which an appellate Court can interfere with a sentence were set out. The following questions must be answered: is the sentence wrong in principle; is it manifestly excessive or so totally inadequate that it induces a sense of shock; are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?

We have considered the circumstances of this case and note that the above questions cannot be answered in the affirmative. The maximum sentence for manslaughter is life in prison. The sentence was not wrong in principle, and the 12 years handed down to the Appellant does not come to us with a sense of shock

given the circumstances under which the deceased was killed. We take the view that this is not one of those cases that warrant this Court's interference with the sentence of 12 years with hard labour. In the premises, we see no injustice that would be occasioned on the Appellant if we do not reduce his sentence. The sentence of 12 years with hard labour handed down by the trial Court is upheld.

The Appeal is dismissed.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE