

IN THE COURT OF APPEAL FOR ZAMBIA

Appeal No.026/2020

HOLDEN AT NDOLA

(Criminal Jurisdiction)



BETWEEN:

DAVID KAKUNGU

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Chisanga, JP, Sichinga, Ngulube, JJA

On the 25th day of August and 3rd day of September, 2020

For the Appellant: Ms. M. Marabesa, Legal Aid Counsel of Legal Aid Board.

For the Respondent: Ms. G. Nyalugwe, Deputy Chief State Advocate of National Prosecutions Authority.

JUDGMENT

Sichinga, JA, delivered the Judgment of the court;

Cases referred to:

1. Princess Nakatindi Wina V The People (1996) SJ

Legislation referred to:

1. *The Penal Code, Chapter 87 of the Laws of Zambia.*
2. *The Court of Appeal Act No. 7 of 2016, Laws of Zambia.*

1.0 Introduction

- 1.1 The appellant was convicted of the offence of Manslaughter contrary to section 199 of the **Penal Code, Cap 87 of the Laws of Zambia**¹ by the High Court (Chali J) at Kitwe. The sentence of the Court was handed down on 17th March, 2017. He was sentenced to a term of 25 years imprisonment with hard labour.
- 1.2. The particulars of the offence were that David Kakungu, on the 14th day of November, 2016 at Chingola in the Chingola District of the Copper belt Province of the Republic of Zambia, did cause the death of Given Mwendapole.

2.0. The appeal

- 2.1 This appeal is against sentence only. The appellant has raised one ground of appeal framed as follows:

The sentencing Court erred in law and in fact when it sentenced the appellant to the colossal term of 25 years

with hard labour when he was a first offender deserving the leniency of the Court.

3.0. Submissions by counsel

- 3.1 At the hearing of the Appeal, Ms. Marabesa, learned counsel for the Appellant entirely relied on her written heads of argument filed into Court on 25th August, 2020.
- 3.2. In response, Ms Nyalugwe, learned counsel for the state relied on her written heads of argument equally filed into court on 25th August, 2020.
- 3.3 In response to questions posed, by the court, as to whether the state supported the sentence imposed by the learned trial Judge, Ms Nyalugwe responded in the affirmative. She further acknowledged when referred to the proceedings, that the learned Judge appeared to make reference to the testimony of Willy to urge the appellant to plead in the manner he did.

4.0 The decision of the Court

- 4.1 We shall not go into the details of counsel's submissions for reasons that will become clear shortly in this judgment. We have carefully considered the record of appeal and observed the following. The appellant was initially charged with the

offence of murder contrary to **Section 200 of the Penal Code**¹. At the time of taking the plea, the state applied to amend the charge to that of manslaughter contrary to **section 199 of the Penal Code**¹ which the appellant admitted to. What ensued thereafter was a barrage of questions by the learned trial Judge to the appellant. After the appellant took the plea, the facts were read out to him. At page 5 of the record of appeal, the following discourse then took place:

"Court: Are the facts correct?"

Accused: Partly, my Lord, there is some truth, and on the other side there are some lies.

Court: What are the lies?"

Accused: My Lord, the part which was saying that I hit him with an axe handle is not true.

Court: Kakungu, are you sure you did not use an axe handle? There were witnesses there, including your friend, Willy. Or is it Lewis?"

Accused: It is Willy.

Court: It's Willy, the one you walked with?"

Accused: I went with William and Lewis, my Lord.

Court: Do you know that they told the police that you used an axe handle to hit him twice in the head.

Kakungu, I can change and say you are denying the charge. Those people will come and prove that you hit with an axe handle. They are here. So, is it not true that you used an axe handle to him?

Accused: That is correct, my Lord

Court: It is true, you used an axe handle?

Accused: Yes, my Lord

Court: So why did you want to waste my time. Yes, what else is not true in those facts? You said you have heard the facts, what else is not true in these facts?"

4.2 From the proceedings in the court below, it is clear to us that the appellant was persuaded by the court to plead in the manner he did. There was an intimidating approach applied by the court below in recording the plea. This was a clear misdirection on the part of the learned trial court as the plea was not properly taken.

4.3 The next issue for our consideration is whether the interest of justice requires that the matter be sent to the lower court for re-trial. It is trite law that the answer is dependent upon the particular facts and circumstances of each case. An order for retrial is only made when the interest of justice requires it or

where such an order is unlikely to cause injustice to an accused person. The case of ***Princess Nakatindi Wina v. The People***¹ refers.

4.4 The Court of Appeal has the power to order a retrial pursuant to **Section 16(3) of the Court of Appeal Act**² which provides as follows:

"The Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered or, if the interest of justice so require, order a new trial".

4.5 *In casu*, we are mindful that the charge the appellant was facing was a serious felony which attracts a maximum of life imprisonment. **Section 202 of the Penal Code**¹ refers. We are of the view that in the circumstances of this case, it would be in the interest of justice that the matter be sent back to the lower court for rehearing on account of the improper plea taken. We are of the view that by sending back the matter for retrial, no injustice would be caused to the appellant.

5.0. Conclusion

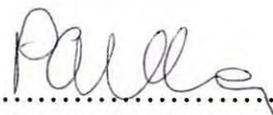
5.1 For the foregoing reasons, we hereby set aside the conviction and sentence and accordingly refer the matter back to the High Court for retrial. The appellant shall remain in custody pending re-trial.



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F.M. Chisanga
JUDGE PRESIDENT



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D.L.Y. Sickinga
COURT OF APPEAL JUDGE



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P.C.M. Ngulube
COURT OF APPEAL JUDGE