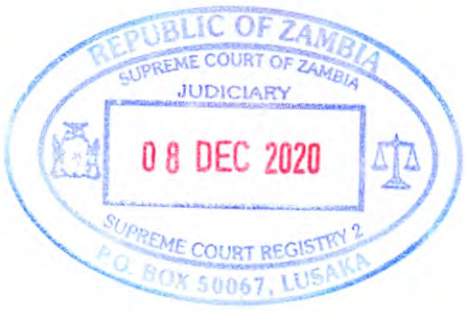
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 184/2020**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:



STEPHEN MWABA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 1st December, 2020 and 8th December, 2020

For the Appellants : Ms E.I. Banda, Senior Legal Aid Counsel

For the State : Mrs M. Hakasenke – Simuchimba, State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Jutronich & Others v The People (1965) ZR 9**
2. **Chilimba v The People (1971) ZR 36**
3. **Ngosa Banda v The People, Appeal No.138 of 2017**
4. **Francis Kangwa v The People, appeal No. 125 of 2017**
5. **Alubisho v The People (1976) ZR 11**
6. **Benua v The People (1976) ZR 13**
7. **Ng'uni v The People (1976) ZR 168**
8. **Whiteson Simusokwe v The People (2002) ZR 63**

This appeal is against sentence.

The appellant appeared before the High Court held at Kasama (Chali, J, presiding) on 11th July, 2016 on a charge of murder. It was alleged that he had murdered his wife Priscah Ng'oma at Chinsali on 26th October, 2015. The appellant denied the charge. The State then amended the information by reducing the charge to that of manslaughter. The appellant admitted the reduced charge. He also agreed with the facts that were read, whereupon the learned judge convicted him of manslaughter. The State then informed the court that the appellant was a first offender.

In mitigation, the learned defence counsel, Mr I. Chongwe, who represented the appellant in the High Court, pointed out to the learned judge that the appellant deserved leniency because, not only was he a first offender, he had readily admitted the reduced charge. The judge then sentenced the appellant to 25 years imprisonment with hard labour. Hence this appeal.

On behalf of the appellant, Ms Banda argued, at the hearing of this appeal, that the sentence of 25 years imprisonment that was imposed on the appellant is very severe and does not reflect the leniency that is due to a first offender. Counsel submitted that we,

as an appellate court, do have power to interfere with a sentence passed by a lower court in certain instances that were outlined in the case of **Jutronich & Others v The People**[1], a decision by this court's predecessor- the Court of Appeal. We were referred to another decision of the same court in the case of **Chilimba v The People**[2] where 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. According to Ms Banda, there were no extraordinary features that aggravated this matter so as to necessitate the imposition of a severe sentence on the appellant. Learned counsel then referred us to our decisions in **Ngosa Banda v The People**[3] and **Francis Kangwa v The People**[4] where we found sentences of 25 years imprisonment and 15 years imprisonment respectively for the offence of manslaughter to be excessive. Accordingly, she urged us to allow this appeal and set aside the sentence.

Mrs Hakasenke-Simuchimba, for the State, argued that, according to the facts of this case, the sentence was not excessive. She sought to distinguish the facts in this case from those in the **Ngosa Banda** and **Francis Kamfwa** cases by pointing out that, in those cases, the appellants had merely accidentally kicked their

victims thereby causing their deaths while in this case the appellant had done so intentionally. Counsel pointed out that the appellant assaulted his wife who had given birth just barely three weeks before. She went on to submit that cases of gender-based violence against women are on the rise and that it is, therefore, in the public interest to impose a sentence that is punitive to the appellant and also a deterrent to would-be offenders.

Counsel, therefore, urged us to dismiss the appeal.

The case of **Jutronich and Others v The People**[1], which we have been referred to, indeed, sets out the circumstances when an appellate court can interfere with a sentence passed by a trial court. One of those instances is when there has been an error in principle. In the case of **Alubisho v The People**[5], we expanded the holding in **Jutronich & Others v The People** when we held:

> **"(ii) In dealing with an appeal against sentence the appellate court should ask itself three questions:**
> **(1) Is the sentence wrong in principle**
> **(2) Is it manifestly excessive or so totally inadequate 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?**
> **Only if one or other of these questions can be answered in the affirmative should the appellate court interfere"**

In **Benua v The People**[6], we held:

> **"(1) 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"**

Further, in **Ng'uni v The People**[7], we held:

> **"(1) Notwithstanding that an accused person by reason of his record has forfeited any claim to leniency the sentencing court should exercise some degree of leniency where there has been a plea of guilty".**

It is clear then that a plea of guilty is a very strong mitigating factor in sentencing. Similarly, the case of **Chilimba v The People**[8] which holds that, unless the case has some extraordinary features which aggravate the seriousness of the offence, a first offender ought to receive the minimum sentence is authority for the proposition that the fact that an accused is a first offender is equally a strong mitigating factor. In this case, during the sentencing session, the appellant's counsel in mitigation did point out to the learned judge these two mitigating factors, among others. After that submission, the learned judge simply said this:

> **"I sentence you to 25 years imprisonment with hard labour with effect from date of arrest."**

The judge said nothing about the two mitigating factors: His mind was not revealed on the record as to whether or not he had taken them into consideration in arriving at that sentence. That was an error in principle. For that reason, we have grounds upon which to interfere with the sentence.

Coming to the sentence, Mrs Hakasenke-Simuchimba submits that because of the facts of the case and the rise in gender-based violence against women, the sentence of 25 years fits the offence in this case. Our view of sentences for manslaughter can be seen in the case of **Whiteson Simusokwe v The People**[9]. There, after we had found that the appellant's failed defence of provocation afforded extenuation for the murder charge, thereby justifying the non-imposition of the mandatory capital sentence, we went on to say this:

> **"We must point out that as a general rule an extenuated murder will still be treated a little bit more severely than a manslaughter case although both might carry the life sentence"**

We then imposed a sentence of 20 years imprisonment. It is obvious that, in our view, sentences in the region of 20 years and above should be reserved for extenuated murders. Therefore, the sentence of 25 years imprisonment which the learned judge

imposed in this case is manifestly excessive for a charge of manslaughter. We set it aside. On the facts of this case, and taking into account the two strong mitigating factors, we think that a sentence of 7 years imprisonment meets the facts of the case.

The appeal is, therefore, allowed. The sentence of 25 years imprisonment with hard labour is hereby set aside. In substitution therefor we impose a sentence of 7 years imprisonment with hard labour, with effect from the appellant's date of arrest.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE