IN THE SUPREME COURT OF ZAMBIA **Appeal No. 30/2016**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

JOSEPH BESA (A JUVENILE OFFENDER) **APPELLANT**

AND

THE PEOPLE **RESPONDENTS**

Coram: Muyovwe, Kabuka and Chinyama, JJS.
On 6th September, 2016 and on 14th September, 2016.

For the Appellant: Mrs Sara Larios, Legal Aid Counsel of Legal Aid Board.

For the Respondents: Ms N.T. Mumba, Deputy Chief State Advocate of National Prosecutions Authority.

J U D G M E N T

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:-

1. *Gedion Musonda and Chisha Chimimba v the People (1979) Z.R. 53*
2. *Nkhata and Four Others v the Attorney General (1966) Z.R. 124*

Statutes referred to:-

1. *The Constitution of Zambia, article 18 (4).*
2. *The Penal Code, Chapter 87 of the Laws of Zambia, section 199.*
3. *The Juveniles Act, Chapter 53 of the Laws of Zambia, sections 2; 9(1)(a); 10; 64(7); 72(3) and 127.*

This is the Appellant's appeal against the Reformatory School Order imposed on him by the High Court on 18th March, 2016.

The background leading to the appeal is that the Appellant, a juvenile offender, was charged with the offence of Manslaughter contrary to section 199 of the **Penal Code**, *Chapter 87 of the Laws of Zambia.* The particulars of offence alleged that on the 25th day of September, 2015 at Lusaka in the Lusaka District in the Lusaka Province of the Republic of Zambia, the Appellant did unlawfully cause the death of Chanda Chileshe.

The facts of the case which the Appellant admitted were that on 25th September, 2015, the juvenile offender was at home in Mtendere Compound in Lusaka with his seven (7) year old cousin, Chanda Chileshe (the deceased). The two were by themselves as the mother to the Appellant had travelled to Liteta. In the night the deceased developed a running stomach and defecated on the bed on which he was sleeping with the Appellant. This infuriated the Appellant who consequently picked up an iron bar and hit the deceased with it on the head and the deceased started bleeding. The Appellant then went to their neighbour, Josephine Jombe, whom he informed what had happened. When Josephine Jombe went to the

Appellant's home, she found the deceased bleeding from the head and some white discharge coming out of the nose and mouth. Josephine Jombe called other neighbours to assist her and they took the deceased to Mtendere Clinic. The deceased was there referred to Levy Mwanawasa General Hospital where he was pronounced dead upon arrival. A post-mortem examination carried out on the body of the deceased on 29th September, 2015 revealed that the cause of death was subarachnoid haemorrhage due to blunt head injury. The juvenile offender was consequently charged on 26th September, 2015 with the offence of manslaughter and appeared before the High Court where he admitted the charge.

A social welfare report dated 2nd March, 2016 prepared by the probation officer, Mr. Daniel Banda, was presented to the court. The report disclosed that the Appellant was fifteen (15) years old having been born on 25th December, 2000 and resided in a three-roomed house in Lusaka's Mtendere Compound with his mother, step father and a young sister. The report stated that according to the Appellant's version of events, he got up from the bed so that he could go and relieve himself outside. He did not know that the deceased had also woken up and was behind him. As he was

pulling out the metal bar that was used to lock the door, it hit the deceased on the head. The Appellant sought the assistance of neighbours who helped him take the deceased to Mtendere Clinic where he died the same night. The report further showed that the mother was contrite about the whole incident, asked for a non-custodial sentence or order and promised to find a better way of helping the Appellant who was traumatised. It also showed that the Appellant was remorseful about the incident and pleaded for leniency. The report stated that the Appellant was a first offender who had admitted the charge; he was desirous of continuing with his schooling. Mr. Banda recommended that the Appellant be ordered to attend counselling sessions and rehabilitation with the Young Women's Christian Association (YWCA).

Upon considering the report, the judge found the facts of the offence in the report to be totally at variance with the statement of facts admitted by the Appellant before the court. She concluded that the report was of no use to the court and disregarded it. The judge observed that this was a sad case in which a mother failed to guide and nurture her child, resulting in the death of another child because she should not have left two young children alone

overnight with no adult supervision. The judge found that the mother was incapable of bringing up and nurturing the Appellant into a decent and responsible citizen. The judge ordered that due to the gravity of the matter and the failed parental care and guidance, the Appellant be sent to Katombora Reformatory School for his total reformation, guidance and rehabilitation.

Dissatisfied with the Reformatory Order imposed on him by the High Court, the Appellant appealed to this court fronting six (6) grounds of appeal as follows:-

"1 **That the honourable court below erred in law when it issued a Reformatory Order in respect of the Appellant herein who was a child at the time of sentencing without first considering and satisfying herself of the existence of the factors prescribed by law in the present case.**

2 **That the honourable court below erred in law when it took into account matters which it ought not to have taken into account when arriving at the decision to issue a Reformatory Order in respect of the Appellant.**

3 **The honourable court below erred in law and fact when it made the finding that the Appellant's mother failed to guide and nurture the Appellant leading to the death of the deceased which finding was unsupported by the evidence on record.**

4 **The honourable court below erred in law in making a finding that put the Appellant within the scope of a "juvenile in need of care" as defined under the Juveniles Act and did not make orders prescribed by section 10 of the Juveniles Act.**

5 **That the honourable court below erred in law when it unilaterally chose to disregard the Social Welfare Report prepared in respect of the Appellant herein on account of the fact that the facts setting**

out the offence he admitted to in court were inconsistent with the facts set out in the Social Welfare Report.

6 **That the honourable court below erred in law when it issued a Reformatory Order in respect of the Appellant in view of the fact that he was a child at the time of sentencing who was a first offender and pleaded guilty to the charge.**"

The Appellant's appeal was argued on his behalf by Mrs Sara Larios, Legal Aid Counsel. She relied on the Heads of Argument which she augmented with oral submissions.

Ground 5 was argued first. In support of this ground of appeal, it was submitted that the overriding theme of the juvenile justice system is that the best interest of the juvenile must always be paramount and in ensuring that this is achieved, section 64 (7) of the **Juveniles Act**, *Chapter 53 of the Laws of Zambia* (the Act) requires the court to ask the juvenile to mitigate and for the court to investigate the background of the juvenile which is done through the instrumentality of the social welfare report. It was argued that the only part of the social welfare report which the trial court was aggrieved by was the part which set out the circumstances under which the offence was committed because the same was at variance with the contents of the statement of facts to which the Appellant

had admitted with no suggestion that any other portions of the report were defective.

It was submitted that in fact the relevant portions required by law for the court to take into account is information regarding the juvenile's general conduct, home surroundings, school record and medical history which were not objectionable. It was contended that the decision by the court below to disregard the social welfare report in its entirety was an error, firstly, because if the court was concerned with the contents of the report it should have ordered another one with accurate information to be prepared. Secondly, that since the portion of the report which contained incorrect information was in fact not legally relevant, the judge could have disregarded the incorrect portion and proceeded with the matter by relying on the correct portions. It was argued that all in all it was an error at law for the trial judge to proceed to sentence the Appellant without having regard to the social welfare report as required by law.

Grounds 1, 2 and 6 of this appeal were argued together. It was submitted that the main reason the learned judge made a reformatory order in respect of the juvenile was because she found

that his mother was not fit to raise him properly. It was contended, however, that the law sets out the factors which should inform a court's decision to make a reformatory order. It was submitted that Article 18 (4) of the **Constitution** gives every person tried for a criminal offence a right to be given a punishment not severer in degree and description than that which could be imposed for that offence at the time they committed the offence. It was further submitted that the Appellant was below sixteen (16) years of age both at the time of the commission of the offence and at the time of sentencing. Therefore, that he is a child as defined under section 2 of the Act which is that a child is "*a person who has not attained the age of 16 years.*"

It was further argued that section 72 (3) of the Act makes it mandatory for the court to establish the juvenile's antecedents or previous criminal record; the character and all the circumstances of the case before making a reformatory order. It was submitted that it was an error at law for the judge to conclude that the reformatory order was necessary because the juvenile's mother has failed to supervise him when this is not one of the factors prescribed by law to be considered when making a reformatory order. As authority,

the case of **Gedion Musonda and Chisha Chimimba v the People**[1] was cited in which this court held that lack of parental care is not a factor to be considered when making a reformatory order.

It was further submitted that had the learned judge directed her mind to the requirements of the Act, she would not have issued the order she did because the Appellant's character and antecedents would have mitigated the need to issue a reformatory order. It was pointed out that there is no indication on record that the Appellant was previously violent or otherwise delinquent and that in fact the social welfare report indicated that he had never given his mother any problems. It was submitted in the alternative that even assuming that the failure by the mother to nurture and guide the Appellant was a relevant consideration in issuing a reformatory order, on the facts of this case it should not have been such a material consideration because the social welfare report showed that the Appellant was living with his mother, step father and his young sister. Further, that the record does not show that the judge considered whether other orders under the Act could appropriately rehabilitate the Appellant. It was contended that

being a first offender, the reformatory order ought not to have been made in terms of section 72 (3) of the Act and that it be quashed.

In support of ground 3, it was submitted that the judge's findings that the Appellant's mother failed to guide and nurture the Appellant was unsupported by any evidence. It was argued that the facts do not suggest that the mother left the Appellant and the deceased overnight and nothing on record shows that the mother who had only gone to Liteta, did not return during the course of the night or indeed that the Appellant's step father or young sister did not return during the course of the night. Therefore, that the judge erred in fact when she made the finding that the mother had left the Appellant and the deceased alone overnight and consequently failed to guide and nurture the Appellant. We were urged to reverse this finding on the authority of **Nkhata and Four Others v Attorney General**[2] because the same is not supported by any evidence on record.

In support of ground 4, it was submitted that when the court deems it fit to issue orders to protect children where the court is satisfied that the children's lives or proper upbringing is endangered by their environment, then the court is required to

invoke part II of the Act. Section 9 (1) (a) of the Act was cited which defines a juvenile in need of care as "*a juvenile who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations or is exposed to moral or physical danger or beyond control requires care, control or protection.*" It was contended that if the judge was concerned that the juvenile offender's parents are unfit to exercise proper care and guardianship and consequently he needs care, control and protection, then she ought to have, firstly, issued an appropriate order in respect of the offence under section 72 of the Act since he had been found guilty of an offence. Secondly, that the judge should have proceeded to issue a follow-up protective order in respect of the Appellant as a child in need of care under section 10 of the Act.

It was contended that it was wrong for the judge to impose a very severe punishment in respect of the Appellant not because that is what the offence, antecedents or character warranted but because of the perceived and alleged shortcomings of his mother. It was submitted that in this case it was open for the court to issue a

counselling order as was recommended in the social welfare report and then issue a protective order under section 10 of the Act to protect the Appellant from the risk of re-offending as a consequence of the mother not exercising proper care and guardianship. It was thus, contended that the judge erred to have imposed a severe order instead of an appropriate order to rehabilitate the Appellant and a protective order to protect him from his mother's alleged failure as a parent.

Counsel urged us to quash the reformatory order and substitute it with a counselling order as recommended in the social welfare report.

Ms Mumba, the learned Deputy Chief State Advocate for the Respondents, informed us that the state had difficulties supporting the order imposed by the High Court. Accordingly, she conceded to the Appellant's submissions. This is, therefore, an uncontested appeal.

We have seriously considered the appeal and counsel's arguments on behalf of the Appellant. We commend the learned Deputy Chief State Advocate for her magnanimity in conceding to this appeal. We also share the view that the reformatory order is not

sustainable. We are not averse to most of the submissions in the appeal. Notwithstanding that the appeal is not contested, we still wish to highlight the few issues that arose in the appeal.

The first issue that we wish to address is the decision by the judge in the court below to wholesomely disregard the social welfare report. Section 64 (7) of the Act, also cited by Ms Larios, states that:-

> **"If the court is satisfied that the offence is proved, the juvenile shall then be asked if he desires to say anything in extenuation or mitigation of the penalty or otherwise. Before deciding how to deal with him, the court shall, if practicable, obtain such information as to his general conduct, home surroundings, school record, and medical history as may enable it to deal with the case in the best interests of the juvenile, and may put to him any question arising out of such information..."**

What comes out of the section is that once the court is satisfied that the offence has been proved, the court must ask the juvenile offender whether he desires to say anything in extenuation or mitigation of the penalty. The court also, where practicable, obtains information regarding his general conduct, home surroundings, school record and medical history to enable it deal with the case in the best interest of the juvenile offender. It is trite that the latter information is ordinarily supplied through a social welfare report.

It is to be expected that in collecting the relevant information the social welfare officer will interview amongst others, the juvenile offender himself, to establish the circumstances in which the offence was committed. It is possible that in doing so, the social welfare officer may not be aware of other facts gathered by the prosecution in support of the offence charged. Where therefore, a court finds, as in the present case, that the story given by the juvenile offender is not consistent with or contradicts the facts as presented by the prosecution, regard must be had to the fact that the offender was already given an opportunity to confirm the correctness of the facts in support of the charge or offence before the finding of guilt was recorded. We do not, therefore, think that the difference in the stories given by the offender to the prosecution on one hand and the social welfare officer on the other hand, must unduly create a difficulty for the judge or trial court. This is more so bearing in mind the fact that the social welfare report will contain other information such as the antecedents of the offender, whether or not there is an expression of remorsefulness and so on and so forth which would still be of use in guiding the trial court to arrive at an appropriate sentence or order.

It must be emphasised, however, that the facts as presented by the prosecution must carry more weight on the basis that it is the foundation on which the finding of guilt is made against the juvenile offender. In this case, therefore, it was an abrogation of the law on the part of the judge in the court below to wholesomely disregard the entire social welfare report. The judge should have addressed herself to the part of the report that disclosed the antecedents of the juvenile offender and the recommendations. To the extent that we have discussed the issue, we uphold the arguments on behalf of the Appellant that the judge in the court below ought not to have disregarded the entire social welfare report as it was still useful in the manner we have demonstrated.

The second issue to address is whether by the determination of the court the Appellant can be regarded as having fallen within the scope of a juvenile in need of care. This issue arises from the finding by the judge that the Appellant's mother had failed to guide and nurture the juvenile and could not bring him up into a decent and responsible citizen. Therefore, according to counsel that he needs care, control and protection in terms of Section 9 (1) (a) of the Act. Our short position is that Part II of the Act does not apply to

juveniles who are facing criminal proceedings. The Appellant in this case cannot, therefore, be one in need of care under Part II of the Act.

The third and last issue arising from this appeal is whether the reformatory order was properly made in the light of the circumstances surrounding the Appellant. Section 72 (3) of the Act provides as follows:-

> **"A court shall not order a child to be sent to a reformatory unless the court is satisfied that having regard to his character and previous conduct, and to the circumstances of the offence, it is expedient for his reformation and the prevention of crime that he should undergo a period of training in a reformatory".**

The considerations that are relevant before a court can make a reformatory order are the character and previous conduct as well as the circumstances of the offence as stated in Section 72 (3) above.

In the case at hand, the social welfare report did not say much about the Appellant's character. All that it said was that he likes reading and listening to music and that he was a first offender. We also note from the record of proceedings that the prosecutor had informed the court that there was nothing known against the juvenile offender. In short, there was no adverse record of the Appellant's character and previous conduct. The report showed that

the Appellant regretted what happened, felt traumatised and could not believe that his cousin was no more. He pleaded for a second chance to enable him go back and continue with his education. The report also showed that the mother was equally contrite and made an undertaking to find a better way of helping the Appellant possibly through the church. She asked the court to be lenient in dealing with the child. The social welfare report recommended that the Appellant be ordered to attend counselling sessions and rehabilitation with YWCA while he continues with his schooling. The Appellant's advocate equally alluded to all these matters in mitigation of sentence. These are the matters that the judge should have taken into account.

A reading of the record shows that the judge in the court below did not take into account all the factors mentioned above. In short, she did not comply with the requirement of section 72 (3) of the Act. To fail to take into account the factors stipulated under section 72 (3) of the Act in deciding how to deal with the Appellant certainly prejudiced him. In the same case of **Gedion Musonda and Chisha Chimimba v the People**[1] we said that "... *a reformatory order is a very severe punishment, warranting as it does*

four year's detention, and should only be made when other methods of reformation are in the circumstances entirely inappropriate or have proved to be in vain in the past". Indeed, a reformatory order would be suitable in dealing with a juvenile offender whose antecedents show that he is prone to crime or where the facts disclose some aggravating conduct in the commission of the offence on the part of the offender. Nothing of the sort happened in this case. The trial judge merely founded her decision on the perceived shortcomings of the mother. We guided in the same case of **Gedion Musonda and Chisha Chimimba v the People**[1] that lack of parental care is not a proper basis for making a reformatory order. We find, accordingly, that the court below misdirected itself in law in sending a child to a reformatory school, based on considerations not sanctioned by the law.

It is on the basis of the foregoing considerations that we agreed that the reformatory order cannot be sustained. We therefore, set it aside. We order that the Appellant be put on probation for a period of two years from the date hereof. During the period of probation, the Appellant shall reside with his mother in Lusaka or such other place as the mother may reside, saving the

times when he may be attending school and at all times shall be under the supervision of a probation officer. Further, we order that the Appellant undergoes guidance and counselling during the period of probation at the YWCA as recommended in the social welfare report.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J.K. KABUKA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE