IN THE SUPREME COURT FOR ZAMBIA **SCZ APPEAL NO. 27/2017**
HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

WILLIAM NGEZA DAKA **APPELLANT**

AND

THE PEOPLE **RESPONDENTS**

Coram: Phiri, Malila and Chinyama, JJS.
On 5th September, 2017 and on 13th September, 2017.

APPEARANCES:

For the Appellants: *Mr L. C. Zulu, Messrs Malambo & Company*

For the Respondents: *Mrs M. G. Kashishi-Ngulube, Senior State Advocate, National Prosecutions Authority*

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. **January Gringo Nakalonga v The People (1981) ZR 253**
2. **Fluckson Mwandila v The People (1979) Z.R. 174**
3. **Musonda v The People (1976) ZR 263**

4. **Matongo v The People (1974) ZR 164**
5. **R v Boswell [1984] 3 ALL ER 353**

Legislation referred to:

1. **The Road Traffic Act No. 11 of 2002, Laws of Zambia, section 161 (1)**
2. **The Penal Code, Chapter 87 of the Laws of Zambia, section 36**
3. **Roads and Road Traffic Act, Chapter 464, Laws of Zambia.**
4. **Fees and Fines Act, Chapter 45, Laws of Zambia**

The appellant was convicted on 23rd May, 2011 on his own plea of guilty of four counts of the offence of Causing Death by Dangerous Driving (CDDD), contrary to **section 161 (1)** of the **Road Traffic Act**[1]. He was fined the sum of K5.4 million (K5,400 rebased) on each count payable by the 31st May, 2011 and in default 9 months simple imprisonment. The fines were ordered to be non-cumulative, that is to say, concurrent which entailed that the total sum that the appellant was required to pay was K5.4 million (K5,400 rebased) only, for all of the four counts. He was also sentenced to 7 days' simple imprisonment with effect from the day of the sentence. It was, however, not explained in respect of which count the custodial sentence was to be served. We will return to this matter in due course. The appellant's driving licence was also suspended for 2 years with effect from 23rd May, 2011. The appeal is against sentence only.

The facts which the appellant did not contest established that on 5th July, 2010, he was driving a Toyota Hilux motor vehicle registration number AAX 2753 along the Great North Road in the northerly direction from Lusaka towards Kabwe and the Copperbelt. When he reached a place known as Chisamba Curry House at Chisamba, in the Chibombo District of the Central Province, he lost control of his motor vehicle which went into the other lane for oncoming vehicles and collided with a Toyota Corolla motor vehicle registration number ACL 2729 being driven by Mwine Nkonde in the opposite direction headed towards Lusaka in the southerly direction from Kabwe and the Copperbelt. As a result of the collision four people in the Corolla, namely: Mwine Nkonde, Dominic Kunda, Sungwe Mulwanda and an unnamed child died on the spot. The sketch plan of the accident scene drawn not to scale by a traffic police officer fixed the point of impact nearer the outer side of the lane for oncoming vehicles, implying that the appellant's vehicle almost crossed over the opposite lane. The legends on the sketch plan also located the appellant's motor vehicle on the eastern edge of the opposite lane pointing eastwards while the

deceased's motor vehicle lay completely off the road on the eastern side as well facing the appellant's motor vehicle.

The statement of facts read by the public prosecutor in open court, which the appellant admitted to be correct, disclosed that the appellant caused the deaths of the deceased persons by driving the motor vehicle on a public road in a manner which was dangerous to the public having regard to all the circumstances, including the nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to have been on the said road.

The highlights of the appellant's plea in mitigation, given on his behalf by his advocate, were that he was a first offender and a medical practitioner of 31 years standing; that he regretted the incident and felt traumatised given his occupation which was dedicated to saving life; that he was a non-smoker and a teetotaller and could not have been influenced by drugs or drink, as we understood the mitigation to suggest; that he was a valuable member of his community such that a custodial sentence would deprive it of his services; that he was a bread

winner for his nuclear and extended families. It was pleaded ultimately that in punishing the appellant the court should, on the authority of the case of **January Gringo Nakalonga v The People**[1], consider imposing a fine as opposed to a custodial sentence.

In arriving at the sentence the court below said the following;

"I have considered the facts in this case which show that the accused person must have been speeding for the type of damage and the number of deaths to result. This was therefore a serious case and the driving which happened in the opposite lane was dangerous. <u>This would normally require a custodial sentence as well</u>. However, I have considered also what has been stated in mitigation in relation to the fact that the convict is a medical practitioner whose services are greatly required. I thus sentence him as a first offender who pleaded guilty ..."
(underlining ours for emphasis)

The court then pronounced the sentence in the manner already stated.

The grounds of appeal are as follows:

(i) ***The learned trial judge erred in law in imposing the maximum permissible fine on each count to be paid at short notice before 31st May 2011 or to serve 9 months imprisonment in default.***

(ii) ***The learned trial judge erred in law in imposing an additional custodial sentence of seven (7) days' simple imprisonment notwithstanding that the appellant was a first offender.***

(iii) ***The learned trial judge erred in law in suspending the appellant's drivers' licence for an excessively long period of two years.***

At the hearing of the appeal, however, Mr Zulu, in consultation with his client, informed us that the appellant was no longer pursuing the first and third grounds of appeal on the respective bases that the non-cumulative fine which came to a total of K5.4million or K5,400 rebased was not excessive and that the appellant had already paid it to the State; that the two years' suspension of the driving licence had been served so that the ground had been overtaken. The two grounds were, accordingly abandoned. This left only ground two.

We will, at this juncture, address the observation we made earlier in this judgment that the trial judge did not explain the count to which the custodial sentence related. As will become apparent, this will resolve the appeal. It is, therefore, not necessary for us to review the parties' submissions unless where it is inevitable to allude to the issues alluded to in the appeal.

It has for a long time been a requirement of the law that in a case in which convictions are made in respect of more than one count of offence, the trial court should pronounce a distinct sentence or order on each count in the same way that the learned trial judge did when she imposed the fines. This is confirmed in section 36 of the **Penal Code**[2] which provides as follows:

> ***"36. With respect to cases where one act constitutes several crimes or where several acts are done in execution of one criminal purpose, the following provisions shall have effect that is to say:***
>
> ***(a)...***
>
> ***(b) If a person by one act assaults, harms or kills several persons or in any manner causes injury to several persons or things, he shall on conviction be punished in respect of each person so assaulted, harmed or killed or each person or thing injured; in such case the court shall order a separate punishment in respect of each person assaulted, harmed or killed or in respect of each person or thing injured. If the court orders imprisonment, the order may be for concurrent or consecutive terms of imprisonment:***

Provided always that-

(i) if the terms of imprisonment ordered are consecutive, the total of the terms of imprisonment so ordered shall not exceed the maximum term allowed by law in respect of that conviction for which the law allows the longest term; and, if the court orders the payment of fines, the fines may or may not be cumulative;

(ii) ***where the court orders cumulative fines, the total of such fines shall not exceed the maximum allowed by law in respect of that conviction for which the law allows the largest fine."*** (Underlining supplied for emphasis)

We are aware of what this court said concerning the application of section 36 of the Penal Code in the case of **Fluckson Mwandila v The People**[2] that the section only refers to charges brought under the Penal Code but not those brought under any other Act such as the then **Roads and Road Traffic Act**[3]. It was, however, noted in the same case that in order to maintain uniformity of practice it is better that a similar practice of charging in separate counts in the case of charges

laid under Acts other than the Penal Code be followed. We reiterate this position. Separately charged offences will inevitably require distinct punishments. That is the law.

In the case before us, the appellant caused the deaths of four persons and he was charged and convicted in respect of each one of the four persons. He should have been punished in respect of each person killed subject, of course, to the permutations regarding the lengths of the sentence as guided in section 36 of the **Penal Code**[2]. The court did not do so but imposed one custodial sentence apparently for all the four counts. This was an error at law and we would set aside the sentence. We are, therefore, at large to determine the appropriate sentence, if necessary. In so doing, we are mindful that the trial court's intention was to impose a custodial sentence.

Sections 161(1) of the **Road Traffic Act**[1] provides for the imposition of (a fine not exceeding thirty thousand penalty units which amounts to K5.4million or K5,400 when converted under the **Fees and Fines Act**[4]) or imprisonment for a period not exceeding 5 years or to both the fine and a term of imprisonment. Section 75 of the Road

Traffic Act[1], as it were, provides for the suspension of a convicted offender's driving licence in the discretion of the court. The combination of the sentence of a fine and a custodial term not to mention suspending the driving licence is, accordingly, within the purview of the **Road Traffic Act**[1]. In deciding which punishment to opt for, a court is always guided by settled principles of law. The authorities are replete and we need only to refer to a couple or so.

In the case of **Musonda v The People**[3], it was said by this court that where the legislature has seen it fit to prescribe a sentence of a fine or imprisonment or both, a first offender should be sentenced to pay a fine with imprisonment only in default if there are no aggravating circumstances. In the case of **Matongo v The People**[4] this court pointed out that, before a custodial sentence is justified in a case of causing death by dangerous driving, there should be recklessness or a wilful disregard for the safety of other road users. The question in this case is: was there recklessness or a wilful disregard for the safety of other road users?

It is a fact that the appellant lost control of the motor vehicle which he was driving and went into the lane for oncoming vehicles and collided with the deceased's motor vehicle. He admitted when the facts were read to him that he drove in a manner which was dangerous to the public. We do not agree with the appellant's suggestion that there was no evidence of recklessness or negligence on the part of the appellant or that at the most the accident was caused by momentary inattention or misjudgement on the part of the appellant. The facts, in our view, do speak for themselves. For the appellant to lose control of the motor vehicle and go on to collide with the deceased's motor vehicle in the opposite lane, at the point of impact shown in the sketch plan which was almost at the left side edge of the lane, is indicative of reckless driving or driving in wilful disregard for the safety of other road users. Further, as we put it at the hearing, there was no tyre bust or mechanical reason to explain the change of lanes. We did not regard the occurrence purely as an accident in the absence of evidence that there was a mechanical (or other) fault. Suffice that the appellant did not challenge the statement of facts.

The English case of **R v Boswell**[5], which addresses the principles of sentencing in cases of causing death by reckless driving, shows that where more than one person is killed as a result of the offender's reckless driving, this is an aggravating factor calling for a custodial sentence. On the basis of the admitted facts in this case and in line with the authorities, a custodial sentence would be called for but for the positive antecedents presented on behalf of the appellant which make a strong case for him for the exercise of leniency. It is clear to us that the appellant has learnt his lesson and society will not be any better off by incarcerating the appellant even for a brief period.

We, accordingly sentence the appellant to seven (7) days simple imprisonment on each count with effect from the date of this judgment as the appellant had been on police bond and later bail pending appeal since the date of his arrest. The sentences will, however, be served concurrently meaning that the maximum sentence to be served is seven (7) days simple imprisonment. In view of the positive antecedents pleaded in mitigation of sentence we will suspend the sentence on

condition that the appellant does not commit a similar offence in a period of 3 months with effect from the date of this judgment.

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G.S. PHIRI
SUPREME COURT JUDGE

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DR. M. MALILA, SC
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE