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SELECTED JUDGMENT NO. 18 OF 2018

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IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 74/2017

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

EVARISTO MULUNDU

APPELLANT

VS

THE PEOPLE

RESPONDENT

Coram : Phiri, Mutuna and Chinyama, JJS

on 8th May 2018 and 29th May 2018

For the Appellant : Mr. C. Siatwinda of Legal Aid Board

For the Respondent : Mrs. S. Chinyama - Kachaka, Senior State Advocate at the National Prosecutions Authority

J U D G M E N T

Mutuna, JS. delivered the judgment of the court.

Cases referred to:

- 1) David Dimuna v The People (1988/1989) ZR 199
- 2) Dorothy Mutale and Richard Phiri v The People (1977) SJ 51
- 3) Steven Nyoni v The People (1987) ZR 99

Other works referred to:

- 1) Penal Code, Cap 87
- 2) Juveniles Act, Cap 53

Introduction

- 1) This appeal is against the sentence by the Learned High Court Judge for robbery and murder of one Hatambu Hambulo, (the deceased).
- 2) The appeal questions the determination made by the Learned High Court Judge that the Appellant was not a juvenile at the time of committing the offences.
- 3) As such, it challenges the findings of fact and sentencing of the Appellant by the Learned High Court Judge.

Background

- 4) The facts of this case reveal that the deceased was murdered in a gruesome manner during the execution of a robbery by the Appellant. The summary is that the deceased who was an employee of Food Reserve Agency did not report for work on 8th January, 2013. Since this was out of character, her workmate was prompted to call her on her mobile phone but the phone was off.
- 5) The workmate then contacted a friend to the deceased to find out if she knew the whereabouts of the deceased. The friend also tried in vain to call the deceased.
- 6) Later the workmate informed the deceased's father who in turn requested the deceased's mother to call at the deceased's house and find out if all was well.

- 7) The deceased's workmate was still worried about the deceased's silence so after leaving work she drove to the deceased's house and managed to enter the yard. She peeped through the bedroom window and noticed that the deceased's bed was still not made which was uncharacteristic of the deceased who was known to be neat and tidy.
- 8) The workmate then enquired from the neighbours if they knew the whereabouts of the deceased and was informed that sometime earlier that morning they had heard agonizing sounds coming from the deceased's house.
- 9) The police later arrived at the deceased's house in the company of the deceased's mother and immediately started conducting investigations around the yard. Their attention was drawn to a

head sock near the septic tank in the yard. They then opened the septic tank and found the deceased's naked body bound around the arms and legs and gagged around the mouth with a towel and masking tape.

- 10) The police called in the Fire Brigade who retrieved the body of the deceased and took it to the mortuary.
- 11) Prior to this at about 6:30 hours, one Sharon Mutinta Chiyambi, a woman sergeant stationed at Emmasdale Police Station, who testified as PW7, whilst driving along American Embassy road, noticed a vehicle swerve from her left, cut across her path and land in a drainage ditch. In line with her duty as a traffic officer, she approached the

vehicle and noticed the Appellant coming out of the vehicle clutching two mobile phones.

- 12) When the Appellant noticed her, he attempted to run away but she apprehended him and detained him in the presence of PW1, for driving dangerously and without a licence, at Woodlands Police Station where she was stationed at the time. She also arranged for the vehicle to be towed to Woodlands Police Station.
- 13) On 9th January 2013, following an invitation to Woodlands Police Station, the deceased's father went and identified the vehicle as belonging to the deceased, thereby linking the Appellant to the crime.
- 14) The Appellant was later charged and prosecuted on two counts of robbery and murder.

Contentions made by the Appellant before the Learned High Court Judge

- 15) During the trial, the Appellant contended that at the time of commission of the offence he was a juvenile. This caused the Learned High Court Judge to conduct a detailed enquiry into his age.
- 16) A number of witnesses of fact and an expert were called.
- 17) At the close of the enquiry the Learned High Court Judge determined the Appellant's age as being 22 years or at least 21 years plus, at the time of commission of the offences.
- 18) After the trial was concluded the Learned High Court Judge found the Appellant guilty of robbery and murder and accordingly convicted him.

- 19) Later the Learned High Court Judge sentenced the Appellant to 14 years imprisonment on the count of robbery and to death on the count of murder.

Grounds of appeal to this Court and arguments advanced before us

- 20) The decision of the Learned High Court Judge has aggrieved the Appellant, prompting him to launch this appeal on two grounds as follows:

20.1 The lower court fell in error when it proceeded to pass sentence on the Appellant without making a ruling and or determination of the Appellant's age after holding an inquiry for age determination.

20.2 The court below erred both in law and fact when it failed to find that the Appellant was a juvenile at the time of the offence, therefore, entitled to be sentenced as a juvenile as opposed to being sentenced to death.

- 21) At the hearing, we were informed by counsel for the Appellant that he had abandoned ground 1 of

the appeal. The reason for this was that counsel for the Appellant noted that the Learned High Court Judge did infact render her decision on the determination of the Appellant's age. In any event, even assuming that she omitted to do so, we would have been at large to conduct a hearing for purposes of determining the Appellant's age. This is in accordance with what we did in the case of ***David Dimuna v The People***¹. As such, the only ground of appeal which stood for determination was ground 2.

- 22) Both parties filed heads of argument prior to the hearing. The gist of the arguments by the Appellant under ground 2, was that the evidence taken during the enquiry into the age of the Appellant reveals that he was a juvenile at the

time of commission of the offence. Arguing in the alternative, the Appellant submitted that since there was conflicting evidence in respect of the Appellant's age which raised doubt as to his true age, the conflict must be resolved in his favour in accordance with our decision in the case of

Dorothy Mutale and Richard Phiri v The People².

- 23) The Appellant concluded his submissions by urging us to follow our decision in the case of ***Steven Nyoni v The People³*** where we held that a person who is no longer a juvenile who had committed an offence when he was a juvenile must be tried as an adult in the appropriate Court in accordance with the ***Juvenile Act*** but for

purposes of sentencing, he should be treated as a juvenile.

- 24) In the *viva voce* arguments counsel for the Appellant, Mr. C. Siatwinda took issue with the Learned High Court Judge's discounting of the evidence by the Appellant's mother as to his age. He argued that the evidence of a mother has always been accepted by Courts as to the age of a child. Further, the mother had produced in evidence a birth record card which was not challenged by the Respondent. It should, in the consequence, be deemed to have been admitted. Counsel concluded that the findings of fact by the trial court were perverse and should be set aside.
- 25) In response, the Respondent argued that there was no doubt raised by the evidence tendered as

to the Appellant's age which required resolving in favour of the Appellant. Further, the court having determined that the Appellant was not a juvenile, he was correctly sentenced as such by the Learned High Court Judge.

Reasoning and decision of this Court

- 26) We have considered the arguments by counsel and the record of appeal. The appeal challenges the findings of fact made by the Learned High Court Judge that the Appellant was not a juvenile at the time of commission of the offence. It is contended that the findings are perverse and should thus, be set aside.
- 27) It is important that we set out the findings made by the Learned High Court Judge and the basis of the findings before we determine the appeal.

- 28) The Learned High Court Judge began by analyzing the evidence of the only expert witness, one Dr. Veronica Sunkutu Sichizya. The fact that this was the only expert witness was noted by the Learned High Court Judge.
- 29) The witness had began her determination of the Appellant's age by conducting an x-ray test which revealed that he was a juvenile. This was based on the x-ray results which suggested that certain bones in the Appellant's hand had not yet fused. She later suggested an MRI scan to confirm the x-ray findings. The scan revealed a scar where the x-ray results had suggested separate bones, meaning that the bones were actually fused, which removed the Appellant from the realms of a

juvenile and she accordingly determined his age as being above 18 years but below 24 years.

- 30) The Learned High Court Judge then examined the evidence of the school registers from the schools the Appellant attended in 2007 and 2011. This evidence revealed that the Appellant was born in 1991 meaning that he was not a juvenile at the time of commission of the offence. She then considered the evidence submitted by the Appellant beginning with the national registration card (NRC). This evidence placed the Appellant's birthday at 16th December 1994. She discounted the reason given by the Appellant for obtaining the NRC and increasing his age which he attributed to the deceased's need to have his contact details because in the judge's view, the

deceased had nothing to gain from the Appellant increasing his age. It was the Learned High Court Judge's finding, in this regard, that the Appellant voluntarily and of his own volition stated his birth year as 1994 when obtaining the NRC. This year, the Court found, resulted in a conflict in the Appellant's evidence because the arresting officer testified that at the time of his arrest he gave his age as 20 years old and handed the NRC, which placed him at the material date at 19 years which was still outside the realm of a juvenile.

- 31) Next, the Learned High Court Judge examined the evidence of the Appellant's mother which revealed that he was born in 1996. The evidence was in the form of a birth record card bearing the date stamp of 2013 subsequent to the commission of the

offence. She discounted this evidence, because it was unusual for a child born in 1996 to have a birth record card with a date stamp of 2013. She held the birth record card to be a fabrication.

32) Last of all, the Learned High Court Judge considered the accused's own evidence that he was born in 1998. She had no problem dismissing it because it conflicted with the evidence of the Appellant's own mother.

33) Having dismissed the conflicting evidence, which was by and large led by the Appellant, the Learned High Court Judge considered the evidence that was not conflicting and concluded that the Appellant was 22 years of age or at least 21 years plus at the time of commission of the offence. This put the year of birth to 1991.

- 34) The summary we have given of the analysis of the evidence placed before the Learned High Court Judge reveals that she properly analyzed the evidence by: comparing it and setting out the conflicts; discounting the conflicting evidence, and giving reasons; and setting out the evidence that was not conflicting and stating the reasons for accepting it.
- 35) The Appellant has contended that the conclusion by the Learned High Court Judge was flawed because it was perverse. We do not accept this contention because in view of the analysis we have given in the preceding paragraph the reasoning by the Learned High Court Judge was sound and not at all flawed. Further, the evidence led by the accused when looked at in totality was all conflicting. There can, therefore, be no question of resolving the conflict in his favour.
- 36) On the other hand the evidence by the prosecution was in no way conflicting save for the

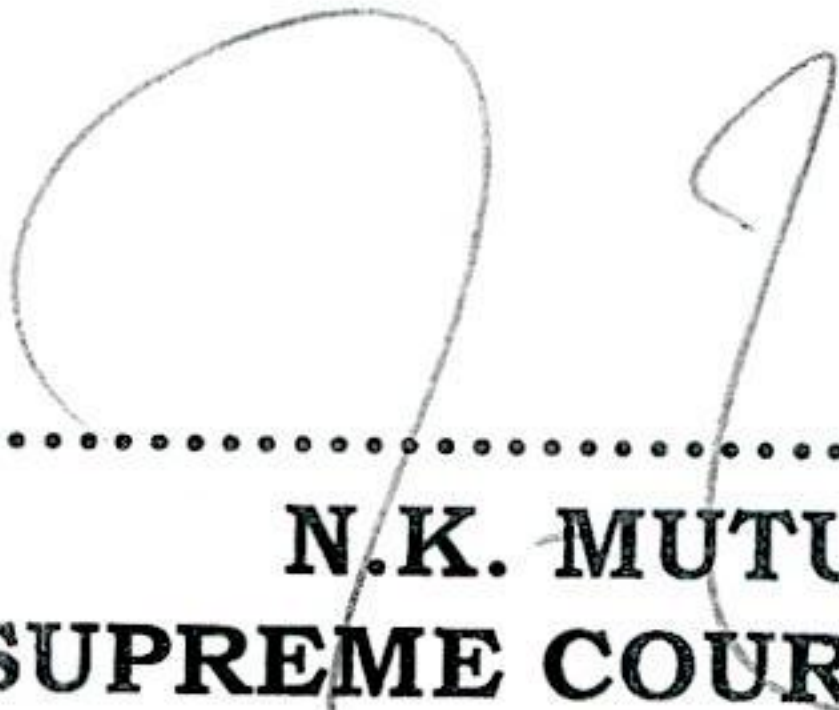
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differences in the x-ray and MRI scan which were verified and explained. We accordingly cannot fault the Learned High Court Judge for accepting it.

Conclusion

- 37) The net result is that the appeal collapses and we uphold the sentence by the Learned High Court Judge in respect of the two counts of robbery and murder.


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G.S. PHIRI
SUPREME COURT JUDGE


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N.K. MUTUNA
SUPREME COURT JUDGE


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J. CHINYAMA
SUPREME COURT JUDGE