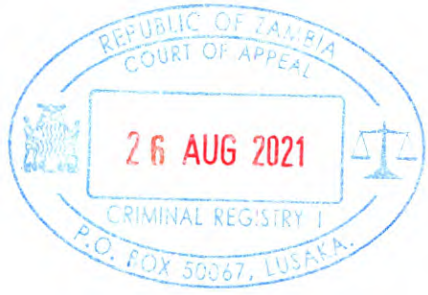
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 127/2020**
HOLDEN AT LUSAKA
(Appellate Jurisdiction)

B E T W E E N:



JOSEPH JACKSON PHIRI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Chishimba and Sichinga, JJA

On 24th March 2021 and 26th August 2021.

For the Appellant: E.I. Banda, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: C.A. Bauleni, Deputy Chief State Advocate, National Prosecution Authority

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J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

CASES REFERRED TO:

1. Jutronich, Schuttle and Lukin v The People [1956]Z.R.9
2. Solomon Chilimba v The People [1971] Z.R. 36
3. Ngosa Banda v The People, Appeal No. 138 of 2017
4. J. W. Phiri v The People [1973] Z.R. 2
5. Francis Kamfwa v The People SCZ Appeal No. 125 of 2017
6. Alubisho v The People [1976] Z.R. 11

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia

1. INTRODUCTION

1.1. The appellant, initially appeared before the High Court (Chitabo, J.), on an information containing one count of the offence of murder contrary to **section 200 of The Penal Code.**

1.2. The information was subsequently amended and the charge of murder substituted with the lesser offence of manslaughter, contrary to **section 199 of the Penal Code.** The allegation was that on 25th May 2019, at Mambwe, he unlawfully caused the death of Elina Zulu.

1.3. He admitted the charge, and following his conviction, was sentenced to 30 years imprisonment with hard labour.

1.4. He has now appealed against the sentence only.

2. EVIDENCE BEFORE THE TRIAL COURT

2.1. According to the facts admitted by the appellant, on 25th May 2019, around 18:00 hours, he returned to

the house, in Mumba Village, in Mambwe District, where he lived with Elina Zulu, his mother.

2.2. He found her cooking nsima on a fire. The appellant removed the pot of nsima from the fire and replaced it with a bucket of water, because he wanted to take a bath. His mother removed the bucket and advised him to wait until she had finished cooking.

2.3. That annoyed the appellant who picked up a log from the fire and struck her repeatedly. The assault only came to an end when she was rescued by her sister. By that time, she had suffered serious injuries that proved to be fatal.

2.4. The appellant's mother died within an hour, while being taken to the hospital. A postmortem examination conducted on her body established that she bleed to death after suffering a raptured spleen from the assault.

3. SUBMISSIONS IN MITIGATION BEFORE TRIAL COURT AND SENTENCE

3.1. In mitigation, it was submitted to the trial judge that the appellant, who was 23 years old at the time

he committed the offence, was youthful and a first offender. He had also readily admitted the charge.

3.2. The trial judge acknowledged that the appellant was entitled to leniency on account of being a first offender, who had readily admitted the charge. However, he noted that the attack was senseless because he was stopping his mother from cooking the evening meal, in preference to taking a bath.

3.3. He also noted that the use of a log and the severity of the injuries he inflicted on his mother, were aggravating factors.

3.4. The trial judge then imposed a sentence of 30 years imprisonment with hard labour.

4. GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

4.1. The sole ground of appeal is that the sentence of 30 years imprisonment was manifestly excessive.

4.2. Mr. Banda referred to the cases of **Jutronich, Schuttle and Lukin v The People**[1] and **Solomon Chilimba v The People**[2], **Ngosa Banda v The People**[3], **J. W. Phiri v The People**[4] and **Francis Kamfwa v The People**[5] and submitted that having regard to the principles of sentencing and the circumstances in

which an appellate court can tamper with a sentence, the sentence imposed on the appellant, should come to this court with a sense of shock as being excessive.

4.3. He argued that guided by the cases he had referred to, this is an appropriate case in which we should substitute the sentence, with a lesser sentence.

4.4. He also pointed out that the trial judge did not consider mitigating factors that favoured the appellant. Particular mention was made of the fact that the appellant killed his own mother, a fact that would haunt him for the rest of his life.

4.5. Finally, Mr. Banda submitted that there was nothing extraordinary that aggravated the circumstances in which the offence was committed.

5. RESPONDENT'S ARGUMENTS AGAINST THE APPEAL

5.1. In response, Mrs. Bauleni referred to the cases of **Jutrorich**, **Schuttle** and **Lukin v The People**[1], **Alubisho v The People**[6] and submitted that the 30 years sentence imposed on the appellant should not come to us with a sense of shock, as it was justified by the circumstances in which the offence was committed.

5.2. As regards the case of **Francis Kamfwa v The People**[7], she submitted that the facts of that case can be distinguished from the facts of this case. Unlike in that case, where the offender was provoked into committing the offence, the attack in this case was unprovoked.

6. CONSIDERATION OF THE APPEAL AND COURT'S DECISION

6.1. In the case of **Jutronich, Schutte and Lukin v The People**, the Court of Appeal, the forerunner of the current Supreme Court, said the following on the approach an appellate court should take when dealing with an appeal against sentence:

> **'In dealing with an appeal against sentence the appellate court should, I think, ask itself three questions:**
> **(1) Is the sentence wrong in principle?**
> **(2) Is it manifestly excessive so 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?'**

6.2. Further, **section 16(5) of the Court of Appeal Act**, provides as follows:

> **'The Court may, on an appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such**

other order as the trial court could have imposed or made or except that-

(a) In no case shall a sentence be increased by reason of or consideration of evidence that was not given at the trial; and

(b) the court shall not interfere with a sentence just because if it were the trial court it would have imposed a different sentence, unless the sentence is wrong in principle or comes to the court with a sense of shock.'

6.3. However, before we consider whether this is an appropriate case in which to invoke the provisions of **section 16(5) of the Court of Appeal Act**, in the appellants favour, we will consider the appellant's reference to the cases of **Ngosa Banda v The People**[3], **J. W. Phiri v The People**[4] and **Francis Kamfwa v The People**[5] and arguments that there no aggravating factors.

6.4. Reference was made to the cases of **Ngosa Banda v The People**[3], **J. W. Phiri v The People**[4] and **Francis Kamfwa v The People**[5], in which the appellants in the three cases were all first offenders who pleaded guilty to the charge of manslaughter. We were urged to tamper with the sentence in this case on the basis of the sentences in those cases.

6.5. We think it is important to set out the facts in those cases before we follow the sentences imposed in them.

6.6. The facts in the case of **J.W. Phiri v The People**[4], were that the appellant and his friend, who were drinking, picked up a quarrel. The disagreement degenerated into a fight, in the course of which he struck his friend with a hoe and killed him. The Supreme Court substituted the sentence of 6 years imprisonment imposed by the High Court with one of 4 years.

6.7. In the case of **Francis Kamfwa v The People**[5], the appellant and his friend went to drink after being paid for some piece work they had done. They differed on the sharing of the money they had earned and a fight ensued. The appellant fatally injured his friend in the fight. The sentence of 15 years imposed by the High Court was reduced to 7 years by the Supreme Court.

6.8. Coming to the case of **Ngosa Banda v The People**[3], the appellant who was trying to separate a fight kicked the deceased in the abdomen. He was sentenced to 25

years imprisonment by the High Court. On appeal, the sentence was reduced to 5 years.

6.9. In our view, the sentences imposed in cases of **Ngosa Banda v The People**[3], **J. W. Phiri v The People**[4] and **Francis Kamfwa v The People**[5], cannot be used as a yardstick for concluding that the sentence imposed on the appellant should have been in the range of 4-7 years, and that the 30 years sentence was excessive.

6.10. The circumstances in which the offences in those cases were committed, are totally different from what happened in this case.

6.11. The fatal blows in those cases, were inflicted in the course of fights involving the offenders and their victims. In this case, the appellant's attack on his mother was unprovoked and for no justifiable reason at all.

6.12. The other issue raised on behalf of the appellant was that the trial judge should have taken into account the stigma that would attach to him for killing his mother. The impression we get is that it is being suggested that he should have received

a more favourable sentence on account of the fact that the victim was his mother.

6.13. If were to accept that argument, it would follow that where two persons, who are similarly circumstanced, caused death, with one of them killing a stranger and the other killing a relative, the one who killed a relative should receive a more favourable sentence, than the one who killed a stranger.

6.14. We have not come across any principle of sentencing that supports such a proposition. The contrary appears to be the case.

6.15. We live in a community where the expectation is that a son will protect his mother and not be the one to take her life. While we agree that stigma will follow a person who kills his mother, we do not think such stigma should be the basis of an offender receiving a more favourable sentence.

6.16. Another argument advanced by Mr. Banda was that there was nothing, in the conduct of the appellant, which aggravated the circumstances in which the offence was committed.

6.17. It is our view that the trial judge correctly found that the use of the log and the amount of violence the appellant inflicted on his mother, were aggravating factors. The appellant used a log, an offensive weapon, to repeatedly inflict injuries that raptured his mother's spleen and turned out to be fatal.

6.18. In this case, other than the fact that the appellant was a first offender who readily admitted the charge, there is nothing else in his favour.

6.19. The appellant repeatedly assaulted his mother for not agreeing with his decision to stop her from cooking in preference of warming water for a bath. It would not be an overstatement, to say that he displayed utmost impunity and disregard for life when he unleashed that savage attack on her.

6.20. Having considered the circumstances of this case, the sentence of 30 years imprisonment imposed on the appellant, does not come to us with a sense of shock as being excessive.

6.21. Consequently, we find no merit in the sole ground of appeal and we dismiss it.

7. VERDICT

7.1. The sole ground of appeal having failed, this appeal collapses. The conviction and sentence imposed by the trial judge are upheld.

C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT

F. M. Chishimba
COURT OF APPEAL JUDGE

D. L. Y. Sichinga
COURT OF APPEAL JUDGE