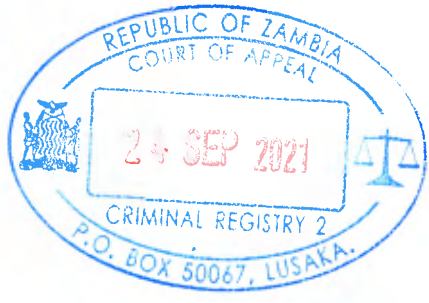
**IN THE COURT OF APPEAL OF ZAMBIA** **Appeal No. 235/2020**
**HOLDEN AT KABWE**
(Criminal Jurisdiction)

BETWEEN:




**ANNIE KALWA** **APPELLANT**

AND

**THE PEOPLE** **RESPONDENT**

**CORAM: Kondolo SC, Banda-Bobo and Muzenga JJA**
**On 21st and 24th September, 2021**

For the Appellant: Mr. C. Siatwinda, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. M. Libakeni, Senior State Advocate, National Prosecution Authority

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# J U D G M E N T

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**MUZENGA JA, delivered the Judgment of the Court.**

Cases referred to:

1. **Edom Lwela vs The People – SCZ Appeal No. 124 of 2017**
2. **Kelvin Kabwe vs The People – SCZ Appeal No. 123 of 2017**
3. **Francis Kamfwa vs The People – SCZ Appeal No. 125 of 2017**
4. **Jutronich, Schutte And Lukin vs The People (1965) ZR 9**
5. **Gift Nkaza vs The People – Selected Judgment No. 31 of 2015**
6. **Patrick Mumba And 9 Others vs The People (2004) ZR 202**

Statutes referred to:

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

## 1.0 INTRODUCTION

1.1 The appellant was initially charged with the offence of Murder contrary to **Section 200** of the **Penal Code Chapter 87 of the Laws of Zambia**. The particulars of offence alleged that the appellant on the 11th day of October, 2019 at Nchelenge in the Nchelenge District of the Luapula Province of the Republic of Zambia, did murder one Felix Musaka. She pleaded not guilty to the charge. The state subsequently applied to amend the information to Manslaughter contrary to **Section 199** of the **Penal Code Chapter 87 of the Laws of Zambia**. The particulars of the amended information alleged that the appellant, on the 11th day of October, 2019 at Mansa in the Mansa District of the Luapula Province of the Republic of Zambia, did unlawfully cause the death of one Felix Musaka.

1.2 The application was granted by the court below. The amended information was read to the appellant to which she pleaded guilty. The state proceeded to prepare a statement of facts.

## 2.0 STATEMENT OF FACTS

2.1 The appellant on the 11th day of October, 2019 at about 15:00 hours went drinking beer whilst carrying her son Felix Musaka (the deceased herein) who was aged 1 year 8 months on her back. She was drinking the beer commonly referred to as Kachasu at the house of a woman called Bana Chola.

2.2 The appellant decided to return home around 19:00 hours. On her way back whilst in a drunken state, she fell into a drainage she was trying to jump over whilst the deceased was strapped in a chitenge wrapper on her back. When appellant reached home, she did not check on the deceased but simply put him on the bed and she slept. In the course of the night, the appellant noticed that the deceased had a high temperature. She woke up some neighbours who helped her take him to Sumbu Clinic. Medical personnel at the clinic examined the deceased and found that he had some bruises on the neck, some lacerations on the chest, cut on the chin and that he had already died. Postmortem was conducted by Dr. Kunda and the cause of death was stated in the postmortem report as **"hypovolemic shock due to internal bleeding as a result of raptured liver due to severe trauma."**

## 3.0 TRIAL COURT VERDICT

3.1 The appellant admitted the facts as read to her and the learned trial court convicted her on her own admission.

## 4.0 MITIGATION

4.1 It was submitted on behalf of the appellant by learned defence Counsel that the appellant was 24 years old, who, if given a second chance was capable of changing and would make better decisions in order to contribute positively to the community. Counsel submitted that the appellant was very remorseful and regretted having caused the death of her beloved child due to her reckless beer drinking habits. It was submitted further that she will be haunted for the rest of her life for having caused the death of her child. Learned Counsel prayed for the maximum leniency of the trial court, especially that the appellant was a first offender who deserved leniency.

## 5.0 SENTENCE BY THE COURT BELOW

5.1 The court below after considering the mitigatory factors sentenced the appellant to 12 years imprisonment with hard labour.

## 6.0 GROUND OF APPEAL

6.1 Distraught with the sentence imposed by the High Court presided over by Madam Justice Y. Chembe, the appellant appealed to this Court advancing one ground of appeal as follows:

> **"The learned trial court erred in law and fact when it sentenced the appellant to 12 years simple imprisonment."**

## 7.0 ARGUMENTS

7.1 Learned Counsel for the appellant filed in heads of argument in support of the appeal.

7.2 Learned Counsel for the appellant Mr. Siatwinda submitted that a sentence of 12 years imposed on the appellant who is a first offender and who readily admitted the charge is excessive and should come before this Court with a sense of shock.

7.3 We were referred to the case of **Edom Lwela vs The People[1]**, a Supreme Court decision where the appellant pleaded guilty to manslaughter and was sentenced to life imprisonment with hard labour by the High Court. The Supreme Court on appeal found the sentence to be excessive for a first offender and reduced it to 4 years imprisonment with hard labour.

7.4 We were also referred to the case of **Kelvin Kabwe vs The People[2]** where the appellant pleaded guilty to manslaughter and

was sentenced to 40 years imprisonment with hard labour by the High Court. The Supreme Court on appeal found the sentence to be excessive for a first offender and subsequently imposed a sentence of 4 years imprisonment with hard labour.

7.5 It was Counsels' submission that the foregoing authorities indicate that a first offender who has readily pleaded guilty is entitled to leniency and that the Court should not just state that a person is entitled to leniency but that the sentence must reflect leniency. Learned Counsel argued that the Supreme Court had occasion to address this issue in the case of **Francis Kamfwa vs The People**[3] where the appellant who was a first offender, pleaded guilty to manslaughter and was sentenced to 15 years imprisonment with hard labour. On appeal against sentence, the Supreme Court held that:

> **"Generally, the principles of sentencing are well settled and so is the need for exercise of prudence, consistency and fairness by the sentencing Judge among many other justifiable considerations. All these attributes are found in numerous decisions which this court has made in the past and which it will continue to make now and in the future. It is with these thoughts in mind that we agree with the approach taken by Mr. Muzenga when he suggested to us that in deciding this appeal we ought to look at our recent decisions in the recent past. With this approach, we are certain that a certain decent level of consistence can be attained. It is in this light that we**

**have equally found value in our decisions in Edom Lwela and Kelvin Kabwe, which are not reported as yet, to the present appeal. Applying the sentencing policy which we did in those cases to the present case, we feel duty bound that the sentence of 15 years imprisonment with hard labour comes to us with a sense of shock for being excessive."**

7.6 It was pointed out that the Supreme Court went further to state that:

**"We are satisfied that had the trial court adopted our recent approach in sentencing first offenders who plead guilty to manslaughter, a much lesser sentence would have been arrived at. For the reasons we have given, we allow the appeal and quash the sentence of 15 years imprisonment with hard labour and in its place we impose a sentence of 7 years imprisonment with hard labour with effect from the date of arrest."**

7.7 Counsel finally urged us to interfere with the sentence of 12 years for being excessive in the light of the Supreme Court decisions and prayed that this appeal be allowed.

## 8.0 RESPONDENT'S ARGUMENTS

8.1 The state did not support the sentence imposed by the court below.

8.2 It was submitted by the learned Senior State Advocate Mr. Libakeni that the questions an appellate court should ask itself in dealing with an appeal against sentence were succinctly stated by Blagden CJ in

the famous case of **Jutronich, Schutte And Lukin vs The People**[4] as follows:

> **"(a) Is the sentence wrong in principle?**
> **(b) Is the sentence so manifestly excessive as to induce state of shock?**
> **(c) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?"**

8.3 He argued that the appellant was convicted on the basis of written facts and the postmortem examination revealed injuries which could have occurred earlier.

8.4 Learned Counsel stated that he was accordingly guided by the case of **Francis Kamfwa** cited by the appellant and that the sentence imposed on the appellant was excessive.

## 9.0 THE HEARING

9.1 At the hearing of this appeal learned Counsel for the appellant and the respondent informed the Court that they would rely on their respective arguments.

9.2 Mr. Siatwinda however added that the learned trial court relied on facts that were not in the statement of facts when imposing a more severe sentence. He pointed the Court to a portion of the relevant part of the trial court's reasoning. Learned Counsel submitted that this was a misdirection.

## 10.0 CONSIDERATION OF APPEAL AND DECISION

10.1 We have carefully considered the record and the sentence imposed by the court below.

10.2 We note from the cases of **Francis Kamfwa, Edom Lwela** and **Kelvin Kabwe** *supra,* the approach taken by the apex court in dealing with appeals against sentence for offences of manslaughter where an accused person has pleaded guilty. It is clear that an accused person in such situations deserves leniency. We therefore take the view that it is not adequate for a trial court to state that the convict deserves leniency. The leniency so expressed by the Court must be reflected in the sentence imposed.

10.3 The appellant herein is a first offender who readily pleaded guilty to the charge.

10.4 We note that the learned trial court when deciding which sentence to impose referred to some facts which were not in the statement of facts. This is the relevant portion of what the trial court said:

> **"The postmortem shows that the infant had other injuries which could have occurred earlier. The explanation from the convict on the record was that, she fell on the brazier. She may well have been drunk at the time."**

10.5 We have checked the statement of facts and have found no such explanation having been offered by the appellant. We do not know where the learned trial court could have possibly gotten these facts. We find this to be a serious misdirection which could have influenced the trial court to impose a more stiffer penalty.

10.6 The Supreme Court had occasion to comment on this subject in the case of **Gift Nkaza vs The People**[5] in the following terms:

> **".....it is crystal clear that the learned trial judge introduced his own facts which he took into account to justify a stiffer penalty. We must emphasize for the guidance of lower courts that in sentencing an accused person, a trial court should restrict itself to the statement of facts presented by the prosecution. The court should not allow itself to stray outside the statement of facts as doing so may prejudice the accused person and may result in an unfair trial."**

10.7 We wish to echo the guidance of the Apex Court to trial courts that when there is a plea of guilty and statement of facts are presented before it, only the facts in the statement of facts should be referred to by the court. Trial courts must never refer to the depositions or witness statements on the file as long as those facts do not form part of the statement of facts.

10.8 We therefore find force in the arguments by both Counsel. We find that the sentence is wrong in principle on account of reference to the facts not contained in the statement of facts. If the learned trial court had properly directed itself, it would not have imposed the sentence herein.

10.9 We thus find the sentence of 12 years imprisonment excessive in the light of the Supreme Court decisions referred to above and comes to us with a sense of shock.

10.10 We have also noted that the learned trial court ordered that the imprisonment be with hard labour. This was a misdirection because the convict is a woman. The Supreme Court in the case of **Patrick Mumba, Pamela Mumba Mwansa, Annet Semushi, Jonas Kunda, Emmanuel Chimense, Mwila Feleshano, Frida Feleshano, Mary Feleshano, Monica Feleshano, Jenipher Mwansa vs The People**[6] held *inter alia* that:

> **"Courts should not pass sentences that cannot be enforced. Therefore Courts should impose sentences with simple imprisonment for women."**

10.11 Therefore, the more appropriate order should have been with simple imprisonment.

10.12 The appellant is a first offender, who readily pleaded guilty, and is a youth. We allow the appeal against sentence and set aside the sentence of 12 years imprisonment with hard labour. We instead impose a sentence of 4 years simple imprisonment with effect from the date of arrest.

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M. M. KONDOLO SC

**COURT OF APPEAL JUDGE**

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A. M. BANDA-BOBO

**COURT OF APPEAL JUDGE**

.....

K. MUZENGA

**COURT OF APPEAL JUDGE**