IN THE COURT OF APPEAL OF ZAMBIA **Appeal No.238/2020**
HOLDEN AT LUSAKA AND NDOLA
(Criminal Jurisdiction)

BETWEEN:

BOWAS MUKUWA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Makungu and Muzenga, JJA

On: 16th February 2022, 23rd March 2022 and 7th December 2022

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

For the Respondents: A. Kennedy-Mwanza, Senior State Advocate, National Prosecution Authority

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JUDGMENT

Mchenga DJP, delivered the judgment of the court.

cases referred to:

1. Jutronich, Schuttle and Lukin v. The People [1965] Z.R. 9
2. Solomon Chilimba v. The People [1971] Z.R. 36
3. Ngosa Banda v. The People, SCZ Appeal No. 138 of 2017

4. Francis Kamfwa v. The People, SCZ Appeal No. 125 of 2017
5. Alubisho v. The People [1976] Z.R. 11
6. Benai Silungwe v. The People SCZ Appeal No. 55 of 2007
7. Kaambo v. The People [1976] Z.R. 122
8. Kenneth Chisanga v. The People [2004] Z.R 93
9. Malaya v. The People [1973] Z.R. 236
10. The People v. Ndema Simolu [1981] Z.R. 318

Legislation referred to:

1. The Penal Code, Chapter 87 of The Laws of Zambia
2. The Court of Appeal Act No. 7 of 2016
3. The Criminal Procedure Code, Chapter 88 of The Laws of Zambia

1. INTRODUCTION

1.1. The appellant appeared before the Subordinate Court (Honourable C. Mumba), charged with the offence of Incest, contrary to **Section 159(1) of The Penal Code.**

1.2. He denied the charge and the matter proceeded to trial.

1.3. At the end of the trial, he was found guilty as charged, and convicted.

1.4. He was then committed to the High Court for sentencing.

1.5. In the High Court (Kamwendo, J.), he was sentenced to life imprisonment.

1.6. He has appealed against the sentence only.

2. EVIDENCE BEFORE THE TRIAL COURT

2.1. On the 31st October 2018, in the evening, the prosecutrix's mother, a resident of Mumbwa, returned home from work. She found her daughter, who was aged 12 years, sleeping.

2.2. The prosecutrix informed her mother that she was not well, but did not disclose what the problem was.

2.3. The following day, a neighbour told the prosecutrix's mother that at some point, the previous day, she had seen her daughter walking with her legs apart. She also informed her that she suspected someone had carnal knowledge of her.

2.4. When the prosecutrix was checked, what appeared to be semen was observed on her private parts.

2.5. The prosecutrix was taken to the hospital where she revealed that it was the appellant, her father,

who had carnal knowledge of her after threatening to harm her.

2.6. Medical examination by a doctor confirmed that the prosecutrix had recently had sexual intercourse. She was also found to have been infected with a sexually transmitted decease.

2.7. There was also evidence from the prosecutrix's mother, that the appellant started having carnal knowledge of the prosecutrix from the time she was 6 years old. She recounted several occasions when she had caught the appellant in the act.

2.8. Although the appellant was reported to the police on at least two occasions, and on one occasion he was detained, he was never prosecuted for reasons that are not clear.

2.9. A clinical officer specialising in gender based violence cases also gave evidence. He testified that as a result of the abuse, the prosecutrix was traumatised and required weeks of counselling to stabilise her.

2.10. In addition, there was evidence from both the prosecutrix and her mother that as a result of the

sexual assault by the appellant, the prosecutrix had suffered injury to her womb and was not going to be able to bear children.

2.11. At sentencing, the judge indicated that he was cognisant of the fact that the appellant was entitled to leniency on account of being a first offender. He however imposed a sentence of life imprisonment after pointing out that he had considered the circumstances under which the offence was committed and the injuries that the prosecutrix sustained.

2.12. The judge also took note of the fact that the appellant started defiling the prosecutrix when she was 6 years old.

2.13. In addition, the judge was of the view that there was need for impose a sentence that would deter others from committing the same offence.

3. GROUND OF APPEAL AND ARGUMENT IN SUPPORT OF AND AGAINST

3.1. The sole ground of appeal is that the sentence of life imprisonment was excessive because the appellant was a first offender.

3.2. In support of the ground of appeal, Ms. Banda referred to the cases of **Jutronich, Schuttle and Lukin v. The People**[1], **Solomon Chilimba v. The People**[2], **Ngosa Banda v. The People**[3], and **Francis Kamfwa v. The People**[4] and submitted that the appellant, being a first offender, a sentence of life imprisonment should come to this court with a sense of shock. This because the sentence is indicative that no leniency was shown to the appellant and there were no aggravating factors.

3.3. In response Ms. Kennedy Mwanza referred to the cases of **Alubisho v The People**[5], **Benai Silungwe v The People**[6] and **Kaambo v The People**[7] and submitted that even if the appellant was a first offender, the circumstances in which the offence was committed are what determine the sentence.

3.4. She also referred to the case of **Kenneth Chisanga v The People**[8], in which it was held that an appellate court should only reduce a sentence if it comes with a sense of shock for being excessive.

3.5. She argued that considering the circumstances of the case, the sentence imposed in the court below is not excessive.

4. CONSIDERATION OF THE APPEAL AND DECISION OF THE COURT

4.1. **Section 16(5) of the Court of Appeal Act** sets out what should inform the decision of this court where an appeal is against sentence, and it is contended that the sentence is excessive. It reads 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, except that—**
> ***(a)*** **in no case shall a sentence be increased by reason of or in 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 a 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."**

4.2. From the foregoing, it is clear that the determining factor when imposing a sentence is the evidence that was presented during the trial. Such evidence will set out the circumstances in which the offence was committed.

4.3. In this case, the judge considered the circumstances of the case which included the age of

the prosecutrix, when the abuse started and the injuries that she suffered.

4.4. The trial judge also considered the desirability of imposing a deterrent sentence.

4.5. In the case of **Malaya v. The People**[9], it was held that it was permissible for a court to impose a particular sentence in order to deter others from committing the same offence. However, it was explained in the case of **The People v. Ndema Simolu**[10], that when imposing a deterrent sentence, a court should not lose sight of the fact that the sentence should reflect the content or gravity of the offence

4.6. We will first deal with the injuries that the prosecutrix suffered.

4.7. Even though the judge did not specify the injuries that the prosecutrix suffered, which he had taken into account before imposing the sentence, it is apparent that it was the evidence of the prosecutrix and her mother that the prosecutrix had suffered damage to her womb.

4.8. We say so because it is the only evidence pointing at the injuries the prosecutrix suffered. While the medical report confirmed that the prosecutrix was defiled, it did not point at any serious injury that she may have suffered.

4.9. Although the evidence that the prosecutrix had suffered damage to her womb was unchallenged, it is our view that **section 302 of The Criminal Procedure Code**, which provides that a court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed, should have been deployed by the judge.

4.10. Its use would have given the judge the opportunity to receive evidence and appreciate the extent of injury that the prosecutrix may have suffered following the commission of the offence. This is more so that the severe sentence he imposed was based on the claim that the prosecutrix had suffered serious injury.

4.11. The same provision should have been deployed to recall the clinical officer who gave evidence to

explain the extent of trauma that the prosecutrix suffered. Had she recovered after the counselling? If not, was she likely to recover?

4.12. Such evidence would have also helped him arrive at an appropriate sentence.

4.13. As regards the circumstances in which the offence was committed, the judge made it clear that he had taken into account the 6 years period in which the prosecutrix had been subjected to abuse.

4.14. The prosecutrix's mother gave details of at least 4 such incidents of abuse in that period. However, from her evidence it is clear that she believed that the abuse was continuous.

4.15. Even if that was the case, one should not lose sight of the fact that the appellant was only prosecuted and convicted for one incident during that period. The other incidents that his wife set out, stood out as separate incidents and could have been the subject of separate charges of incest.

4.16. It follows that the approach that the judge took, that is, sentencing the appellant on the basis that

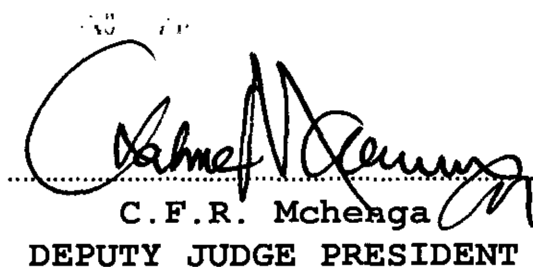
he had abused his daughter over a period of 6 years, was wrong in principle.

4.17. The appellant was in effect sentenced as if he had been convicted of all the incidents of abuse his daughter suffered over the 6 year period.

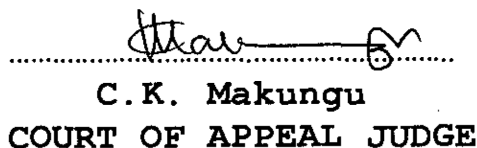
4.18. In the circumstances, we find merit in the appeal against the severity of the sentence imposed on the appellant and we will interfere with it.

5. VERDICT

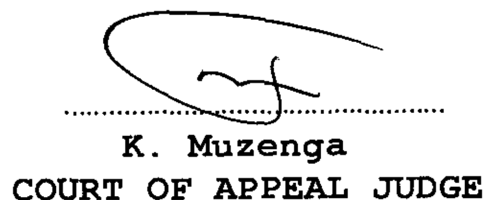
5.1. We set aside the sentence of life imprisonment and in its place we impose a sentence of 25 years imprisonment, with hard labour. The sentence will run from the 12th of November 2019, the day the appellant was arrested.



C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



C.K. Makungu
COURT OF APPEAL JUDGE



K. Muzenga
COURT OF APPEAL JUDGE