

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

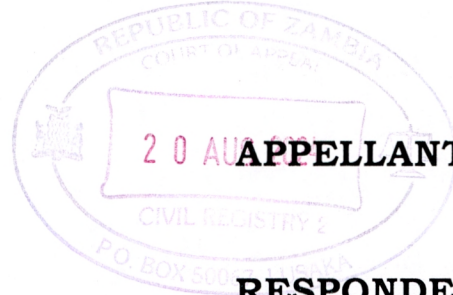
APPEAL/95/2023

BETWEEN

MWILA MUSELEPETE

AND

THE PEOPLE



RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe, JJA

On 13th August 2024 and 20th August 2024

For the Appellant : ***Mr. Mweemba – Director Legal Aid Board***

For the Respondent : ***Ms. L. Zunduna – State Advocate, National Prosecution Authority***

JUDGMENT

Cases referred to:

1. *Frank Ndenjema v The People CAZ Appeal No. 165/2022*
2. *Evaristo Bwalya v The People CAZ Appeal No 106 of 2021*
3. *Ndonda Daka v The People CAZ Appeal No 24/2022*
4. *Matongo v The People (1974) ZR 164*
5. *Daimon Lungu v The People (1977) ZR 208*

Legislation referred to:

1. *The Road Traffic Act No 11 of 2002*

1.0 INTRODUCTION

- 1.1 This appeal emanates from the decision of Limbani J. Following a conviction on a plea of guilty to a charge of Causing Death by Dangerous Driving contrary to Section 161 of the Road Traffic Act, the Appellant was sentenced to 6 months simple imprisonment.

2.0 BACKGROUND

- 2.1 The Appellant was charged with one count of Causing Death by Dangerous Driving contrary to Section 161 of the Road Traffic Act No 11 of 2002.
- 2.2 The particulars of offence were that on 23rd February 2022 at Kapiri Mposhi, the Appellant caused the death of Fundison Mashilipa by driving a motor vehicle being a Toyota Wish registration number BCD 8582 on a public road in a manner that was dangerous to other road users.

- 2.3 At the hearing of the matter, the Appellant readily pleaded guilty and admitted the facts in the statement of facts. According to the statement of facts, on 23rd February 2022, the Appellant was driving a motor vehicle registration No BCD 8582 on a public road namely the Ndola Highway. He was carrying five passengers.
- 2.4 When he reached Fibawe in Kapiri Mposhi, he failed to keep to his lane and hit into a Howo truck and trailer registration No BAJ 1405 and BAJ 1319 respectively which was travelling in the opposite direction on the same road.
- 2.5 After the collision, the Appellant lost control of his vehicle which overturned. The deceased, who was a passenger in the Appellant's vehicle, died at the scene. The deceased's body was deposited at Kapiri Mposhi District Hospital mortuary.
- 2.6 The postmortem examination was conducted on the body of the deceased on 24th February 2022 and revealed that the cause of death was severe head trauma, brain contusion, large subdural hematoma due to road traffic accident.

2.7 The Appellant was charged and arrested for the offence of Causing Death by Dangerous Driving. He was subsequently convicted of the subject offence.

2.8 The Court below sentenced the appellant to six months simple imprisonment after considering the mitigatory factors. The Court also ordered the suspension of the Appellant's driver's licence for one year.

3.0 THE APPEAL

3.1 Disconsolate with the sentence imposed by the High Court, the Appellant lodged this appeal. He raised one ground of appeal as follows:

“The learned trial Judge erred in law and fact for condemning the Appellant to a custodial sentence when a fine was more appropriate in the circumstances.”

4.0 APPELLANT'S ARGUMENTS

4.1 The Appellant filed arguments in support in which we were referred to a number of our decisions such as **Frank Njenjema v The People¹**, **Evaristo Bwalya v The People²** and **Ndoda Daka v The People³** in which we held that a fine is appropriate

where there is no recklessness or willful disregard for other road users.

4.2 It was submitted that the facts in the case did not reveal recklessness on the part of the part of the Appellant. Our attention was drawn to the cases of *Matongo v The People*⁴ and *Daimon Lungu v The People*⁵ where the Supreme Court guided that a fine was appropriate in cases of causing death by dangerous driving unless there was recklessness.

5.0 RESPONDENT'S ARGUMENTS

5.1 The Respondent did not support the custodial sentence imposed by the trial Judge on the Appellant. It was submitted that as the Appellant was a 1st offender, he should have been accorded leniency and sentenced to a fine as guided by this court in the case of *Frank Njenjema v The People* (supra).

6.0 CONSIDERATION AND DECISION

6.1 We have carefully considered the record of appeal and the sentence imposed by the Court below. The appeal is against sentence and the issue we need to resolve is whether the sentence was appropriate in the circumstances of the case.

6.2 Section 161 of the Road Traffic Act provides an option of a fine on conviction for the offence of causing death by dangerous driving. The position of the law on sentencing where the statute provides for an option of a fine is to impose a non-custodial sentence on a first offender unless there are aggravating factors.

6.3 In the case of **Lungu v The People (supra)**, it was held that:

“where the legislature has provided for a fine as well as imprisonment, it is traditional to impose a fine on a first offender rather than to inflict a custodial term especially where the offender has come to Court for the first time and he has pleaded guilty.”

6.4 We are alive to the case of **Matongo v The People (supra)** where the Supreme Court guided that a custodial sentence is justified where there has been recklessness or willful disregard for the safety of others. However, this position was clarified in later authorities as applying only if there were aggravating factors.

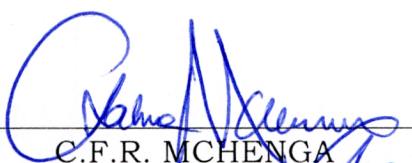
6.5 We have consistently held that a first order should be ordered to pay a fine where the law provides for an option of a fine unless there are aggravating factors. (See the cases of **Frank Njenjema v The People**¹, **Evaristo Bwalya v The People**² and **Ndoda Daka v The People**³ above).

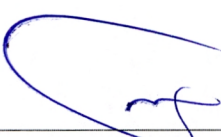
- 6.6 In the cases of ***Ndonda Daka v The People***³ and ***Evaristo Bwalya v The People***³, we stated that a first offender should ordinarily be ordered to pay a fine where the law provides for an option of a fine unless there are aggravating factors.
- 6.7 In the present case, the Appellant was a first offender who readily admitted the charge. Further, there were no aggravating factors and the trial Judge did not find any. At pages 8 and 9 of the Record of Appeal, the trial Judge merely noted that a lot of lives had been lost due to indisciplined drivers. He concluded that the admitted facts revealed that the Appellant was driving recklessly.
- 6.8 We note that the admitted facts did not show any recklessness on the part of the Appellant. There was no suggestion that he was driving at an excessive speed or under the influence of alcohol. The finding of recklessness was therefore perverse. Failing to keep to his lane constitutes an ingredient of the offence of causing death by dangerous driving.
- 6.9 We hold the view that the custodial sentence that was passed by the court below was unwarranted in the circumstances. The

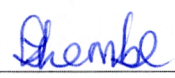
sentence of six months simple imprisonment was wrong in principle and excessive. We accordingly set it aside.

7.0 CONCLUSION

7.1 In view of the foregoing, we allow the appeal. We set aside the sentence and impose a fine of Three thousand Kwacha (K3000.00) payable forthwith. In default of payment the Appellant will serve 2 months simple imprisonment.


C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT


K. MUZENGA
COURT OF APPEAL JUDGE


Y. CHEMBE
COURT OF APPEAL JUDGE