

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

Appeal No. 165/2022

BETWEEN:

FRANK NJENJEMA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe, JJA
On 14th June, 2022 and 25th August, 2023.

For the Appellant: Ms. D. Kabuka, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. S. Siafwa, State Advocate, National
Prosecution Authority

J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Musonsa v. The People (1976) ZR 215**
2. **Siyauya v. The People (1976) ZR 253**
3. **Evaristo Bwalya v. The People – CAZ Appeal No. 106 of 2021**
4. **Jutronich, Schutte and Lukin v. The People (1965) ZR 9**
5. **Gift Nkaza v. The People – Selected Judgment No. 31 of 2015**
6. **Matongo v. The People (1974) ZR 164**

7. Mulizwa v. The People (1974) ZR 165

Statutes referred to:

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

1.0 INTRODUCTION

- 1.1 The appellant appeared before Limbani, J, charged with the offence of Causing Death by Dangerous Driving contrary to **Section 161** of the **Road Traffic Act**.
- 1.2 The particulars alleged that the appellant on the 30th day of November, 2021 at Kapiri Mposhi District of the Central Province of the Republic of Zambia, did cause the death of Elijah Kalunga, by driving a motor vehicle namely Toyota Premio Registration No. ACR 3900 on a public road namely; Great North Road in a manner which was dangerous to the public having regard to all the circumstances of the case, including the nature, condition, use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the said road.
- 1.3 He pleaded guilty and the State proceeded to prepare a statement of facts.

2.0 STATEMENT OF FACTS

- 2.1 According to the statement of facts, on the 30th day of November, 2021 at about 18:30 hours, the appellant was driving an insured motor vehicle namely Toyota Premio, registration number ACR 3900, along Great North Road, from the direction of west to east.
- 2.2 When the appellant reached Kapiri Mposhi turn off junction, a built up area, one Elijah Kalunga aged 61 years a pedestrian was crossing the said road from the direction of west to east. Due to the speed at which the appellant drove at and without having a proper look out for other road users, he went on to hit the deceased who died on the spot. The appellant drove to Kapiri Mposhi Police Station and reported the accident.
- 2.3 Police officers from Kapiri Mposhi Police Station proceeded to the scene of the accident. The body of the deceased was picked and conveyed to Kapiri Mposhi District Hospital.
- 2.4 On the 2nd day of December, 2021, a postmortem examination was conducted on the body of the deceased person at Kapiri Mposhi District Hospital, by Dr. Pavlo Lermontov a Government Pathologist and the cause of death was opined as **"severe head trauma, large lacerated wound on the Rt. Thigh and skull fracture."**

- 2.5 On 9th December, 2021, the motor vehicle was examined by a motor vehicle examiner namely Bernard Kawimbe of Road Transport and Safety Agency, Lusaka. The examiner found that the motor vehicle was not roadworthy at the time of the accident.
- 2.6 The appellant was charged and arrested for the subject offence.
- 2.7 The appellant did cause the death of the deceased person due to the dangerous manner he drove his vehicle having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic, which was actually at the time on the said road or, which might reasonably be expected to be on the said road.

3.0 TRIAL COURT VERDICT

- 3.1 The appellant admitted the facts as read to him and the learned trial court convicted him.

4.0 MITIGATION

- 4.1 In mitigation, counsel submitted that the appellant was a first offender who had readily pleaded guilty, which itself was a sign of remorsefulness. It was submitted that the appellant assisted the family with funeral expenses and had since reconciled with the deceased's family. Learned counsel prayed for maximum leniency of the court.

5.0 SENTENCE BY THE COURT BELOW

5.1 The court below after considering the mitigatory factors sentenced the appellant to three (3) months imprisonment. The court further ordered the suspension of the appellant's driver's licence for six (6) months.

6.0 GROUNDS OF APPEAL

6.1 Discontent with the sentence imposed by the High Court, the appellant appealed to this Court advancing two grounds of appeal couched as follows:

- 1. The learned trial court erred in law and fact by condemning the appellant to a custodial sentence, when a fine was more appropriate sentence in the circumstances.**
- 2. The learned trial court erred in law and in fact when it refused to and or neglected to restrict itself to the facts contained in the statement of facts which it took into account when imposing the custodial sentence.**

7.0 ARGUMENTS

7.1 In support of ground one, counsel for the appellant submitted that the appellant was a first offender, who at law was entitled to leniency in whose favour a fine ought to have been imposed instead

of imprisonment. Counsel placed reliance on the cases of **Musonda v. The People**¹, **Siyauya v. The People**² and **Evaristo Bwalya v. The People**.³

7.2 It was learned counsel's contention that the sentence herein should come to us with a sense of shock as it offends the sentencing principles in the case of **Jutronich, Schutte and Lukin v. The People**.⁴

7.3 In support of ground two, counsel submitted that the trial court placed reliance on information that was not included in the statement of facts when sentencing the appellant. This, according to counsel, was a serious misdirection. Reliance was placed on the case of **Gift Nkaza v. The People**⁵ where the Supreme Court guided that only facts contained in the statement of facts should be referred to by the court.

7.4 It was counsel's prayer that we allow the appeal and set aside the sentence of three (3) months imprisonment and in its place impose an appropriate fine.

8.0 RESPONDENT'S ARGUMENTS

8.1 Learned counsel for the respondent submitted that the learned trial court was on firm ground in imposing a custodial sentence. Counsel contended that the area where the accident took place was a built

up area and that the appellant was driving a vehicle which was not road worthy. It was counsel's contention that this amounted to recklessness.

8.2 It was learned counsel's submission that, though it is trite that a fine should be imposed on a first offender, in certain instances where there are aggravating circumstances, a custodial sentence can be imposed even on a first offender. Reliance was placed on the cases of **Matongo v. The People**⁶ and **Mulizwa v. The People**.⁷

8.3 Counsel contended that the sentence of three months was within the much lower confines of the maximum sentence and as such should not come to us with a sense of shock.

8.4 In responding to ground two, learned counsel for the respondent argued that once the postmortem report, Road Transport and Safety Agency report and sketch plan drawn not drawn to scale are produced, they become part of the court's record.

8.5 We were urged to dismiss the appeal against sentence for lack of merit.

9.0 THE HEARING

9.1 At the hearing of this appeal learned counsel for the appellant Ms. Kabuka, Legal Aid Counsel and learned counsel for the respondent

Mr. Sifali, State Advocate, informed the Court that they would rely on their respective filed grounds and heads of argument.

10.0 DECISION OF THE COURT

- 10.1 We have pedantically considered the record and the sentence imposed by the court below. We note that the appeal is against sentence and as such the main issue is whether the custodial sentence is warranted in the circumstances of this case.
- 10.2 The appellant has raised two grounds of appeal. We shall deal with the second ground first, in which he assails the use of information in the sketch plan by the lower court.
- 10.3 Learned counsel for the appellant seemed to suggest that by the trial court using information from the sketch plan, it violated the guidance in the **Gift Nkanza case** *supra* as the same was not contained in the statement of facts admitted by the appellant.
- 10.4 We wish to guide that once documents are produced in evidence alongside the statement of facts, they become part of the statement of facts and can be used by the court in considering what sentence to impose. The best time to object to the production of any documents is at the time of production after the reading of the statement of facts, clearly stating the reasons for the objection. We

thus agree with learned counsel for the respondent's submission that this ground has no merit and we dismiss it.

10.5 We now turn to consider ground one of the appeal. There is no dispute that the offence the appellant was convicted for has an option of a fine. We stated in the case of **Evaristo Bwalya** *supra* at page J11 that:

"It is trite that where an offence prescribes for an option of a fine, first offenders should ordinarily be ordered to pay a fine, imprisonment should be in default, unless there are aggravating factors."

10.6 We went further to hold at page J12 that:

"The cases of Matongo and Mulizwa *supra* clearly show that a custodial sentence is reserved for cases where there is recklessness or wilful disregard for the safety of other road users. We agree that a fine is appropriate where driving was due to momentary inattention or misjudgement."

10.7 The statement of facts presented before the trial court, which the appellant admitted, clearly showed that the cause of the accident was due to speed and failure to have a proper lookout for other road users. There is nothing in the facts which disclosed recklessness or willful disregard of the safety of other road users. The trial court

appears to have been persuaded by what it said when imposing the sentence in the following words:

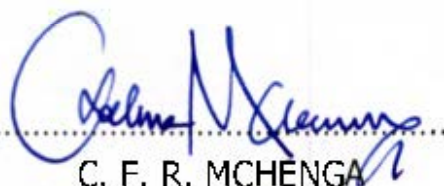
"I also note as per facts and RTSA Report that your motor vehicle was at the time of the accident not road worthy. It had no road tax and or test certificate contrary to Section 30 and 122 of the Road Traffic Act for having or driving a motor vehicle that is not fit to be on the road is recklessness as it is a danger to not only to the driver but also all other road users. The law is clear as per the referred two Sections 30 and 122 of the RTSA Act that only motor vehicles with valid road tax and fitness should be on the road."

10.8 We hold the view that lack of road tax and road fitness, which are separate offences for which the appellant could be charged cannot, especially in the circumstances, be an aggravating factor to warrant the imposition of a custodial sentence. Therefore, a violation of **Sections 30 and 122 of the Road Traffic Act** cannot amount to recklessness as the lower court found. We thus set aside the finding in this regard. We therefore agree with the submission by counsel for the appellant that a custodial sentence was unwarranted. Had the learned trial court properly directed his mind, he would certainly have found that there were no aggravating circumstances to warrant the imposition of a custodial sentence.

10.9 We thus find the sentence of three (3) months imprisonment to be wrong in principle and we set it aside.

11.0 CONCLUSION

11.1 We therefore allow the appeal, set aside the sentence. In its place, we impose a fine of One Thousand Five Hundred Kwacha (K1,500.00), in default the appellant will serve three (3) months simple imprisonment.




DEPUTY JUDGE PRESIDENT



K. MUZENGA

COURT OF APPEAL JUDGE



Y. CHEMBE

COURT OF APPEAL JUDGE