

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

**KWASHIRAI WITIMOSI**

**Appellant**

**- v -**

**THE PEOPLE**

**Respondent**

**CORAM:** Ngulube, D.C.J., Gardner and Sakala, JJ.S.

16th October, 1987

Appellant in person

K.C. Chanda, Senior State Advocate, for the respondent

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**J U D G M E N T**

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Ngulube, D.C.J., delivered the judgment of the court

The appellant was tried on a charge of murder, the particulars of which alleged that on a date unknown but between 5th and 7th February, 1987, at Kabwe, he did murder Edward Katoni. At the conclusion of the trial the learned trial commissioner found that the charge of murder had not been made out but convicted the appellant of the lesser charge of manslaughter. He was sentenced to undergo five years imprisonment. He now appeals to this court against both the conviction and the sentence.

The only ground of appeal filed in the appeal against conviction alleged an error of law and fact on the part of the learned trial commissioner to have convicted him, in the judgment, of a charge of manslaughter to which he did not plead. We wish to indicate that, from any point of view, there is no merit whatsoever in this ground of appeal. Quite clearly, manslaughter is always an invisible alternative in the case of a murder charge and it is unnecessary for us to draw attention to any of the numerous cases where this has been done.

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The appeal against conviction has no chance of success and we dismiss that appeal. With regard to the sentence of five years, we note that the facts of this case were that the deceased was a notorious thief in the village. On the night in question, the appellant found the deceased stealing his chickens. The appellant chased the deceased, and in the course of the chase he picked up a stick and beat up the deceased person. The deceased died from the injuries sustained from that beating.

The learned trial commissioner took into account the fact that the appellant was a first offender and that he was accordingly entitled to leniency. In the circumstances the learned trial commissioner imposed the sentence to which we have referred. In our considered opinion, the sentence of five years, on the facts of this case, was not wrong in principle and it does not come to this court with any sense of shock. The appeal against the sentence is also dismissed.

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M. S. Ngulube  
DEPUTY CHIEF JUSTICE

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B. T. Gardner  
SUPREME COURT JUDGE

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E. L. Sakala  
SUPREME COURT JUDGE