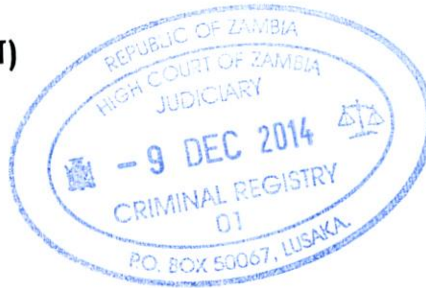
IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

HPA/58/2013



BETWEEN

TRINITY SIABEENZU — APPELLANT

AND

THE PEOPLE — RESPONDENT

Before the Honorable Mr. Justice I.C.T. Chali in open Court at Lusaka the 9th day of December 2014.

For the Appellant	:	Mr. C. Siatwindi- Legal Aid Counsel, Legal Aid Board
For the Respondent	:	Mrs. C. Hambayi- Acting Principal State State Advocate, N.P.A

J U D G M E N T

Cases and Legislation Referred to:

1. Musonda v. The People (1976) ZR 215.
2. The People v. Tenson Chipeta (1970) ZR 83.
3. Adam Berejena v. The People (1984) ZR 19.
4. Syakalonga v. The People (1977) ZR 61.

The Appellant appeared before the Subordinate Court on a charge of depriving beneficiaries of their entitlement contrary to section 14(a) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia. The particulars of the offence alleged that on unknown dates but between 1st January 2010 and 1st May 2011 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, he did deprive Constance

Simanguwa, Janet Simanguwa, Rex Simanguwa, Beenzu Simanguwa and Brandine Simanguwa of their 70% entitlement amounting to K114, 700.00 the property of their late father Howard Simanguwa to which they were entitled.

The trial Court found him guilty and convicted him accordingly and as a way of punishment imposed a sentence of twelve months imprisonment with hard lard.

Being dissatisfied with the sentence of the Court below, he now appeals to this Court against sentence only and advances the following grounds of appeal:

1. That he is a first offender and deserves the court's maximum leniency;
2. That he did not waste the courts time and agree to deliver up his dwelling house valued at K300,000 to the beneficiaries; and
3. The Learned Magistrate should have imposed a fine on him.

In support of these grounds of appeal it was submitted by Defense Counsel that the sentence of twelve months imprisonment with hard labour without the option of a fine was excessive and wrong in principle and that the Appellant should have been given the option of a fine. Further on this point the case of MUSONDA v THE PEOPLE (1976) ZR 215 was cited where it was held:

> ***"where the legislature has seen fit to prescribe a sentence of a fine or imprisonment or both, it is well established that a first offender in a case where there are no aggravating***

circumstances which would render a fine inappropriate should be sentenced to pay a fine with imprisonment only in default."

According to the Learned Defense Counsel, no aggravating circumstances emerged from the record in this case and that the Appellant should have been ordered to pay a fine.Counsel also cited the case of THE PEOPLE v. TENSON CHIPETA (1970) ZR 83 (H.C)where it was stated by the Court that:

> **"When imposing sentence the court should take into account the intrinsic value of the subject matter, antecedents of the accused, his youth, conduct at the trial particularly with regard to his plea and the prevalence of that particular crime in the neighborhood."**

Counsel also relied on the passage in the *Chipeta* case which is that the convict was a first offender and that there was no information placed before the magistrate as to the prevalence of this kind of offence in his area. In referring to the case in *casu*, counsel contended that there was no information placed before the trial Magistrate as to the prevalence of this kind of offence in his area.

It was finally submitted on the Appellant's behalf relying on the case of ADAM BEREJENA v THE PEOPLE (1984) ZR 19 (SC) where it was held:

that an appellate court may interfere with a lower court's sentence for good cause, as where the sentence is wrong in law, in fact or in principle or where the sentence is so manifestly excessive or totally inadequate

that it induces a sense of shock, or where there are exceptional circumstances to justify an interference.

In response to the 1st, 2nd 3rd and 4th grounds of appeal, it was submitted that the conduct of the appellant was very reprehensible and callous. Further that as an Uncle to the beneficiaries of his late brother's estate he had a duty to protect the interests of his niece and nephews as he was in a position of trust and he breached that trust by being secretive and appropriating the terminal benefits for himself. It was contended on behalf of the State that the close relationship is an aggravating factor which necessitates a stiffer punishment. I was implored to take judicial notice of the fact that offences of property grabbing and depriving beneficiaries are prevalent in Zambian society and that the trial court was thus on firm ground in imposing the 12 months sentence based on the prevalence of the offence. She cited the case of SYAKALONGA v. THE PEOPLE (1977) ZR 61 where it was stated:

> ***"One of the principles of sentencing is for the purpose of deterring other would be wrongdoers from commiting similar offences, and it is perfectly proper to refer to the prevalence of an offence and to use that prevalence as a basis for imposing a deterrent sentence."***

I have considered the said submission from both Counsel and taken them into account in arriving at my decision. There is no dispute that the beneficiaries in this case were all related to the Appellant and were young school going children. Further, the amount of money involved was quite large by any standard. Indeed, even if no evidence was laid in the

Court below as to the prevalence of this offence in the Appellant's community, I can take judicial notice of its prevalence and the fact that it is rarely reported and not sufficiently punished for.

I therefore find that in the circumstances of this case, the trial Magistrate was on firm ground to impose a custodial sentence on the Appellant even though he was a first offender. I, therefore, find no merit in the appeal and I dismiss it.

The Appellant is informed of his right of further appeal.

Delivered in Open Court, at Lusaka, the 9th day of December, 2014.

I.C.T. Chali
JUDGE