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**THE PEOPLE v DAVIES MUMENO**  
**(1990 - 1992) Z.R. 13 (H.C.)**

HIGH COURT  
W.M. MUZYAMBA, J.  
10TH JULY, 1990  
(REVIEW CASE NO. HPR/79 OF 1990)

**Flynote**

Criminal law and procedure - Sentence - Offence of which convicted carries sentence of fine only - Whether trial court competent to order corporal punishment.

**Headnote**

The accused pleaded guilty to and was convicted of the offence of unlicensed driver contrary to s.110 ss. (1) of the Roads and Road Traffic Act, Cap. 766 of the Laws of Zambia and was sentenced to five strokes of a cane.

Section 110(1) of the Roads and Road Traffic Act, however, provides that any person convicted of driving a motor vehicle without licence, either for the first, second or subsequent offence, is liable to a fine only.

**Held:**

Where a person is convicted of an offence which carries a sentence of a fine only, he cannot be ordered to receive strokes of a cane [s. 27(2) of the Penal Code, Cap. 146].

**Case referred to:**

(1) Berejena v The People (1984) Z.R. 19.

**Legislation referred to:**

1. Criminal Procedure Code, Cap. 160, s. 338.
2. Penal Code, Cap. 146, ss. 27(1), 27(2), 27(3).
3. Roads and Road Traffic Act, Cap. 766 s. 110(1).

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**Judgment**

**W.M. MUZYAMBA, J.:**

The accused pleaded guilty to, and was convicted of the offence of unlicensed driver contrary to s.110 ss. (1) of the Road Traffic Act, Cap. 766 of the Laws of Zambia, and was sentenced to five strokes of a cane. I understand from the chief marshal that the sentence has already been carried out.

The case is before me for review under s. 338 of the Criminal Procedure Code, Cap. 10. The Court will not interfere with the conviction because it is unequivocal. With regard to sentence, the issue to be decided is whether or not it is competent for any trial court to order an accused person to be caned where the offence for which he is convicted carries a sentence of a fine only.

Briefly the facts of the case are that the accused, Davies Mumeno, was on 7th June 1990 found driving a motor vehicle namely, Toyota, registration no AAD 3998, on a public road, namely Freedom Way, Lusaka. When he was asked to produce a driving licence he failed to do so and he was subsequently arrested and charged with the subject offence. When he appeared in court, he pleaded guilty and was convicted accordingly, and when passing sentence the trial court said, and I quote:

"The courts will not allow persons to be violating traffic laws by saying they will be fined and pay for driving without a licence. The courts will now be tough against such offenders."

The court then ordered that the accused receive five strokes of the cane.

Section 110 ss. (1) of the Roads and Road Traffic Act provides as follows:

"110(1) No person shall drive a motor vehicle on a road unless he is a holder of a driving licence authorising him to drive a vehicle of that class or description, and no person shall permit or employ any person to drive a motor vehicle on a road unless that person is a holder of such a driving licence and if any person acts in contravention of any of these provisions he shall be guilty of an offence and liable upon conviction, in the case of a first offence, to a fine not exceeding one hundred kwacha."

This is a proviso to this section which is not relevant for the purpose of this judgment. It is quite clear from the above section that any person convicted of driving a motor vehicle without a licence, either for the first, second or subsequent offence, is liable to a fine only.

And s.27 ss. (1), (2) and (3) of the Penal Code Cap.146 provides as follows:

"27(1) No person shall be sentenced to undergo corporal punishment for any offence except as provided in ss. (2), (3), (4) and (5).

(2) Where any person under the age of 21 years is convicted of any offence punishable by imprisonment for a term of or exceeding three months, the Court may, in its discretion, order him to be caned in addition to or in substitution for such imprisonment;

'Provided always that a court shall not order caning where imprisonment may be ordered only on non-payment of a fine or upon insufficient distress.

(3) The court may sentence to caning a person convicted of burglary, house breaking or theft in circumstances where it is expedient in the interests of the community to order caning or of an offence specified in the First Schedule."

I will hasten here to say that the offence of unlicensed driver under Cap. 766 is not one of the offences specified in the First Schedule to the Penal Code.

It is quite clear from the above section that where a section under which a juvenile is convicted provides for a term of imprisonment of three months or more, a juvenile may, at the discretion of the trial court, be ordered to receive strokes of a cane in addition to or in substitution for such imprisonment. It is also quite clear that an adult male is amenable to corporal punishment under ss. (3). The question, as I said earlier on, is whether or not it is competent for the trial court to order an accused person to receive strokes of the cane where he is convicted of an offence which carries a fine only.

It is quite clear to me from s. 27, ss. (2) of the Penal Code that where a person is convicted of an offence which carries a sentence of a fine only, he cannot be ordered to receive strokes of a cane. It is even so where he fails to pay a fine and is sent to prison. That this is so, is quite clear from the proviso to ss. (2).

I find, therefore, that the learned trial magistrate erred in principle in sentencing the accused to five strokes of a cane. Accordingly, I set aside  
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the sentence. However, since the sentence which was imposed has already been carried out, I do not propose to substitute any other sentence.

In passing off I would like to echo what the Supreme Court said in the case of *Berejena v The People* [1] at page 21 that the corporal punishment is a form of inhuman and degrading punishment which should be imposed sparingly and only in most serious circumstances such as grave brutality or serious outbreak of crime; mere prevalence of crime does not justify

imposition of such punishment.