IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL NO. 116 OF 1999

(CRIMINAL JURISDICTION)

B E T W E E N:

BOSTON MULENGA	1ST APPELLANT
WILSON SHAKA	2ND APPELLANT
AND	
THE PEOPLE	RESPONDENT

CORAM: NGULUBE, CJ, SAKALA AND LEWANIKA, JJS,
On 8th December, 1999.

For appellant - Mrs. J.C. Kaumba, Assistant Principal State Advocate,
Directorate of Legal Aid.

For respondent - Mr. D. Mupeta, Senior State Advocate, Legal Aid.

J U D G M E N T

NGULUBE, CJ, delivered the judgment of the court.

Cases referred to:

1. **TAPISHA –v- THE PEOPLE (1973) ZR 222.**
2. **WAKILABA (1979) ZR 74.**
3. **MUDENDA (1981) ZR 174.**
4. **MBUMWAE AND MWALA –v- THE PEOPLE (1995-97) ZR 135.**

The appellants appeared in the High Court on a charge of murder and at an early stage in the proceedings the State applied to reduce the charge to one of manslaughter. The application was granted, and the appellants pleaded not guilty to the reduced charge. At the conclusion of the trial, the learned trial Judge we take it by oversight convicted of the original capital charge. We affirm that persons cannot be convicted in this fashion on a more serious charge on which they have not been tried.

Mrs. Kaumba's first ground of appeal questioned the capital conviction when the charge had been reduced. We agree with her and Mr. Mupeta quite properly concedes it. It follows that the convictions on the capital charge are immediately quashed. Mrs. Kaumba has also argued that there was no evidence of any kind upon which the first appellant could have been convicted. Again Mr. Mupeta quite properly concedes and does not support the conviction of the first appellant. We agree with Counsel on both sides, and we express mild surprise that the first appellant could be convicted of homicide solely because he was earlier on seen drinking with the deceased person in a tavern. The appeal of the first appellant is allowed in full, he is acquitted and the sentence quashed. He is to be freed from custody unless he is otherwise lawfully imprisoned on something else.

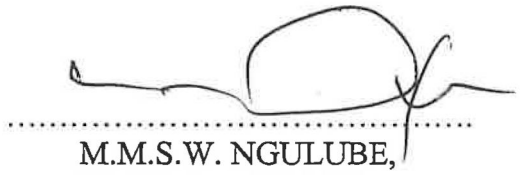
With regard to the second appellant, the evidence against him was circumstantial and it is Mrs. Kaumba's submission that such evidence was not sufficiently cogent to take the case out of the realm of speculation and conjecture. The evidence came from his nephew who was PW1 in the case. The upshot of such evidence was that the second appellant was grumbling about the death of his daughter and informed the witness that he would that day do something to somebody. The witness saw the appellant straightening some nails. He also saw him preparing some paraffin in a goldspot container. The prosecution evidence was that early the next day, the body of the deceased was found in Fisenge Compound. It was partly burnt and exuding the smell of paraffin. Nearby was a lid of a goldspot bottle similar to the one PW1 had seen. In addition, there was evidence that, the body of the deceased had a nail which had been driven into the head. On this evidence, it is the submission of Mr. Mupeta that a very strong circumstantial case was made out. We have considered this case most anxiously. We agree with Mr. Mupeta that it would have been too

much of a coincidence that there should be found in this case and on the body of the deceased person a concatenation of factors so similar to the preparations the second appellant was making. We are satisfied that the case was beyond conjecture and that a conviction for manslaughter would have been fully warranted and will now be imposed by this court in place of the capital conviction which was quashed.

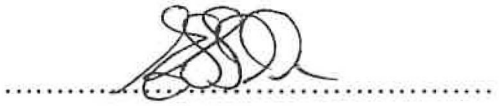
Before we leave this matter, we should also refer to a confession statement alleged to have been made by the second appellant. The second appellant had alleged at the trial that he did not give a statement but he was only forced to sign one. The learned trial Judge considered this not to be a proper ground for objection and that it simply raised a general issue which did not require a trial within the trial. This was a clear misdirection and in this regard, we wish to draw attention of the trial court and all those involved in a trial in which an accused alleges that he was forced to sign, that the law in this country has long been that the signature on the confession statement is as much a part of that statement as everything else in it. Since voluntariness is a condition precedent to the admissibility of a confession statement, a statement disputed on the ground that the signature was forced should have voluntariness resolved in the ordinary way by trial within a trial. We draw attention of the learned trial Judge to the case of **TAPISHA –v- THE PEOPLE**(1) which has been followed consistently in subsequent cases including such cases as **WAKILABA**(2) the case of **MUDENDA** (3) and that of **MBUMWAE and MWALA –v- THE PEOPLE.**(4) It follows that the confession of the second appellant was wrongly admitted, and the conviction of this appellant can only stand if in relation to him we can apply the proviso to Section 15 of the Supreme Court of Zambia Act which we can only do if on the remainder of the evidence he would have been convicted in any

event. We are satisfied that on the circumstantial case already discussed a conviction for manslaughter was fully warranted.

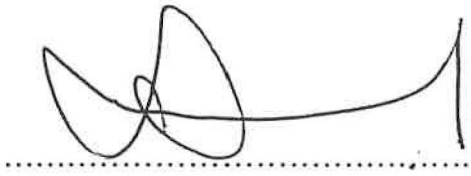
With regard to the substituted charge of manslaughter, we would like the appellant to realise that we take a dim view of the taking of life in this fashion. The case itself was fairly horrific and in all the circumstances we consider a sentence of ten years imprisonment with hard labour as appropriate. The ten years will be effective from 27th November, 1997, when the appellant was finally apprehended and arrested for this case. The appeal succeeds to the extent indicated.



M.M.S.W. NGULUBE,
CHIEF JUSTICE.



E.L. SAKALA,
SUPREME COURT JUDGE.



D.M. LEWANIKA,
SUPREME COURT JUDGE.