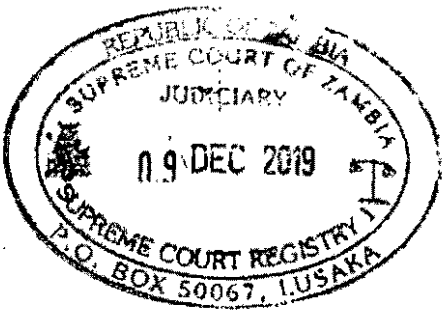
IT

IN THE SUPREME COURT OF ZAMBIA Appeal No. 119/2018
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:



KENNEDY MBAO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Kaoma and Chinyama, JJS.

On 5th November, 2019 and 9th December, 2019

For the Appellant: Mr. I. Yambwa, Legal Aid Counsel

For the Respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate

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J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Nondo v Director of Public Prosecutions (1968) Z.R. 83**
2. **Adam Berejena v The People (1984) Z.R. 19**
3. **Simon Mbozi and Paul Nyambe v The People (1987) Z.R. 101**
4. **Nasilele v The People (1972) Z.R. 197**
5. **Iiunga Kalaba and another v The People (1981) Z.R. 102**
6. **Alubisho v The People (1976) Z.R. 11**
7. **Jutronich, Schutts and Lukin v The People (1965) Z.R. 9**
8. **R v Ball (1951) 35 Criminal Appeal Reports 164**
9. **Philip Mungala Mwanamubi v The People - Selected Judgment No. 14 of 2013**

Legislation referred to:

1. **Penal Code, Cap 87 of the Laws of Zambia, section 328(1)(a)**

1 Introduction

1.1 This appeal is against both conviction and sentence. The Subordinate Court at Mpulungu convicted the appellant aged 33 years, of arson contrary to section 328(a) of the Penal Code. It was alleged that on 4th May, 2015 he willfully and unlawfully set fire to the dwelling house of Richard Siwamezi destroying property valued at K10,420.

2 Background facts and evidence in the Subordinate Court

2.1 The prosecution evidence established that on 3rd May, 2015 the appellant's father complained to, PW2 (the village headman) that the appellant had stolen fuel from his house. PW2 assigned PW1 and another Community Crime Prevention Unit member to apprehend the appellant. That evening the appellant was apprehended around 19:00 hours and tied with a rope. However, he broke the rope and escaped whilst threatening to burn PW1's house.

2.2 Later, that night around 01.00 hours, PW1's house was set on fire. When PW1 and his wife, PW4 went outside, they saw a person running away within their premises. PW1 immediately caught that person who turned out to be the appellant.

2.3 Sadly, they failed to extinguish the fire as it had spread but they managed to rescue their children from the burning house. Property valued at K10,420 was lost in the fire. PW1 reported the matter to PW2 who later searched the appellant, and found a box of matches in his pocket.

2.4 The appellant in his defence denied burning the house. He claimed that he was apprehended from home about 06:00 hours where he was with friends and only saw the box of matches in court. DW2, his witness, refused being with the appellant on the material date. Instead, he confirmed in cross-examination that the appellant burnt the house.

3 **Consideration of the matter by the Subordinate Court**

3.1 The trial magistrate was alive to the fact that no one saw the appellant setting fire to the house; that the only evidence the prosecution relied on was that earlier the appellant had threatened to burn PW1's house and at 01:00 hours, the house was burnt; and that the appellant was found outside, standing near the burning house.

3.2 The magistrate applied the case of **Nondo v Director of Public Prosecution**[1], whose facts were similar to the facts of this case. In that case, the Court of Appeal held that

when the prosecution fails to put forward eyewitness proof that the accused set the fire in question, it must disprove "any possibility" of accidental fire. The Court stated that this is done normally by calling the people from the house to testify that they put out their cooking fires and that there was no grass fire from which sparks might come.

3.3 In this case, the trial magistrate accepted PW1's evidence that before going to bed they ensured that all the fire on the brazier was put out and that there was no fire inside or outside the house that could have sparked a fire. On that ground, he distinguished this case from the **Nondo**[1]case.

3.4 He concluded that the circumstantial evidence before him could permit only of one inference that the appellant burnt the house. He convicted the appellant and committed him to the High Court for sentence.

4 **Consideration of the matter by the High Court**

4.1 The learned High Court judge, late Chali, J., was satisfied that PW1's house was set on fire. On whether the appellant was the real culprit, the judge considered the facts as stated in paragraph 3.1 above. He held the view that the apprehension of the appellant near the crime scene and the

finding of the box of matches on him provided some other connecting evidence between the appellant and the offence, which excluded the dangers of false implication. Consequently, he upheld the conviction.

4.2 In sentencing the appellant, the judge considered that the offence was unprovoked and that had it not been for the alertness of PW1 and PW4, some lives could have been lost. The judge also accepted that the appellant was a first offender but he decided to punish him more severely in order to send a message to other like-minded criminals. He also considered the high value of the property lost in the fire and that the offence of arson was becoming very prevalent in Northern and Muchinga Provinces. He sentenced the appellant to forty years imprisonment with hard labour with effect from date of arrest.

5 **Appeal to this Court and arguments by the parties**

5.1 The appellant has advanced two grounds of appeal. In ground 1, he alleges that the trial judge erred in law and fact when he convicted him on circumstantial evidence that did not permit only an inference of guilt. In ground 2, he attacks the sentence of forty years imprisonment.

5.2 In support of ground 1, Mr. Yambwa submitted in his heads of argument that although PW1 testified that the appellant threatened to burn his house in the hearing of people in the village, he did not call any of those witnesses to confirm the allegation and he may have had an interest to implicate the appellant after he overpowered them.

5.3 Counsel contended that the finding of the box of matches on the appellant was not conclusive that he was the culprit and that the court should have taken judicial notice that people in villages move around with matches for lighting fires. He also argued that the court should have considered another alternative inference that the appellant may have been one of the first people to notice the fire and had gone to help.

5.4 In support of ground 2, counsel submitted that the sentence was severe considering that the appellant was a first offender who was entitled to some leniency. He cited the case of **Berejena v The People**[2] where we stated that:

> **"An appellate court may interfere with a lower court's sentence only 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."**

5.5 Counsel also cited the case of **Mbozi and another v The People**[3] where we quoted a passage from the case of **Nasilele v The People**[4] as follows:

> **"It is trite that a bad record must not be a basis for imposing a heavier sentence than the offence itself warrants. In other words, the first decision must always be: what is the proper sentence for the offence, and ignoring at this stage the presence or absence of mitigating factors; only after deciding what is the proper sentence for the offence itself does the Court proceed to consider to what degree that sentence may properly be reduced because of the presence of mitigating factors. These principles are no less applicable when the offence is one for which Parliament has prescribed a minimum sentence; by doing so Parliament has expressed the intention that all offences of the particular type be treated more seriously than previously. The effect is that for the least serious offence of stock theft, or where there are mitigating factors enabling the Court to exercise maximum leniency, the minimum sentence should be imposed, while for more serious offences, and where there are insufficient mitigating factors to enable the Court to exercise maximum leniency, a more severe penalty should be imposed."**

5.6 Counsel argued that the court had recorded the appellant's mitigation but looking at the resulting severe sentence it appears that the court did not consider the mitigation.

5.7 Counsel further submitted that the court should have considered the appellant's youthful age and capability to reform as a first offender instead of condemning him to a long prison term. That the sentence must come to us with a sense of shock, considering that there is a mandatory

minimum sentence of ten years. Counsel invited us to set aside the sentence and to impose a reasonable one.

5.8 In contrast, Mrs. Chipanta-Mwansa supported the conviction and sentence. She submitted in her oral response to ground 1 that the evidence on record properly connected the appellant to the offence and that he failed to explain the odd coincidences in this case, which could only lead to an inference of guilt. To support this argument she cited the case of **Ilunga Kalaba and another v The People**[5].

5.9 As to ground 2, learned counsel alluded to the aggravating factors mentioned by the learned judge as stated in paragraph 4.2 above and submitted that the sentence was appropriate considering the gravity of the offence.

6 **Consideration of the matter by this court and decision**

6.1 We have considered the evidence on record and the arguments by learned counsel. As regards the conviction, there was strong circumstantial evidence, as found by the trial magistrate, which the learned judge also accepted that PW1 caught the appellant at the scene of crime, a few hours after he had threatened to burn PW1's house and that he was found with a box of matches in his pocket.

6.2 As submitted by Mrs. Chipanta-Mwansa, the appellant did not explain these odd coincidences, which supported the finding by the trial magistrate that he set the house on fire and the magistrate properly ruled out the possibility of an accidental fire. Besides, the appellant's own witness confirmed that he was the one who burnt the house. The appellant did not even attempt to impugn that evidence.

6.3 Further, we find no basis on which the trial court could have taken judicial notice that people in villages move around with matches for lighting fires because this is not a notorious fact.

6.4 Neither do we accept that the trial court should have considered that the appellant was among the first people to notice that the house was on fire and went there to help. Had that been the case, he would not have run away when PW1 and PW4 got outside. On the facts of this case, PW1 could not have wrongly implicated the appellant. Therefore, we dismiss the appeal against conviction.

6.5 Coming to the sentence, in the case of **Alubisho v The People**[6], we referred to the decision of the Court of Appeal

in **Jutronich, Schutts and Lukin v The People**[7], where Bladgen, C.J., (as he then was) stated that:

> **"In dealing with an appeal against sentence the appellate court should ask itself these questions:**
> **1) Is the sentence wrong in principle?**
> **2) Is it manifestly excessive so that it induces a sense of shock?**
> **3) Are there any exceptional circumstances, which would render it an injustice if the sentence were not reduced?**
>
> **Only if one or other of these questions can be answered in the affirmative should the appellate court interfere."**

6.6 In that case, Bladgen, C.J., further referred to the case of **R v Ball**[8] where Mr. Justice Hilbery stated the principles, which should guide a court in passing sentence as follows:

> **'In deciding the appropriate sentence, a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it'."**

6.7 We also alluded to the above principles in the case of **Philip Mungala Mwanamubi v The People**[9].

6.8 In this case, the appellant was a first offender. Therefore, as guided in the **Nasilele**[3] case, which we have referred to in paragraph 5.5 above, he was liable to the statutory minimum sentence of ten years imprisonment. However, he got a sentence of forty years imprisonment. The question is whether forty years was a proper sentence given the circumstances in which the offence was committed.

6.9 We recognise that the appellant set the house on fire in the middle of the night whilst PW1 and his family were sleeping and put the lives of the entire family at risk of perishing in the fire. We accept that he did so out of spite, because PW1 had apprehended him earlier as already stated.

6.10 However, no one was injured or died in the fire. Although the family lost property valued at K10,420, the appellant was a first offender who was still entitled to leniency. There was no evidence that he had a propensity to commit a similar offence and he had no previous convictions for either theft or arson. Thus, the sentence of forty years imprisonment with hard labour comes to us with a sense of shock for being manifestly excessive and we set it aside.

6.11 We consider that a proper sentence is fifteen years imprisonment with hard labour, as this is what would meet the justice of this case and we impose that sentence.

7 Conclusion

7.1 The appeal fails on conviction but succeeds on sentence.

E.C. MUYOVWE
SUPREME COURT JUDGE

R.M.C. KAOMA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE