

REPORTABLE (121)

SIMBARASHE MUNAKAMWE
v
THE STATE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAKONI JA & MATHONSI JA
HARARE: 19 OCTOBER 2023

The appellant in person

W. Badalane, for the respondent

MATHONSI JA: A convicted killer, who, by all accounts, should have received a stiffer penalty if not the ultimate one, but for the general leniency of the courts, suddenly became unbelievably lenient despite the prosecution's pleas for a sentence of life imprisonment, appealed against the sentence of seventeen years imprisonment. The sentence was imposed on 7 July 2017.

If ever there was a trifling with an appellate court by a recalcitrant, unrepentant and indeed ungrateful litigant, this appeal deserves a special prize for it. After hearing arguments from the parties, with the appellant self-representing, the court was exceedingly unanimous in its rejection of the unmeritorious appeal, which it dismissed out of hand. The court stated that the reasons for doing so would follow. These are they.

THE FACTS

The facts of this matter which are breathtakingly common cause, make for painful reading. On the morning of 11 February 2016 at Mandaza Village under Chief Nyamweda in Mhondoro, the fifteen year old deceased girl was making her way to Chitemere Secondary School, clad in her beautiful school tunic. She was in the company of her school mates in the ordinary course of things, as they had obviously done on countless occasions in their quest for knowledge and intellectual enhancement.

Only that on this particular day evil was lurking in the fringes, the appellant was lying in ambush with obvious intent and filled with all evil demons worse than those that overwhelmed the biblical Legion. Armed with a kitchen knife he had snatched from his wife's kitchen back in Harare, the appellant emerged from the side of the road and rushed towards the deceased in the full glare of the other innocent young souls. He was wielding the 15 centimeter bladed kitchen knife.

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The appellant launched his first frontal attack, a completely unprovoked aggression on an innocent sister-in-law he had abused continuously for two years commencing when she was thirteen years old. The abuse had been discovered by his wife, sister to the deceased, when she intercepted text messages between the deceased and the appellant.

It was upon being exposed that the appellant's criminal enterprise commenced. First, he travelled from Harare all the way to Mhondoro under the cover of the night aboard a hired taxi. Upon arrival, staggering and with a bottle of beer in hand, he confronted his father-in-law and his mother-in-law demanding to marry the fifteen year old victim. When he was rebuffed, somehow his warped mind took this as an insult. His resolve,

if he was not going to marry the deceased, no one else would. Never mind that he was already married, and to none other than the deceased's elder sister, and that the deceased was a mere school going child.

Second, even though he returned to Harare that night, first thing the following morning the appellant again hired another car to take him back to Mhondoro. This time he asked to be dropped off a distance away from his in-laws' homestead and waylaid the deceased on her way to school. As already stated, upon seeing the deceased, the appellant launched an unprovoked attack.

Sensing danger, the deceased tried to run away but fell down facing up. The appellant sat on her stomach and started stabbing her all over the body. It took the intervention of some villagers for the appellant to stop the stabbing and stand up telling them that the deceased's parents knew why he was viciously attacking the girl. The deceased stood up and staggered towards her home only to collapse and die some fifty metres away. The appellant then made a feeble attempt to take his own life using the same knife but could not even penetrate his body before being arrested by villagers.

PROCEEDINGS BEFORE THE COURT A QUO

For his troubles, the appellant was arraigned before the court *a quo* on a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He pleaded not guilty and put up a spirited fight arguing that, in stabbing the deceased the way he did, he was trying to repossess the school uniform she was wearing because he is the one who had bought it for her.

The court *a quo* found that the deceased died from hypovolemic shock secondary to multiple stab wounds and assault and that, it being a condition where the body rapidly loses blood or fluid supply, she died a painful but rapid death. It found that it was proved beyond a reasonable doubt that the appellant is the one who stabbed the deceased inflicting mortal wounds.

The court *a quo* found further that the appellant pre-planned the killing of the deceased, carried a knife from Harare for that purpose and executed his plan. It therefore returned a verdict of guilty of murder with intent. _

In considering sentence, the court *a quo* accepted the concession by state counsel that there were extenuating circumstances in the case, the offence having been committed prior to the amendments to s 47 (2) of the Criminal Law (Modification and Reform) Act and ss 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:06*]. The amendments introduced a new sentencing regime for murder.

The court *a quo* took into account that the appellant was an unsettled person prior to the commission of the offence due to his differences with his wife and his in-laws. He had taken to excessive drinking and the court *a quo* considered the events of the night prior to the killing of the deceased as having influenced his conduct the following morning.

After weighing the mitigating factors against the aggravation, the court *a quo* reasoned that:

“The accused person stood in *loco-parentis* towards the deceased because he looked after her by providing for her needs. It was an abuse of such relationship for the accused to wish to make the deceased his wife at the tender age of 15 years. The accused’s conduct of starting a love affair with the deceased was therefore abusive of

the deceased. The accused knew that the deceased was under the age of marriage when he engaged in a love relationship with the deceased. Such conduct should be frowned upon by the courts which have a mandate under s19 of the Constitution to ensure that the best interests of children be made paramount.

The accused committed the offence in a brutal and callous manner using a dangerous weapon, a knife. The deceased could not defend herself. She died a painful though quick death. The accused was selfish and cowardly in his conduct. He attacked a defenceless child. The murder was heartless, senseless and selfish”.

The court *a quo* then settled for the sentence of seventeen years imprisonment.

PROCEEDINGS BEFORE THIS COURT

After serving more than six years of the sentence imposed by the court *a quo* the appellant appealed against the sentence on the following grounds;

- “1. The court *a quo* upon adopting Supreme Court appeal analysis on the case circumstances of *Siluli*- case erred to pass (sic) harsh sentence that confirmed in *Siluli* case (sic). **Judgment No. SC 121/23**
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2. The court *a quo* erred to ignore statutory provision of s 239 (1) (2) (a) of the Criminal Code. The court *a quo* erred to consider circumstances which cause (sic) appellant to lose self- control. Therefore proper sentence should have been proper to culpable homicide (sic).
3. Further, the court *a quo* erred and misdirected upon failing to give proper weight to appellant factual circumstances (sic) of intoxication to pass fair sentence.
4. The court *a quo* failed to consider provision of s49 of the Criminal Law (Codification and Reform) Act.

Wherefore appellant prays for duplication of sentence as passed on *Siluli* case SC146/04 through application of judicial character of continuity rule.”

The grounds of appeal are typically those of a self-representing litigant without the benefit of legal counsel. They border on the meaningless. Be that as it may they raise only one issue for determination on appeal namely; whether or not the court *a quo* erred in imposing the sentence of seventeen years imprisonment.

The appellant submitted that once the court *a quo* made a finding that his wife and his in-laws fuelled the events that resulted in the killing of the deceased, it should have settled for a lesser sentence. In his view the appropriate sentence should be thirteen years imprisonment as in the case of *S v Siluli* SC 146/04. He submitted further, even though he does not know the number of times he stabbed the deceased, that the court should credit him for the positive strides he has made since he went to prison.

The appellant revealed that he is now the proud holder of a certificate of baptism, certificate of peace education and a certificate of prisoner`s journey. He rounded off by saying that the fact that the court *a quo* granted him leave to appeal means that his appeal has merit and that this court should accord him the opportunity to come out of prison so that he raises money to compensate his in laws for their loss.

In opposing the appeal Ms *Badalane* for the respondent sought to distinguish this case from the *Siluli* case. She submitted that the facts of the *Siluli* case suggest that it was more or less a “thin skull” case in that the deceased had died from an isolated blow which ordinarily would not have killed a person. In counsel`s view there are no similarities in the two cases.

It was further argued on behalf of the state that the court *a quo* took into account all the relevant factors in arriving at the sentence to the extent of crediting the appellant for intoxication which he had denied. Counsel urged the court to dismiss the appeal for lack of merit.

THE LAW

The starting point is to make the general observation that the objective of sentencing is to correct, rehabilitate and punish convicted offenders in a just and proportionate manner. While reformation and rehabilitation of offenders is a relevant consideration, retribution is still part of the sentencing policy of this jurisdiction. In other words, the sentencing court must always bear in mind that sentencing is also aimed at ensuring that the offender faces a sentence that is in equal measure to the harm he or she has caused. Anything short of that will bring the criminal justice system into disrepute.

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Having said that, it must also be stated that the position is settled in our law that sentencing is, first and foremost, pre-eminently the discretion of the trial court. The purpose of discretion is certainly to allow the sentencer to select the sentence which he or she believes to be most appropriate in the individual case having regard to the facts and the circumstances of the offender.

As to when an appeal court can interfere with the discretion of a trial court, it is also settled that interference can only be done where the sentence is disturbingly inappropriate or where the discretion has been exercised capriciously or upon a wrong principle. The law is impressively captured by MALABA DCJ (as he then was) in *Muhomba v The State* SC 57/13 at p 9 as follows;

“On the question of sentencing, it has been said time and again, that sentencing is a matter for the exercise of discretion by the trial court. The appellate court would not interfere with the exercise of that discretion merely on the ground that it would have imposed a different sentence had it been sitting as a trial court. There has to be evidence of a serious misdirection in the assessment of sentence by the trial court for the appellate court to interfere with the sentence and assess it afresh. The allegation in this case is that the sentence imposed is unduly harsh and induces a sense of shock. In *S v Mkombo* HB – 140-10 at p 3 of the cyclostyled judgment it was held that:

‘The position of our law is that in sentencing a convicted person, the sentencing court has a discretion in assessing an appropriate sentence. That discretion must be exercised judiciously having regard to both the factors in mitigation and aggravation. For an appellate tribunal to interfere with the trial court’s sentencing discretion there should be a misdirection. See *S v Chiweshe* 1996 (1) ZLR 425 (H) at 429D; *S v Ramushu & Ors* S-25-93.

It is not enough for the appellant to argue that the sentence imposed is too severe because that alone is not misdirection and the appellate court would not interfere with a sentence merely because it would have come up with a different sentence. In *S v Nhumwa* S – 40 -88 (unreported) at p 5 of the cyclostyled judgment it was stated:

‘It is not for the court of appeal to interfere with the discretion of the sentencing court merely on the ground that it might have passed a sentence somewhat different from that imposed. If the sentence complies with the relevant principles, even if it is severe than one that the court would have imposed sitting as a court of first instance, this Court will not interfere with the discretion of the sentencing court.’”

It is in that context that even the applicability of the case of *Siluli, supra*, will be considered.

EXAMINATION

Upon convicting the appellant of murder with intent the court *a quo* had a discretion to sentence the appellant to up to life imprisonment even after finding extenuating circumstances. It did not. Instead it settled for seventeen years imprisonment giving valid

reasons. To that extent therefore, that sentence fell squarely within the sentencing discretion of the court *a quo*, a discretion which cannot be interfered with on appeal.

During his submissions on appeal the appellant made reference, *ad nauseum* to the authority of *Siluli* pleading with the court to apply its reasoning. That case is spectacularly of no relevance to the present case. The facts were that the appellant therein and the deceased had been dating the same girlfriend. On the fateful night the appellant arrived first at the girlfriend's residence and asked to be intimate with her but was turned down.

After the appellant had been sent away by the girlfriend, the deceased arrived and was seen by the appellant fondling the girlfriend's breasts and bottom in what this Court inferred to have been a prelude to intimacy. Shortly after that the appellant struck the deceased once on the head with the girlfriend's pestle. The court found the degree of force used to have been moderate because the deceased had died some ten days after the assault.

The trial court had found no extenuating circumstances and imposed the death penalty. This Court found extenuating circumstances in that the appellant had been piqued by the girlfriend's readiness to be intimate with the deceased after turning down his amorous advances earlier on. It quashed the death sentence.

Taking into account that it was a crime of passion and that the appellant had administered a single blow on the deceased who died ten days later, the court assessed a sentence of thirteen years imprisonment. Those facts are completely at variance with the present case.

Here we have a thirty three year old man, who cheated on his wife with his under-aged sister-in-law, obviously taking advantage of the girl's poor background to lure her with freebies. When he was caught, he was so arrogant and disrespectful to the extent of approaching his in-laws in a high state of inebriation at night carrying a beer, demanding marriage with a child.

The appellant saw it as his God given right to end the life of an innocent young girl who had done him no wrong simply because her parents could not let him perpetuate his abuse of the child. There was absolutely nothing in the appellant's favour as would attract a lesser sentence. Quite to the contrary, the court *a quo* was very lenient with him to the extent of finding drunkenness where there was no evidence of any. The appellant had been drunk the previous night. He had ample time to sober up overnight and there was no evidence that he partook of alcohol consumption on the morning before he killed the deceased.

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The same applies to the court *a quo*'s finding that the appellant was provoked by his wife and mother-in-law. If indeed he was, that was extremely unreasonable. It is his wife and mother-in-law who had a reason to be provoked not the other way round. All this points to the fact that the appellant should be grateful that he got a lenient sentence when he deserved a harsher one.

DISPOSITION

The sentence imposed fell within the sentencing discretion of the court *a quo*. No basis for interference with it has been established. The appeal is demonstrably without merit. For some reason the appellant thinks that he can get away with what he did, abusing

an under-aged girl before murdering her in the most brutal manner, and then compensating her parents.

It does not work like that. There are consequences for criminal conduct. The sentence he is serving is one of them. It should serve as a warning to other pedophiles that the courts will not let them off the hook. It is for these reasons that this court dismissed the appeal.

GUVAVA JA : I agree

MAKONI JA : I agree

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