

IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT CHIPATA  
(Criminal Jurisdiction)

HPJA/03/2018

**BETWEEN:**

JOSEPH MWANZA  
YOBE TEMBO  
AND  
THE PEOPLE



1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT  
  
RESPONDENT

**BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA THIS 26<sup>TH</sup> DAY OF APRIL  
2018**

**APPEARANCES**

FOR THE APPELLANT : MR. J. PHIRI, SENIOR LEGAL AID COUNSEL OF  
LEGAL AID BOARD

FOR THE RESPONDENT : MRS. A.N. SITALI, DEPUTY CHIEF STATE  
ADVOCATE APPEARING WITH MR. M. LIBAKENI  
ACTING SENIOR STATE ADVOCATE OF NATIONAL  
PROSECUTIONS AUTHORITY

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**J U D G M E N T**

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**LEGISLATION REFERRED TO:**

1. THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA
2. THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF  
ZAMBIA

**AUTHORITIES REFERRED TO:**

1. ISAAC SIMUTOWE AND OTHERS V THE PEOPLE (2004) ZR 91
2. MUKE AND ANOTHER V THE PEOPLE (1983) ZR 94
3. ALFRED MULENGA V THE PEOPLE (1977) ZR 106
4. ALUBISHO V THE PEOPLE (1976) ZR 11

5. CHOMBA V THE PEOPLE 1975 ZR 245

**Joseph Mwanza** and **Yobe Tembo**, the appellants herein were charged before the Subordinate Court of the first class in Petauke district on one count of unlawful possession of firearm contrary to section 10(1)(2)(a)(b) of Chapter 10 of the Laws of Zambia, one count of unlawful hunting in an open area contrary to section 67 of the Zambia Wildlife Authority Act Number 12 of 1998 of the Laws of Zambia, one count of unlawful possession of government trophy of unprotected animal contrary to the said Act Number 12 of 1998 and one (1) count of unlawful possession of prescribed trophy contrary to section 136(1)(a) of Act Number 12 of 1998 as follows:

**Count 1**

The particulars of offence alleged that **Joseph Mwanza and Yobe Tembo** on the 20<sup>th</sup> day of June, 2015 at Nyimba in the Nyimba District of the Eastern Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did possess a firearm namely 458 rifle without a firearm license as it is required by law.

**Count 2**

The particulars of offence alleged that **Joseph Mwanza and Yobe Tembo** on the 20<sup>th</sup> day of June, 2015 at Nyimba in the Nyimba District of the Eastern Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did hunt three elephants without a permit issued by the Director General of the Zambia Wildlife Authority in respect therefore.

**Count 3**

The particulars of offence were that **Joseph Mwanza and Yobe Tembo** on the 20<sup>th</sup> day of June, 2015 at Nyimba in the Nyimba District of the Eastern Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did possess 8 kilograms of Elephant meat attached to it with bones without a certificate of ownership issued by the Director General of the Zambia Wildlife Authority in respect thereof.

**Count 4**

The particulars of offence were that **Joseph Mwanza and Yobe Tembo** on the 20<sup>th</sup> day of June, 2015 at Nyimba in the Nyimba District of the Eastern Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did possess 45 kilograms of Ivory without a certificate of ownership issued by the Director General of the Zambia Wildlife Authority in respect thereof.

The appellants pleaded guilty to all counts and were sentenced to 3 years imprisonment with hard labour on the first count, 12 months imprisonment with hard labour on the second count, 3 years imprisonment with hard on the third count and 5 years imprisonment with hard labour on the fourth count, the sentences to run consecutively.

Being dissatisfied with the sentence, the appellants appealed before this court. Their ground of appeal is that the trial court erred in ordering the sentences to run consecutively. In support of this ground, he referred to the case of **Isaac Simutowe and others v the People (2004) ZR 91** wherein the court confirmed the principle that where an accused person has engaged in a course of conduct and in the process has committed many offences, the court should assess the proper sentence which is appropriate for the whole course of conduct. The appellant went on to refer to the case of **Muke and another v the People (1983) ZR 94** in which the court held that where the facts of the case disclose a series of offences forming a course of conduct, the proper procedure is for the sentence to run concurrently.

Counsel for the appellants filed written head of argument for which I am greatly indebted.

Counsel for the appellant submitted that the trial court misdirected itself when it ordered the sentences to run consecutively. Counsel cited the case of **Alfred Mulenga v The People (1977) ZR 106** to buttress his submission. In that case the court decided that concurrent sentences were a better course when dealing with offences which form part of a systematic course of conduct. Counsel also submitted that a consecutive sentence was wrong in principle.

Counsel drew the court's attention to the case of **Alubisho v The People (1976) ZR 11** in which it was held alia that:

**“In dealing with an appeal against sentence the appellate court should ask itself three questions:**

- (1) Is the sentence wrong in principle?**
- (2) Is it manifestly excessive or so totally inadequate 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 the other of these questions can be answered in the affirmative should the appellate court interfere.”**

I have considered the appeal and I wish to comment that when a person is convicted at a trial of more than one crime he may be given consecutive sentences. Circumstances when such a sentence may be appropriate are: where a person is charged with several counts which do not form a single transaction or a systematic course of conduct; where one of the offences was committed while the offender was on bail for the other; use of violence to avoid apprehension for another offence; possession of a firearm at the time of committing an offence and breaches of conditions of probation, conditional discharge or suspended sentence.

However, sentences may be concurrent where offences arise out of the same transaction or incident (whether or not they arise out of precisely the same facts) and where a series of offences are committed against the same victim within a short period of time.

In **Chomba v The People**, the court held, inter alia, that:

**“When dealing with a series of offences comprising a course of conduct...we have pointed out that although there are anomalies**

**inherent in each of the two possible methods the better course is to impose concurrent sentences in respect of all the charges, the length of each sentence being that which the court considers appropriate for the total course of conduct."**

In the case before me, the appellants admitted all the counts with which he was charged. It is my considered view that the offences formed a systematic course of conduct for the purpose of sentencing as they were committed on the same day. A concurrent sentence would therefore have been most appropriate in respect of all the counts, the length to reflect the court's desire to punish the appellants for their total conduct.

I further noted that the sentence was imposed by a magistrate of the first class and thereby draw guidance with regard to his jurisdiction from *Section 7 of the Criminal Procedure Code* which stipulates the following:

*"...a subordinate court presided over by a magistrate of the first class shall not impose any sentence of imprisonment exceeding a term of five years"*


From the foregoing, a magistrate of the first class can impose a term of imprisonment which does not exceed five (5) years on each count.

In this matter, the sentences passed on all counts aggregated to imprisonment for twelve (12) years. It is my view that if the magistrate considered the offence as being so serious that it deserved a stiffer punishment to be meted, he ought to have sent the matter to the High Court for sentencing.

I therefore quash the order that the sentences are to run consecutively and substitute it with an order that the sentences will run concurrently.

Appeal allowed.

Delivered at Chipata in open court this 26<sup>th</sup> day of April, 2018.



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**M.CHANDA**

**JUDGE**