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Willard Mwiinga v The People APPEAL NO/167/2022 (24 August, 2023)

Mwami Kabwabwa¹

Facts

The appellant and the deceased were a married couple. Their marriage was characterized by strife and allegations of mistreatment. According to the appellant, he was ill-treated by his wife (the deceased). The appellant gave evidence of several incidents where he felt disrespected by the deceased. On one occasion, the appellant waited for the deceased at the bus station where she was scheduled to arrive from Lusaka. The appellant later discovered that unknown people had driven the deceased home. On another occasion, the deceased refused to accompany the appellant home after a party celebration of their daughter's birthday. The deceased opted to stay out late drinking until midnight. When she got home that evening, she declined to discuss her behavior and spent the night in the children's bedroom.

In another incident, the deceased lied to the appellant that she was going to attend a funeral in another part of town. However, the deceased was spotted in a car with another man. During the day, she did not answer any of the appellant's phone calls, until later that evening, when the appellant picked up the deceased from her friend's house. That same evening, the deceased rejected the appellant's sexual advances at her and informed him that she was traveling to Lusaka the next day.

On the next day, the appellant decided to have a discussion with the deceased concerning her behavior as he drove her to the bus station. On their way, the appellant packed by the roadside so that they could talk. The appellant confronted the deceased on a number of issues regarding her behavior but she declined to discuss these issues. At this point, the appellant alleged that the deceased hit him with her cell phone. The deceased got out of the car and picked a stone, then the appellant hit the deceased with a plug spanner that was close by. The deceased fell to the ground and hit her head on a rock. The appellant lifted her and placed her in the back seat of the car and waited for her to recover so that they could continue with the discussion. However, the appellant realized that the deceased had become unresponsive. At this point, the appellant alleged that he was confused and left the body of the deceased near the roadside and drove home.

The following day, the body of the deceased was discovered in a pond near the roadside with cuts on her forehead and back of her head. Fast forward, the appellant was found guilty of murder contrary to section 200 of the Penal Code Act Chapter 87 of the Laws of Zambia and was sentenced to death. The High Court concluded that the appellant caused the death of the deceased and rejected his defence of provocation and self-defence and found no extenuating circumstances. Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal on the ground that the High Court failed to hold that there were extenuating circumstances to warrant sentencing the appellant to any sentence other than the death penalty.

¹ LLB (Cape Town).

In the Court of Appeal, the court was tasked with determining whether the evidence adduced revealed extenuating circumstances.

Holding

The Court of Appeal concluded that the facts and evidence adduced in this matter afforded the appellant extenuation. The court allowed the appeal, set aside the death penalty, and substituted it with a sentence of twenty years imprisonment with hard labour. The court stated as follows:

In our view, any one of the above circumstances would have annoyed any man and elicited a violent reaction. The Appellant was providing for his family and paying for the deceased's education. The behaviour of the deceased would no doubt have upset him resulting in violence. The deceased's behavior towards the Appellant, in our view, amounted to facts which could diminish his moral guilt (authors emphasis) We are satisfied that the Appellant's reaction to the deceased's behaviour was in accord with the behaviour of an ordinary person in the community to which he belongs. No person would have tolerated the behaviour that the Appellant was subjected to. We accordingly find that facts existed in the matter which afforded the Appellant extenuation.

Significance

Gender Based Violence (GBV) has been described as the most pervasive yet least visible human rights violation in the world.² According to a study conducted by GIZ on violence against women in southern Africa, between half and two-thirds of all women have experienced violence at some point in their lives, with violence by a male intimate partner being the most common form of GBV.³ Our own domestic statistics on GBV reveal a similar trend. According to the Zambia Police 2023 second quarter GBV data analysis, 9,988 cases of GBV were reported across the country. Out of this number, 73.3% were criminal matters and 26.7% were non-criminal matters. Further, of the total number of GBV cases reported, 7,659 were females representing 76.7% and 2,330 were males representing 23.3%, during the second quarter of 2023 across Zambia.⁴ We read almost daily in the local newspapers and various media platforms of occurring perpetration of GBV against women and girls in Zambia in the form of sexual and extreme physical violence such as femicide which the United Nations has described as the most brutal and extreme manifestation of

² Unicef: Report on Gender Based Violence in Emergencies (2022) available at: <https://www.unicef.org/protection/gender-based-violence-in-emergencies>

³ Alexander Erich (2019). *Partnerships for the Prevention of Violence Against Women and Girls in Southern Africa*. Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

⁴ Sichone Chusa. Zambia Police Second Quarter Gender Based Violence Data Anaysis (2023). Times of Zambia News Paper.

violence against women and girls.⁵ Femicide has been defined as the murder or intentional killing of a female by her intimate partner.⁶

As a nation, we are faced with the scourge of GBV which in extreme cases leads to the death/murder of women and girls. Therefore, cases such as this present an opportunity for the courts to play their role in protecting women against GVB by developing and adopting a gender-sensitive approach to interpreting laws, particularly in cases in which GBV has resulted in extreme consequences such as death. In this commentary, It is argued that, the Court of Appeal overlooked this opportunity and its obligation to interpret the law in a manner that is alive to gender consciousness and the current scourge of GBV. The court in the Zimbabwean case of *S v Jeri*⁷ succinctly summarized the role and obligation of the court when deciding cases of GBV as follows:

As courts, it is our duty to be alive to the constitutional imperatives and to make the gender connections from the everyday cases that we deal with. Our efficacy as courts in addressing gender-based violence rests in ensuring that the criminal justice system speaks to the lived realities and experiences of all its victims. Equally important is showing our appreciation and understanding of the manifestations of gender violence in the cases that we are confronted with. Such open recognition in the cases that we deal with, helps to put into gender violence the consciousness of the law and society in general from the perspective of the courts thereby aiding the process of change.

Article 8 and 9 of the Constitution of Zambia requires courts to have regard for human dignity, equality, social justice, and non-discrimination in the interpretation of laws.⁸ Further, our Constitution provides foundational human rights guarantees that accrue to all human beings. These are enshrined in Article 11 which guarantees that every person in Zambia is entitled to the fundamental rights and freedoms of the individual including but not limited to life, liberty security of the person, and the protection of the law. These foundational constitutional rights demonstrate the high value placed on a person's life and bodily integrity and the court ought to have taken this into key consideration in its analysis of the case. Had it done so, it would have pronounced itself on the fact that the ongoing GVB against women and girls that in extreme circumstances has led to the death of women and girls is a violation of the constitutional rights accorded to every person by the Constitution. In addition, the court would have pronounced itself on the fact that the murder of a female by an intimate partner as was in this case is a serious matter that involves interpreting legal provisions/law beyond the lens of the traditional interpretation of criminal law.

⁵ United Nations Concept Note: Event on Breaking the Silence on Femicide: Ending Gender Based Violence against Women and Girls. (2023).

⁶ World Health Organization, 2012; Centre for the Study of Violence and Reconciliation (CSVR), 2015, Femicide Census, 2016).

⁷ (CRB 40 of 2017; HH 516 of 2017).

⁸ Constitution of Zambia Chapter 1 of the Laws of Zambia.

In its analysis, the court observed that the deceased behavior as per the facts would have annoyed any man and prompted a violent reaction and that because the appellant was providing for his family and paying for the deceased's education, the behaviour of the deceased would no doubt have upset him resulting in violence. This position by the court is concerning in the sense that the court was indirectly implying that considering the amount of 'investment' the appellant put into providing for his family and paying for his wife's education. the wife's behaviour was unacceptable and thus the appellant was justified in his action of violence. In my view, the court should not have tolerated such a position. It did not send a strong deterring message to abusive partners. Instead, it should have guided that the fact that the appellant provided for his wife to the extent of paying for her education did not give him the right to act in a violent manner causing the death of the deceased. The court in *King v Ntshangase*⁹ dealt with a similar case in which a young woman was murdered by her boyfriend because the relationship went bad. The man had assisted his girlfriend financially including bringing up her child from her previous relationship. The court at paragraph 5 of the judgment stated:

The accused may have done significant favours to the deceased during her lifetime, but none of those things gave him a right of ownership over the life of the deceased, so as to allow him to take her life when he was unhappy with her. The male gender must learn to walk away from disappointment by their partners, whatever form it may take. (authors emphasis) One can imagine absolute mayhem in our society if the female gender were to also bash their male partners once promises were not kept. Such state of affairs is too ghastly to contemplate, and part of the responsibility of the courts is to ensure that it does not occur.

The quotation demonstrates gender consciousness by the court and shows how courts should and can go beyond traditional interpretation to provide judicial admonition to men and speak strongly on the scourge of GBV and femicide, and call out some of the problematic male attitudes toward women which if not judicially addressed contributes to how men perceive women. As stated earlier, all persons are equally entitled to human dignity and equality before the law. This should be demonstrated in the decisions of the courts where GBV has led to the death of a woman or girl. The reluctance of the court in this case to demonstrate gender consciousness and provide judicial admonition, may also contribute to the stereotypical social pattern that blames women for the violence perpetrated against them. Importantly, the courts should play their role and make use of every opportunity to guard against creating the perception that the lives of women are not deserving of judicial protection.

The effect of the court's conclusion in this case was setting aside the sentence of death and substituting it with twenty years imprisonment. The court in the case of *Syakalonga v The People*¹⁰ considered the issue of the prevalence of an offence when imposing a sentence. In that case, it was held that it is right for a court to take into account the prevalence of an offence when imposing a sentence. This is in order to deter others from committing similar offences. Further, the court in

⁹ (292 of 2013) [2019] SZHC 121 (16 July 2019).

¹⁰ [1977] Z.R. 61.

*The People v Ndema Simolu*¹¹ rightly guided that when imposing a sentence to deter other would-be offenders, the court should be cognizant of the fact sentence should reflect the gravity of the offence. Violently ending the life of a human being is not a trivial matter especially when it is done by an intimate partner who resorts to violence to express his anger and disappointment in respect of a love relationship that has not worked out according to his or her expectations. As such, it deserves a harsh sentence that seeks to quash the egocentric attitude attached to GBV against women. This position was aptly stated in the case of *Rex v Dlamini*¹² as follows:

Domestic violence leading to the death of a spouse is prevalent in our society and must be stopped. Courts must pass sentences that sent (sic) a message to would be offenders to desist from such crimes.

It is therefore important for sentences passed by the courts to function as a deterrent that sends a loud and clear message to would be perpetrators. In addition, sentences should reflect judicial non-tolerance to GBV particularly GBV that stems from intimate love relationships.¹³ Given the ongoing scourge of GBV, there is an urgent need for our courts to break loose from traditional criminal law interpretation and lay down new sentencing precedents that send a crystal-clear message of deterrence. If indeed the law is a living institution, it should be able to respond to emerging challenges.¹⁴ This should be done in a manner that establishes society's utmost confidence in it. In *Sv Rhode*¹⁵, a husband was convicted of the murder of his wife. When it came to sentencing, the court took into consideration international and domestic research, studies, and statistics on female murders and femicide. It noted that the courts bear the responsibility to contribute to the justice system and to impose appropriate sentences, especially in situations where women are murdered in the context of marriages and intimate relations. One might argue that GBV is a crime like any other crime in criminal law and that the courts are justified in applying the traditional principles of criminal law. The answer to such an argument was aptly addressed by Justice Albie Sachs in *S v Baloyi*¹⁶ where he stated that all crimes have harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life.

Justice Mandisa Maya, President of the South African Supreme Court of Appeal (as she was then) delivered a lecture on Judicial and legal Responses to Gender based Violence and Femicide at a Gender Violence and Femicide Summit in Pretoria.¹⁷ In her lecture, she spoke on the role of the courts in alleviating the problem of GBV. Among other things, she stated as follows:

¹¹ [1981] Z.R. 318.

¹² [2019] SZHC 22 (11 February 2019).

¹³ *S v Pacham* [2019] JOL 45328 (WCC).

¹⁴ *Attorney General v Dow* (1992) BLR 119 at p166.

¹⁵ [2018] ZAWCHC 146 (WCC).

¹⁶ (CCT29/99) [1999] ZACC 19; 2000 (1).

¹⁷ Judiciary of South Africa. Available at:

[https://www.judiciary.org.za/images/speeches from the judiciary/Gender Based Violence and Femicide Summit Speech.pdf](https://www.judiciary.org.za/images/speeches%20from%20the%20judiciary/Gender%20Based%20Violence%20and%20Femicide%20Summit%20Speech.pdf)

The Courts, guided by various principles of our legal system, which is adversarial in nature, play a crucial role in ensuring just outcomes in these cases and alleviating the problem. They bear the difficult task, when the guilt of an offender has finally been proved, of finding the right balance between a just sentence on one hand, and a clear message that will deter gender-based violence in society on the other. The Courts must be constantly reminded that as the final arbiters in matters involving gender-based violence, they have the power to protect abused women and to effectively punish the offenders, and in so doing send a clear message to perpetrators that such conduct will not be condoned.

It is therefore clear that it cannot be business as usual for the courts when determining cases such as this or indeed in other cases involving GBV of women and girls. Our courts should have a paradigm shift in the manner in which cases involving GBV are adjudicated. This case (Willard Mwiinga v The People) is one of such case where the court had an opportunity to do so.