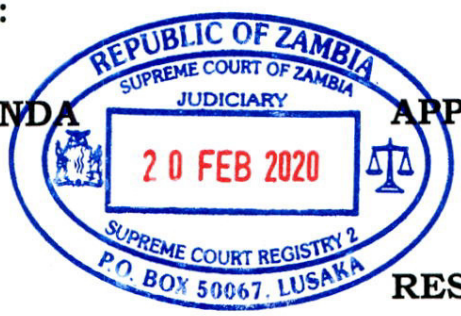
IN THE SUPREME COURT OF ZAMBIA **Appeal No. 14/2017**
HOLDEN AT KABWE
(Criminal Jurisdiction)

B E T W E E N:



OSWARD CHANDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe, and Chinyama, JJS**
on 1st August, 2017 and 20th February, 2020

For the Appellant: Mr. J. Zulu, Senior Legal Aid Counsel

For the Respondent: Ms. M.S. Ziela, Deputy Chief State Advocate

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Saluwema vs. The People (1965) Z.R. 4**
2. **Whiteson Simusokwe vs. The People (2002) Z.R. 63**
3. **Bwanausi vs. The People (1976) Z.R. 103**
4. **Maidon Chimbila vs. The People Appeal No. 507/2013**
5. **Kambarage Kaunda vs. The People (1990/1992) Z.R. 215**
6. **Choka vs. The People (1978) Z.R. 344** (Reprint)
7. **Binwell Changwe vs. The People Appeal No. 32/2015**

This is an appeal against the judgment of the High Court delivered by Hon. Madam Justice Catherine Makungu (now in the Court of Appeal). The appellant was convicted of the offence of murder and sentenced to the mandatory death sentence.

The facts established by the five prosecution witnesses was that on the 17th August, 2013 around 18:00 hours the deceased Michael Sanjongo, PW3 (cousin to the deceased) and PW4 (mother to the deceased) were chatting inside a hut. The appellant arrived and demanded that his wife accompany him home, but she refused. This angered the appellant who started beating his wife. PW4, as a parent, admonished him but the appellant started insulting her and he also assaulted her. The deceased then intervened and got hold of the appellant and there was a struggle between the two and the deceased managed to take the appellant outside the hut to reason with him. PW3 and PW4 who had remained in the hut heard the deceased screaming and rushed outside only to find him in a pool of blood and he had an injury on his hand. According to PW3, he heard the deceased scream that "Oswald you have hurt me!" while PW4 stated that he heard the deceased scream that "mother, I am dying, you have injured me." PW4 applied first aid to stop the bleeding but to no avail as the deceased passed on the following day. The postmortem examination report shows that the cause of death was acute anemia caused by bleeding.

The appellant's defence which was rejected by the trial judge was that the deceased injured himself with a bottle which he had carried in his hand as he came out of the hut. According to the appellant, the deceased called him for help after he injured himself. He denied assaulting his mother-in-law.

On behalf of the appellant Mr. Zulu advanced three grounds of appeal couched in the following terms:

1. **The learned trial court erred both in law and in fact when it held that the prosecution had proved the case beyond reasonable doubt despite the accused's case being reasonably possible.**

2. **The learned trial court erred both in law and in fact when it held that the appellant had an intention to do grievous harm to the deceased and found that malice aforethought had been proved without considering the definition of grievous harm.**

3. **The learned trial court erred both in law and in fact when it failed to find that there was a failed defence of provocation.**

In support of ground one, Counsel for the appellant argued that none of the witnesses saw the appellant strike the deceased and there was no evidence to show that the appellant was armed with any weapon. According to Counsel, PW3 and PW4 contradicted each other as regards the statement which the learned trial judge accepted as *res gestae*. Counsel asserted that this should

have cast doubt in the mind of the trial court, and it should have been resolved in favour of the appellant.

It was submitted that the appellant explained that the deceased injured himself as he was staggering out of the hut while holding a bottle of alcohol which cut him when he hit himself against the door. Counsel argued that this was a reasonable explanation which the learned trial judge ought to have accepted. Counsel buttressed his argument by relying on the case of **Saluwema vs. The People**[1] where the Court of Appeal (the forerunner of this court) held that:

> **If the accused's case is reasonably possible although not probable, then a reasonable doubt exists and the prosecution cannot be said to have proved its case.**

In ground two, Counsel argued that the lower court should be faulted for finding that the prosecution had established that the appellant had an intention to do grievous harm to the deceased, and that the appellant ought to have known that his actions would probably cause death or grievous harm to the deceased. We were referred to the definition of grievous harm under Section 4 of the Penal Code which states that:

"grievous harm" means any harm which endangers life or which amounts to a maim or which seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense"

Counsel argued that the deceased suffered injury to his hand which in his view is not a vital part of the body and that this should raise a doubt as to whether the appellant intended to cause grievous harm or death to the deceased. He urged us to quash the conviction for murder and instead convict him of the lesser offence of manslaughter.

In support of ground three, it was submitted that the appellant was provoked by his wife's refusal to go home and because he suspected her of infidelity. And when the deceased got involved in the quarrel by pulling the appellant outside the hut, this enraged the appellant. Counsel conceded that the defence of provocation failed in this case because the deceased was not directly quarreling with the appellant. However, his argument is that provocation having failed, we should apply the case of **Whiteson Simusokwe vs. The People**[2] where we held that a failed defence of provocation affords extenuation for a charge of murder.

We were urged to set aside the death sentence and impose a lesser appropriate sentence.

In her heads of argument in response Mrs. Ziela submitted in respect of ground one that although none of the prosecution witnesses saw the appellant strike the deceased, on the totality of the evidence before the trial court, the only reasonable inference that could be arrived at is that the appellant caused the death of the deceased. She cited the case of **Bwanausi vs. The People**[3] in support of her argument. She submitted that the key witnesses saw the deceased struggling with the appellant whom he pulled out of the hut on account of the fact that he was fighting with his wife and assaulting his mother in law.

Mrs. Ziela submitted that looking at the injury sustained by the deceased on his right hand makes it unreasonable that he was holding a bottle in his hand. She defended the learned trial judge's finding that the statements heard by PW3 and PW4 qualified as *res gestae* as obviously the deceased was injured by someone. And when PW3 and PW4 rushed outside the hut, the deceased was with the appellant. Counsel pointed out that PW3 and PW4 discovered that the deceased had a serious injury on his right hand and was

bleeding profusely and there was a broken bottle by his side on the ground. She argued that the statements which were accepted by the trial court as *res gestae* should not be looked at in isolation but in the totality of the evidence before the trial court. It was submitted that the evidence considered in totality, the learned trial judge was on firm ground when she found that the case was proved beyond reasonable doubt.

In response to ground two, it was submitted that malice aforethought was established going by the fact that the appellant hit the deceased with a broken bottle, and he must have known that the result would be grievous harm or death. Mrs. Ziela relied on the case of **Chimbila vs. The People**[4] where in that case the deceased was also hit with a bottle by the appellant. We were urged to find no merit in ground two.

In the third ground of appeal, Counsel responded that each case must be considered on its own peculiar facts. It was contended that in this case, the appellant was aggressive and he caused the death of a man who was merely trying to stop him from attacking not just his wife but also his mother in law and we should

not accept that the appellant was provoked. She submitted that the appeal be dismissed.

We have considered the submissions by learned Counsel. In our considered view, the first and second ground of appeal are interrelated. It is trite law that malice aforethought is one of the major ingredients which the prosecution must establish in order to prove the offence of murder. We will, therefore, deal with ground one and two together.

It is important to note that in her judgment, the learned trial judge addressed her mind to the relationship between the deceased, the star witnesses and the appellant. The star witnesses were closely related to the deceased and the learned trial judge relied on the case of **Kambarage Kaunda vs. The People**[5] and **Choka vs. The People**[6] and after considering the evidence, she was satisfied that the danger of false implication was eliminated. We agree and note the contradiction in the evidence of PW3 and PW4 as regards what they heard when the deceased cried out in pain outside the hut. In our view, this contradiction does not affect the prosecution case. In fact, there was no need to rely on the statements allegedly uttered by the deceased as the situation spoke for itself. The two witnesses were steadfast in their evidence stating that the deceased

dragged the appellant outside the hut and when they heard the deceased crying out, they rushed out and observed that blood was gushing out like water from a tap from his right hand. It is not in dispute that PW3 and PW4 did not have sight of any weapon in the hands of the appellant. On his part, the appellant's story is that the deceased injured himself with the broken bottle and Counsel took the view that the appellant's story is reasonably probable. We do not agree. On the totality of the evidence, the only reasonable inference is that the appellant is the one who injured the deceased as he was the only person with the deceased at the time. And the fact that there was a broken bottle on the ground close to where the deceased lay in excruciating pain while bleeding profusely, can only lead to one reasonable inference that the appellant had used the broken bottle to attack the deceased thereby causing the fatal injury on his right hand. The nature of the injury suffered by the deceased was serious and led to his death. So the argument by Counsel for the appellant that he did not intend to cause the death of the deceased cannot be sustained. Therefore, we cannot fault the learned trial judge for holding that the appellant had the intention to do grievous harm to the deceased and that he ought to have

known that his actions would probably cause the death of the deceased. The learned trial judge was on firm ground when she found that malice aforethought was established as provided under Section 204 of the Penal Code. We find no merit in ground one and two.

Turning to ground three, Mr. Zulu's argument is that the appellant was provoked by the fact that his wife refused to go home with him and he suspected that her mother (PW4) was encouraging her to go out with other men. In the case of **Binwell Changwe vs. The People**[7] we had occasion to consider whether the defence of provocation was available to the appellant who suspected his wife of having an affair with the deceased. We said in that case that if we were to hold that provocation exists when a spouse suspects the other of unfaithfulness we shall give a licence to any spouse or partner to harm him/her or another person. We have stated time and again that for provocation to succeed as a defence, all the elements of the defence must be present. In this case, the so-called provocation alluded to by Counsel for the appellant was from the appellant's wife who refused to go home with him and he turned on her and her mother and the deceased intervened to protect the

women but the appellant turned on him. The appellant was the aggressor. He arrived at his mother in laws place where he found peace and instead behaved in a despicable manner and ended up killing the deceased. Looking at the facts of this case, we find no trace of any provocation and, therefore, the case of **Whiteson Simusokwe vs. The People**[2] relied on by Counsel for the appellant is not applicable in this case. The defence of provocation was not available to the appellant and the question of it failing to afford him extenuation cannot arise. Ground three fails.

In the premises, the appellant's appeal has collapsed, and it is dismissed.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE