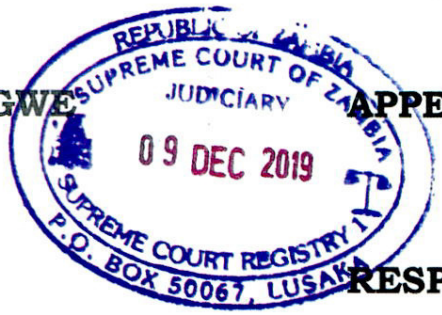
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)

Appeal No. 32/2015

B E T W E E N:



BINWELL CHANGWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Wanki, and Muyovwe, JJS**
on 14th April, 2015 and 9th December, 2019

For the Appellant: Mr. H. Mbushi, Messrs HBM Advocates

For the Respondent: Mrs. C.M. Hambayi, Principal State Advocate, National Prosecution Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to

1. **The People vs. Njovu (1968) Z.R. 132**
2. **Mupota vs. The People (1976) Z.R. 258 (Reprint)**
3. **Whiteson Simusokwe vs. The People (2002) Z.R. 63**
4. **Zulu v Avondale Housing Project Ltd (1982) Z.R. 172**
5. **Eddie Christopher Musonda vs. Lawrence Zimba Appeal No. 41/2012**
6. **Yokoniya Mwale vs. The People Appeal No. 285/2014**
7. **Makomela vs. The People (1974) Z.R. 54**

When we heard this appeal, we sat with the late Justice Wanki. Therefore, this judgment is by majority.

This is an appeal against the judgment of Hon. Mr. Justice Siavwapa delivered on 18th October, 2012

The appellant was convicted of the offence of murder and sentenced to suffer the death penalty. The particulars alleged that on the 24th May, 2012 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, he murdered one Geoffrey Mulenga (hereinafter called "the deceased")

The tragic story was told by the eyewitness PW1, the mother in law to the appellant. She explained that on the material day, the appellant arrived at her home in Kabushi around 17:00 hours in the company of a friend. He asked for his wife (PW6) who was away at the time. Shortly thereafter, the deceased also arrived and handed PW1 a packet of foodstuffs and proceeded to his cabin. The appellant followed the deceased into the cabin. PW1 observed that the appellant was looking somewhat annoyed and advised the appellant's friend to go into the cabin. What followed was that the appellant's friend dragged the deceased out of the cabin while the

appellant was holding on to the deceased. At this stage, the friend to the appellant fled the scene. PW1 then saw the appellant pick a plank which he used to hit the deceased on the head and then he ran away. The matter was reported at Kaloko Police Post and the deceased was rushed to Main Masala Clinic in Ndola and then he was referred to Ndola Central hospital where he passed away on 1st June, 2012. The postmortem examination report revealed that the cause of death was severe head injuries.

Suffice to state that the appellant's wife (PW6) confirmed that she was not present at her mother's house when the appellant attacked the deceased. It was also established that PW6 had left her matrimonial home following a dispute with her husband, the appellant herein. According to PW1, her daughter (PW6) had stayed with her for three months at the time of the tragic incident while the deceased had lived with PW1 for a month.

The appellant was apprehended and charged for the subject offence. The appellant remained silent at trial.

After considering the evidence before him, the learned trial judge found that the defence of provocation was not available to the

appellant in view of the fact that the deceased did not provoke him in any way and that his wife was not even at home at the time of the incident. The learned trial judge found the appellant guilty as charged, found no extenuating circumstances and sentenced him to death.

Unhappy with his conviction, the appellant launched his appeal before this court. Counsel for the appellant, Mr. Mbushi filed a document titled "grounds of appeal and points of arguments". A perusal of the document reveals that there are no grounds of appeal only arguments. With due respect to Counsel for the appellant, we found that most of his arguments were full of assumptions. Below is the summary of the arguments advanced by learned Counsel for the appellant.

Counsel accused the trial court of failing to consider the appellant's defence which, according to him, was revealed in his warn and caution statement recorded by the police and this was to the effect that the appellant found his wife and the deceased in the cabin on the material day. According to Counsel, the learned trial judge should not have relied on the evidence of PW1 the mother of

the appellant's wife because she was bound to protect her daughter who was having an affair with the deceased.

Counsel also attacked the evidence of the investigations officer which he contended revealed a lack of proper investigations and as a result, there were issues which were left hanging such as whether PW6 was at PW1's house on the fateful day and why the appellant and his friend went to PW1's house. That in fact the prosecution should have called the appellant's companion of that day to establish their mission and the happenings of that day at PW1's house.

Mr. Mbushi, strongly argued that the appellant was provoked by the fact that he found his wife and the deceased in the cabin. Counsel found solace in the cases of **The People vs. Njovu**[1] and **Mupota vs. The People.**[2] It was submitted that this case can be distinguished from the **Mupota** case as the appellant had no time for his passion to cool. Counsel also called in aid the case of **Whiteson Simusokwe vs. The People**[3] adding that this was a case involving infidelity on the part of a wife of 15 years and the learned trial judge should have accepted that the defence of provocation

was available to the appellant under the circumstances. Therefore, the appellant should have been found guilty of the lesser offence of manslaughter.

In support of his argument that malice aforethought was not established in this case, Counsel relied on the case of **Njovu vs. The People**[1] where we held that to establish "malice aforethought" the prosecution must prove either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone. In this case, Counsel argued that the prosecution failed to discharge its burden and that the charge of murder cannot be sustained. Counsel contended that this is a proper case where the appellant should be given the benefit of doubt and he should be found guilty of the lesser charge of manslaughter taking into account the circumstances of this case and impose an appropriate sentence.

In response, Counsel for the respondent submitted, *inter alia*, that the defence of provocation could not stand in the face of evidence from the prosecution that the appellant's wife had left

PW1's residence a week before the incident. It was submitted that the claim by the appellant that he was provoked as he found his wife and the deceased in a compromising position is flawed and lacks logic. Further, that PW1's evidence was that the deceased found her with the appellant and handed her a plate of foodstuffs and proceeded to the cabin without uttering any word to the appellant. That it was the appellant who followed the deceased, dragged him out and hit him with a plank on the head showing that he had the intention to cause grievous harm to the deceased. It was submitted that the lower court cannot be faulted for relying on the evidence of PW1 as she had no motive to falsely implicate the appellant. Counsel pointed out that the appellant's wife (PW6) who was called as a witness by the court confirmed that at the time of the incident she was not at home. Counsel submitted that the appellant acted on pure suspicion that his wife had an affair with the deceased hence the altercation with the deceased. Counsel contended that provocation cannot succeed as a defence in this case and the question of the appellant being found guilty of the lesser offence of manslaughter cannot arise. We were urged to

uphold the conviction and sentence of the lower court and dismiss the appeal.

The appellant's Counsel filed a reply to the respondent's arguments. His arguments centered on what constitutes malice aforethought and he looked at various dictionary definitions of malice aforethought which we do not find necessary to reproduce in our judgment. In the words of Counsel "the prosecution did not establish or prove intention or planning by the appellant that he had intended or planned to kill the deceased". Therefore, Counsel submitted that the appellant's action amounted to manslaughter under Section 199 of the Penal Code.

We have considered the evidence before the trial court, the judgment of the lower court and the submissions by Counsel.

We find it prudent to deal, firstly with the issue that the learned trial judge failed to consider the appellant's defence contained in the warn and caution statement. As we have already noted herein, the appellant elected to remain silent. Therefore, for Counsel for the appellant to argue that the appellant's version of what happened was ignored by the trial court is misleading. Our

perusal of the record reveals that the warn and caution statement was not produced by the prosecution. Since the warn and caution statement was not admitted in evidence, the trial court could not consider its contents as it was not part of the evidence before it. The trial court could only deduce the appellant's defence from the questions put to the witnesses by his defence Counsel in the court below. Our emphasis here is that the appellant did not offer any defence having opted to remain silent which was his constitutional right. Bearing in mind that the burden of proof rested solely on the prosecution, the trial court considered the evidence before it and arrived at the inescapable conclusion that the prosecution had proved its case beyond reasonable doubt.

As we pointed out earlier in this judgment, Counsel's arguments are full of assumptions. In fact, most, if not all the issues that he has raised attack findings of fact. And we have stated in a plethora of cases that as an appellate court we will only reverse findings of fact made by a trial court if we are satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts. (See **Wilson Masauso Zulu vs. The People**[4]). The learned

trial judge found as a fact that as per the evidence of PW1, the appellant and his friend did not find PW6 at her mother's home on the fateful day. And PW6 was called as a witness and she confirmed that she was not present at the time of the attack. It was established that at the time of the assault on the deceased, the only persons present were PW1, the appellant and his friend. In this case, the eyewitness was PW1 the appellant's mother in law. Mr. Mbushi attacked the evidence of PW1 arguing that it was tainted with lies as she was protecting her daughter who was having an affair with the deceased. The learned trial judge in our view rightly accepted the evidence of PW1 who witnessed the tragic event and as we stated in the case of **Eddie Christopher Musonda vs. Lawrence Zimba**[5], that the trial judge is a trier of facts who has the advantage of observing the demeanour of witnesses to determine who is telling the truth in the trial and we cannot fault the trial judge in this case. Further, we have stated in numerous cases that evidence of relatives should not be discounted by trial courts as it may be the only evidence in a case but that it should be weighed against other evidence bearing in mind the category of the witness. (See **Yokoniya Mwale vs. The People**[6]). In this case, it is plain from

the evidence that the deceased was helpless as he was facing two people who dragged him out of the cabin shortly after arrival. PW1 observed that he was drunk and powerless, so the learned trial judge's finding was based on the evidence before him and we cannot fault him for accepting PW1's evidence which clearly was not shaken in cross-examination.

Regarding the issue that the appellant's friend was not called as a witness, Mr. Mbushi opined that he would have filled in the gaps in the evidence and he would have revealed why they went to PW1's house that morning. It is trite law that the burden of proof in criminal cases lies on the prosecution, however, the appellant had the opportunity to call his friend if he felt that he would have assisted his defence. The appellant would have provided the name and whereabouts of his friend to the police instead of accusing the arresting officer of shoddy investigations. Surely, if the defence had information favourable to the appellant, disclosing the information would have benefitted the appellant. Counsel cannot blame the trial court for arriving at the decision it did as the same was based on the evidence before it.

We now turn to consider whether the defence of provocation was available to the appellant. We have pronounced ourselves in numerous cases on the availability of the defence of provocation. In the case of **Makomela vs. The People**[7] we held that:

(i) **Provocation in law consists mainly of three elements-the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. These elements are not detached.**

Dictum of Lord Devlin in Lee Chun - Cheun v R [4] cited with approval.

(ii) **The question is not merely whether an accused person was provoked into losing his self-control but also whether a reasonable man would have lost his self-control and, having done so, would have acted as the accused did.**

(iii) **Loss of self-control is not absolute but is a matter of degree; the average man reacts to provocation according to its degree with angry words, with a blow of the hand, or possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon.**

(iv) **A man who completely loses his temper on some trivial provocation and reacts with gross and savage violence cannot hope for a verdict of manslaughter on grounds of provocation.**

In his judgment, the learned trial judge aptly addressed his mind to the defence of provocation and held that the fact that the

appellant strongly suspected that his wife had an affair with the deceased could not avail him of the defence of provocation. We totally agree with the learned trial judge. If we accede to Mr. Mbushi's argument that the defence of provocation was available to the appellant on the ground that he suspected that the deceased was having an affair with his wife, we shall give license to any spouse or partner who suspects the other of unfaithfulness to harm him/her or another person.

The evidence clearly pointed to the fact that at the time of the incident, the deceased did not even talk to the appellant, but without any provocation, the appellant followed the deceased into his cabin from where he started his attack on him and he eventually hit the deceased on the head with a plank. To crown it all, evidence on record which was not challenged by the appellant is that the appellant's wife PW6 was not present at the scene. Hence, ruling out the allegation that the appellant found his wife with the deceased in his cabin. These were findings of fact by the learned trial judge which we cannot reverse as they are based on the evidence adduced before the trial court. The cases of **Mupota vs. The People** and **Simusokwe vs. The People** heavily relied upon by

Counsel for the appellant cannot be of any assistance to the appellant's case as the two cases can be distinguished from this case. We do not intend to go into the facts of the **Mupota** case. Suffice to state that in the **Mupota** case we accepted that the appellant was provoked but that there was time for his passion to cool, hence the defence failed.

In the case of **Simusokwe vs. The People** the court found as a fact that the appellant found the deceased who was his intimate partner with another man. The defence of provocation succeeded on that score. In the case in *casu*, the learned trial judge did not make any such finding as there was no evidence to that effect and we agree with him. The evidence clearly points to the fact that the appellant's wife was not in the cabin with the deceased at the time of the attack. The question of failed defence of provocation cannot arise as there was no provocation at all looking at the threshold we have set in numerous decided cases and Section 206 of the Penal Code. The appellant was the aggressor who attacked the deceased who did not even retaliate going by the evidence of PW1. Therefore, Mr. Mbushi's argument that the appellant had no intention to kill the deceased cannot be sustained. The appellant ought to have

known that by hitting the deceased on the head with a plank, grievous harm would be occasioned to the deceased. In other words, malice aforethought was well established in this case.

All in all, we find that the learned trial judge was on firm ground when he convicted the appellant as charged as the prosecution proved its case beyond reasonable doubt. The appeal has no merit 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