

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

Appeal No. 37,38/2015



B E T W E E N:

JOACHIM KINGSLEY KAWAWA

1ST APPELLANT

ELALIO MWANSA SMART

2ND APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Phiri, Wanki and Muyovwe, JJS
On 5th May, 2015 and 8th June, 2020.

For the Appellant: Mrs. S.C. Lukwesa, Senior Legal Aid Counsel

For the Respondent: Mrs. M.M. Kawimbe, Deputy Chief State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

- 1. Mbomena Moola vs. The People (2000) Z.R. 148**
- 2. Abedinegal Kapeshi and Best Kanyakula vs. The People, Selected Judgment No. 35 of 2017.**

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

This appeal is against sentence only. The appellants were tried and convicted of the offence of murder by learned High Court Judge Mchenga J (as he then was).

The brief summary of the facts of this case was that the seven deceased persons, all elderly, were rounded up by the appellants and other persons unknown and locked up in a house which was set on fire. All the seven elderly persons perished in the fire. There was evidence from the prosecution that the deceased were allegedly practicing witchcraft.

The appellants completely denied participating in the killing of the seven deceased persons. In fact, they distanced themselves from the happenings of the material day.

In a nutshell, the learned trial judge after considering the evidence before him "was satisfied that all the witnesses had ample opportunity to identify the two appellants because they approached the deceased persons during the day claiming that they had been sent by the Chief. The learned trial judge found that although the appellants are not the ones who set the house on fire, they were actively involved in rounding up the deceased persons and there

was no evidence that they disassociated themselves from the whole exercise leading to the conclusion that they knew and were part of the plan to kill the deceased by setting the house where they were being held on fire. The trial court found that the prosecution had proved its case beyond reasonable doubt and convicted them as charged.

As regards whether there were extenuating circumstances in this case, the learned trial judge considered Section 201 of the Penal Code and bearing in mind the case of **Mbomena Moola vs. The People**,¹ he found no extenuating circumstances.

Counsel for the appellant in her lone ground of appeal contends that the learned trial judge erred by failing to find witchcraft as an extenuating circumstance in this case. Mrs. Lukwesa's argument is that the learned trial judge after rejecting the appellant's defence had nothing to fall back on except the prosecution evidence which revealed that the reason for killing the deceased was because they were suspected of being witches and wizards. Counsel opined that for this reason, the learned trial judge should have accepted the belief in witchcraft as an extenuating circumstance.

Mrs. Kawimbe defended the stance taken by the learned trial judge that there were no extenuating circumstances.

We have considered the arguments by Counsel for the parties.

In arguing this appeal, Mrs. Lukwesa contended that there was ample evidence from the prosecution that the killings were based on a belief in witchcraft and the learned trial judge should have found witchcraft as an extenuating circumstance.

The learned trial judge had this to say:

“...In court, both accused persons denied knowing anything about the deaths or that the deceased persons were killed on account they were suspected of practicing witchcraft. The accused persons having denied participation in the killings, I find no basis for finding that they believed that the seven old people were witches or wizards. In my view, it is not enough that some other people believed that any of the deceased persons were witches or wizards; the accused persons should have themselves killed believing that the deceased persons practiced witchcraft. I therefore find that there were no extenuating circumstances based on belief in witchcraft in this case. ...”

We are in total agreement with the learned trial judge that the appellants not having raised the belief in witchcraft as the reason for their despicable actions, they cannot benefit from it as an

extenuating circumstance. In the case of **Abedinegal Kapeshi and Best Kanyakula vs. The People**² we dealt extensively with the belief in witchcraft as an extenuating circumstance and we pointed out that this belief is inconsistent with the Witchcraft Act. We stated, *inter alia*, that:

“...The consequences of such belief are the persecution and or murder of suspected wizards, which violate not only the criminal laws of this country but amount to multiple violation of human rights, both under our domestic bill of rights and under international human rights law. The belief in witchcraft and the offending conduct, premised as it is on that belief, are both illegal in themselves.

We held that:

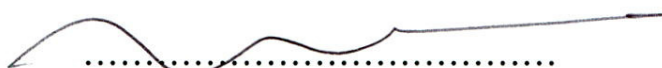
“..... a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor to an accused person facing a charge of murder. There is absolute need to protect victims of witchcraft accusations from unprovable allegations leading invariably to multiple violations of their rights, and in some cases death. ...”

In this case, the seven deceased elderly persons were picked up in broad daylight on the pretext that they were wanted by the Chief. Each one of them cooperated and were unsuspectingly led to their slaughter. The situation was so volatile that no one dared to

intervene and save them. Having considered the evidence in total, we cannot fault the learned trial Judge for not finding extenuating circumstances in this case – there were none. Counsel for the appellant’s spirited arguments cannot be sustained. The appeal has collapsed and it is dismissed.



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G.S. Phiri
SUPREME COURT JUDGE



.....
E. C. Muyovwe
SUPREME COURT JUDGE