IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.343/2011**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

LEVYSON ZIMBA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe, and Hamaundu, JJS**
On 6th November, 2012 and 13th August, 2020

For the Appellant : Ms B. Pizo, Legal Aid Board

For the State : Mrs C.M. Hambayi, Assistant Senior State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Double Mwale v ThePeople (1984) ZR 76**
2. **Whiteson Simusokwe v The People (2002) ZR 63**

This appeal comes to us on the single ground that the appellant should have been spared the sentence of death on account of extenuating circumstances.

The appellant was charged with murder before the High Court sitting at Chipata, presided over by Kajimanga, J, (as he then was). It was alleged that on 23rd August, 2009, in Petauke District, the appellant murdered John Banda. The prosecution's case rested on an eye witness, Yohane Phiri, (PW1). This witness told the court that the appellant, the deceased, the witness himself and other young men were a group of Nyau dancers. Sometime prior to the incident in issue, a group of women conducting an initiation ceremony had borrowed a drum from the Nyau group. As a token of appreciation, the women had given the Nyau group a piece of pork meat. Since the meat was not enough for everyone in the group to share, the group decided that the deceased, being the head of the Nyau group, should take the meat. Two days later, the Nyau dancers sounded the drums at the shrine in the bush. The witness, the deceased, the appellant and other members of the group responded to the call and went to the shrine. There, the appellant picked up a quarrel with the deceased over the piece of meat that the latter had been given. During

the quarrel, the appellant broke a branch from a tree and started whipping the deceased with it. In annoyance, the deceased fought back. PW1 separated the two. The appellant then attacked the deceased a second time and ran away. Again, annoyed by the attack, the deceased gave chase but failed to catch up with the appellant. The witness and the deceased then left the shrine.They headed for the place where the drums were being played. The appellant followed them behind, taunting the deceased with insults. The deceased then stopped and engaged the appellant in a discussion. During that discussion, the deceased asked the appellant what he really wanted. The appellant did not respond, but instead picked a piece of wood and struck the deceased with it. The deceased fell down and became unconscious.

The rest of the facts for the purpose of this appeal are common ground. Suffice to say that the deceased was taken to the hospital where he was attended to, while the appellant was charged and imprisoned for the assault; and that some days later the deceased died of his wounds, whereupon the appellant, who was then serving a term of imprisonment for the assault, was now charged with murder.

The appellant completely denied having assaulted the deceased. He told the court that, on the fateful evening, it was PW1 and another member of the group, Yelesani Banda, who were quarreling with the deceased over a chicken and a sum of K15,000(unrebased) which had been given by one woman as a token of appreciation for the drum that had been borrowed. He said that he reasoned with the two not to quarrel with the deceased because the latter was drunk. Instead, the two set upon him and beat him until he fell down. When he got up, he saw the form of the deceased lying on the ground, presumably beaten by the same people.

Again, we must say that the rest of the appellant's version is not relevant to this appeal. The learned trial judge rejected the appellant's explanation and accepted that of the prosecution; He convicted the appellant and sentenced him to death. The issue of provocation was not considered by the judge because the appellant did not raise it at all. Whether or not the defence of provocation did arise on its own from the evidence is an issue which is being canvassed on behalf of the appellant in this appeal.

Ms Pizo, on behalf of the appellant, while conceding that the appellant did not raise the defence of provocation in the court below,

has submitted that the defence nevertheless did arise from the evidence adduced; and that the learned trial judge ought to have considered it in arriving at his decision. Counsel points out that the appellant and the deceased were both equal combatants, with equal opportunity to inflict fatal injuries on each other; and that the appellant, in the heat of the moment, picked a stick and hit the deceased with it, thereby causing the injury which eventually led to the death of the deceased. Ms Pizo submits that these are the circumstances that constituted provocation, and urges us to so accept; so that the appellant should only be liable for manslaughter. She finds support for that submission in the case of **Double Mwale v The People**[1].

Counsel submits further that, if we do find the appellant's actions to have been disproportionate with the provocation, then we should treat the failed defence of provocation as an extenuating circumstance, as we did in **Whiteson Simusokwe v The People**[2], so that the appellant may receive some other punishment than the death penalty.

Mrs Hambayi, on behalf of the prosecution, has submitted that the facts in this case do not reveal any provocation that could afford

the appellant either a defence or extenuating circumstances. She points out that on all the three occasions of the fight, it is the appellant who was seen to be intent on causing grievous harm to the deceased.

Although the appellant's appeal is against sentence only, the arguments have gone towards conviction as well. We will, nevertheless, consider the appeal from the point of view of conviction also.

Provocation is defined in the **Penal Code**, **Chapter 87** of the **Laws of Zambia**. **Section 206(1)** provides:

> **"The term *'provocation'* means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.For purposes of this section, 'an ordinary person' shall mean an ordinary person of the community to which the accused belongs"**

The facts in this case reveal that the appellant picked a quarrel with the deceased over the piece of meat that the deceased was given.

Now, the decision that the deceased should take the meat was made by the Nyau group. So, first, if that act was provocative, then it was the group that committed the provocative act; not the deceased. Secondly, since the Nyau group, which comprised ordinary members of the community to which the appellant belonged, did not find anything wrong with giving the deceased, the head of the Nyau dancers, the piece of meat then it cannot be said that this was an act that would deprive an ordinary person of the appellant's community of the power of self-control; and would induce him to assault the person by whom the act was done. Clearly, the receipt by the deceased of the meat that was given to him by the group did not amount to provocation.

As for what followed thereafter, it is clear that it was the appellant, in fact, who kept goading the deceased into fighting him; on all three occasions. Therefore, as between the two of them, it was the deceased who was entitled to claim that he was provoked to the point of fighting. The appellant can, certainly, not claim that it was the other way round.

So, on the evidence, we are unable to see any circumstances that constituted provocation. We are, therefore, not surprised that it

never even occurred to the trial judge to consider provocation: the issue simply did not arise from the evidence. The appellant was, consequently, properly convicted of murder.

Now, were there any extenuating circumstances in this case? To begin with, when the defence of provocation is raised successfully, it affords an accused person a complete defence against the charge of murder. By **section 205** of the **Penal Code**, the accused in those circumstances is guilty only of manslaughter. For the defence of provocation to be successful, two thresholds must be met: first, there must be circumstances which the court accepts as constituting provocation as defined in **Section 206**. That isthe first threshold. However, that, on its own, does not complete the defence. **Section 205** provides that other factors must also be satisfied: Such as that the accused's retaliation must be in the heat of passion, and before there is time for his passion to cool; but even so, the retaliation must be proportionate with the provocation. This is the second threshold. So, where, for example, the court accepts that an accused person was provoked, but finds that his retaliation was disproportionately severe, the defence will fail; and the accused will be convicted of murder: Now, this is where our holding in **Whiteson Simusokwe v The**

People comes in. In these circumstances, the failed defence of provocation provides extenuating circumstances. Therefore, there can be no extenuating circumstances where the court has not accepted that there was provocation in the first place.

All in all, we do not accept that there was any provocation in this case. Consequently, there were no extenuating circumstances. The trial judge, again, properly meted out the mandatory death sentence. We dismiss this appeal.

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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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E. M. Hamaundu
SUPREME COURT JUDGE