

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 02/2020

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

MBUYU KAILO

APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Kondolo SC, Chishimba and Mulongoti, JJA

On ^{19th} June, 2020 and 28th August, 2020

For the Appellant: B. Banda, Legal Aid Counsel-Legal Aid Board

*For the Respondent: K. I. Waluzimba, Deputy Chief State Advocate-National
Prosecution Authority*

JUDGMENT

MULONGOTI, JA, delivered the Judgment of the Court

cases referred to:

- 1. Esther Mwimbe v The People (1986) ZR 15 (SC)*
- 2. Simusokwe v The people (2002) ZR 6*
- 3. Kanyanga v The People SCZ Appeal No. 145 of 2011*

4. *Mwango v The People* SCZ Appeal No. 171 of 2015
5. *Nyambe Mubukwanu Llyumbl v The People* (1987) ZR 25 (SC)
6. *Daudl Phiri v The People* (SCZ Appeal No. 192 of 2014)
7. *Webster Kay Lumbwe v The People* (1986) ZR 98
8. *Litepo v The People* (SCZ Appeal No. 20 of 2014)
9. *Director of Public Prosecution v Lukwosha* (1996) ZR 14 (CA)
10. *Jack Chanda v The People* (2002) ZR 124
11. *Noah Kambobe v The People* (220) ZR 57
12. *Kalima v The People* (SCZ Appeal No. 96 of 2017)
13. *R v Clegg* (1995) 1 AC 482, HL
14. *The People v Pelete Banda* (1977) ZR 304
15. *Mulenga v The People* (1966) ZR 118
16. *Precious Longwe v The People* (CAZ Appeal No. 128 of 2017)
17. *R v Duffy* (1949) 1 ALL ER 932
18. *Malangisha Kapwepwe v The People* (CAZ Appeal No. 59 of 2018)

Legislation and Works referred to:

1. *The Penal Code, Cap. 870 of the Laws of Zambia, sections 200, 201, 204 & 17*
2. *PJ Richardson and others (eds), Archibald Criminal Pleading, Evidence and Practice 2011*

1.0 Introduction

1.1 The appellant, Mbuyu Kailo, was convicted of murder by her Ladyship Lamba J, sitting at Solwezi. The appellant was sentenced to death.

1.2 The particulars, in the information at page (ii) of the record of appeal, alleged that on the 13th day of April

2019 at Kalumbila in the Kalumbila District of North Western Province of the Republic of Zambia Mbuyu Kailo murdered Denise Kailo.

2.0 **Evidence Adduced in the Court Below**

2.1 On ^{13th} April, 2019 around 12:00 hours, PW2, Stella Kasoti, went to collect some food from her parents' house at the farm where they lived. When she arrived, she found her mother Denise Kailo, now deceased, in a fight with her father, Mbuyu Kailo, the appellant, in the courtyard. Particularly, that the appellant was brutally whipping the deceased with a stick and some strokes landed on her neck. When PW2 inquired about the fight, the appellant said he was beating the deceased because he caught her committing adultery with another man.

2.2 Petrified by what she witnessed, PW2 rushed to a nearby village and informed her grandfather Joseph Nyambaza (PW 1) about the fight. At the time PW2 was reporting to her grandfather (PW1), he was with his nephew Justine Kolone (PW4) and a man named

Joseph Kimuchima (PW3) a CCPU officer of the neighbourhood watch.

2.3 Upon receiving the report, PW1 accompanied by PW2, PW3 and PW4 rushed to the scene. They arrived at the deceased's farm around 17:00 hours and found that the appellant had fled the scene. The house was crowded by the neighbourhood watch and spectators.

2.4 Joseph Kimuchima, PW3, entered the house and from what he observed concluded that the deceased had passed on. Her body lay on the bed naked and bruised suggesting that she had been beaten. PW3 went outside the house and informed the others of what he had seen. He then excused himself to report the matter to the police via phone. PW1 stayed back to safeguard the body. Both PW1 and PW3 said they observed that there were about four (4) blood stained

sticks (P1) at the scene which were later collected by the police together with the deceased's body.

2.5 According to PW2, the deceased's body had a broken neck and bruised right cheek. The arresting officer, detective constable Chipeco Evans (PW5) testified that the body of the deceased lay naked facing up and was bruised on the face and left leg. The post-mortem examination report, P2, revealed that the deceased died of severe broken neck.

2.6 PW4 testified that the next day, 14th April 2019, with the help of the village headman Mumba Chituta, a search party for the appellant was instituted. They managed to trace the appellant using a footprint trail along which they found his bicycle partially buried in a shallow swamp. They apprehended him at a nearby shrub around 13:00 hours, about 4 to 5 kilometres

from the village where the deceased's body was found.

2.7 PW4 called PW3 and informed him that they had apprehended the appellant who notified the police. The police arrested the appellant around 22:00 hours.

2.8 In his defence, the appellant testified that he found his wife having sexual intercourse with another man on their matrimonial bed. A fight ensued and, in the process, the deceased hit him on the left eye with a stick causing his eye to bleed. In retaliation, he hit her back with the same stick. During the struggle, the other man ran away into the maize field, never to return.

2.9 During the fight, PW2 came on the scene and the appellant informed her that her mother had done something shameful. That she had committed

adultery. According to the appellant, PW2 responded that it was indeed shameful and left.

2.10 The appellant testified that he only hit the deceased with a stick once. Thereafter, the deceased entered the house, sat on the bed, crying, saying that his beatings had killed her. When he could no longer hear her cry, he entered the house to check on her. At that point, it dawned on him that she might have passed on. Fearing mob justice, that he would not be spared by the community for killing his wife, he fled into hiding. The next day, he was apprehended, and arrested by the police.

2.11 In cross examination, the appellant admitted that he hit his wife with a stick after which she complained of pain and subsequently died.

3.0 **Consideration of the Evidence and Decision of the Trial Court**

3.1 After analysing the evidence, the learned trial court found that the appellant had caused the deceased's death by hitting her with a big stick. The Judge noted that the appellant had the defences of raised provocation and self defence.

3.2 The trial court accepted PW2's evidence that the appellant beat the deceased repeatedly with a big stick and that the evidence is supported by the injuries the deceased sustained and dispelled the appellant's version that he only hit her once.

3.3 In addition, the fact that the big stick which was used to hit the deceased broke into pieces spoke to the excessiveness of the degree of force applied. The appellants evidence that he acted in retaliation to the injury the deceased inflicted on his left eye was not cogent as none of the witnesses mentioned that he had an injury at all. The learned trial judge thus dismissed the availability of self-defence and placed

reliance on **section 17 of the Penal Code** and the case of **Esther Mwimbe v The People**'.

3.4 As regards the defence of provocation, the learned trial judge found that from the evidence tendered by the prosecution witnesses, there was no indication that the appellant found his deceased wife naked and having sex with another man. There was no evidence of the unknown man being present at the scene when the offence was committed. The trial court had the following to say:

"When pressed under cross examination he said as they were struggling, he was putting on a white shirt and a red trousers, but the buttons of his shirt were open, and his chest was out so he just had a trousers. In my considered view, the accused person was highly inconsistent when It came to the involvement of the man, he found his wife with. Initially he said they were both naked and when he could not explain at what point this man put his clothes on in the time, he entered the house and when the struggle ensued, he changed his evidence to say that he had an unbuttoned shirt on and his trousers around his legs."

3.5 In any event, the appellant's daughter PW2 would have been around to witness the other man's presence because the only time he said he hit the

deceased was when the deceased hit him, and he picked up the stick to retaliate. The trial court also pointed out that there was no evidence as to why PW2 would implicate her biological father and risk losing both parents.

3.6 The trial court concluded that there was no concrete evidence that the appellant caught his wife in the act of committing adultery. The appellant did not inform the police of this fact and only brought it up during trial that he informed PW2 when he did not find his wife at the farm. Consequently, there was no element of conduct rousing sudden provocation to establish the defence. The trial court decided that the defense of provocation could not stand.

3.7 The trial judge reasoned that as per **section 204 (b) of** the Penal Code, the accused knew or ought to have known that the act of hitting the deceased with a big stick on the neck would probably cause death or grievous harm, hence, establishing malice aforethought.

3.8 Accordingly, the appellant was found guilty of murder contrary to section 200 of the Penal Code. The trial judge found no extenuating circumstances and sentenced him to death.

4.0 **The Appeal**

4.1 Dissatisfied with the conviction, the appellant has appealed to this Court on two grounds.

4.2 The two Grounds of Appeal are couched as follows:

4.2.1 "the learned trial judge erred both In law and in fact to hold that there was no provocation and self-defence that arose from the facts on record to negative malice aforethought; and

4.2.2 the learned trial judge erred both in law and fact to convict the appellant for murder and sentence him to the ultimate, death by hanging, when there were extenuating circumstances."

5.0 **The Arguments**

5.1 Both parties filed heads of argument for and against the Appeal.

5.2 The appellant's counsel argued grounds one and two simultaneously.

5.3 It was submitted that the appellant did not have the requisite *mens rea* for murder being malice aforethought as defined by **section 200 of the Penal Code Cap 87 of the Laws of Zambia.**

5.4 It was argued that the appellant acted in the heat of passion such that he had no opportunity to cool off. He could not reason to foresee the effect of his actions when he beat the deceased with a stick after he caught her *flagrante delicto* on their matrimonial bed with an unidentified man. This act caused the appellant extreme anger as it would to any reasonable man. In addition, the appellant used the stick he grabbed from his wife to beat her in retaliation and anger.

5.5 Counsel submitted that the retaliatory force was reasonable and proportionate to the threat he suffered from the deceased. It was not excessive at

all. The case of **Simusokwe v The people**² was cited as authority that:

"(I) if a man and woman who are not married are nonetheless in a stable relationship of Intimacy, they will be treated on the same footing as married persons;

(II) in a claim of provocation, the reaction of the accused person must be proportionate with the result that any evidence of excessive force defeats the defence; and that

(ill) a failed defence of provocation affords extenuation for a charge of murder."

5.6 In *casu*, the elements of malice aforethought set out **in section 204 of the Penal Code** were not proved beyond reasonable doubt in order for the appellant's action to constitute murder. Consequently, the Court ought to allow the Appeal and substitute the conviction of murder with manslaughter.

5.7 As regards sentence, it was submitted that the trial court neglected to explore the option of considering the failed defence of provocation as an extenuating circumstance which would mitigate the severity of the sentence.

5.8 It was submitted that **section 201(b) of the Penal Code** provides that where there are extenuating circumstances, the sentence for murder should be *"any sentence other than death except for murder committed in the course of aggravated robbery and with a firearm."*

5.9 To illustrate what constitutes extenuating circumstances, counsel relied on the case of **Kanyanga v The People**³ where the Supreme Court in interpreting **section 201 of the Penal Code** stated that:

"In our view, section 201 should be read with Black's Law Dictionary Eighth Edition by Bryan A. Garner at p.260, which defines extenuation as:

Mitigating circumstance, means a fact or situation that does not Justify or excuse a wrongful act or offence, but that reduces the culpability, and this may reduce punishment. A fact or situation that does not bear on the question of a defendant's guilt, but that is considered by the court in imposing punishment and especially in lessening severity of a sentence."

5.10 In concluding the arguments, counsel argued that the trial court erred in convicting the appellant of murder and meting out the ultimate sentence of

death. We were urged to substitute the charge of murder with manslaughter.

5.11 In response to Ground one, it ~~was~~ submitted on behalf of the State that the defence of self-defence was not properly raised during trial in the court below. The issue only arose after the appellant had been out on his defence. The case of **James Mwango v The People**⁴ was cited as authority that:

it goes without saying that a person accused of an offence and on trial begins to build his or her defence right from the time of apprehension and from the first prosecution witness by asking questions in cross examination. Where an issue or defence is only raised when the accused is on the stand, the court cannot be faulted for treating it as an afterthought and an explanation which cannot reasonably be true. In this case the appellant was represented by counsel and had the opportunity to instruct his counsel regarding his defence which he should have raised from his apprehension or at the earliest time during trial..."

5.12 It was argued that the learned trial judge rightly found that there was no provocation. Reference was made to the case of **Nyambe Mubukwanu Liyumbi v The Peoples** in which the Supreme Court set out the elements of provocation as follows:

"there are three inseparable elements to the defence of provocation – the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. All the elements must be present before the defence is available."

5.13 Relying on the case of **Daudi Phiri v The People**⁶ which tells of the effect of a successful plea of provocation, being the reduction of murder to manslaughter, it was argued that the court below was on firm ground to discount provocation because there was no evidence that the appellant actually found the deceased in *flagrante delicto*. Interestingly, the appellant accepted that he did not inform the prosecution witnesses of the man he allegedly found the deceased with. There was equally no evidence as to why PW2 would want to implicate her biological father in such a heinous crime. PW2 was a credible witness and as per our holding in **Webster Kay Lumbwe v The People**⁷, as an appellate court we cannot interfere with the findings on credibility unless it is clearly shown that the finding was erroneous.

Therefore, the court below cannot be faulted for dismissing the appellants explanation.

S. 14 In the alternative it was submitted that the retaliation by the appellant was excessive and disproportionate in the circumstances of the case with the result that the defence of provocation should be defeated.

5.15 It was argued that the prosecution proved that the appellant had malice aforethought as defined in **section 204 of the Penal Code**. The appellant repeatedly hit the deceased on the neck with a stick causing her the injuries recorded in the post-mortem report. The appellant ought to have known that beating the deceased in that manner would cause serious injury. Hence malice aforethought was proved as held in the **cases of Litepo v The People⁸ and Director of Public Prosecution v Lukwosha⁹**.

5.16 In response to ground two, it was argued that there were no extenuating circumstances in *casu*, to warrant a custodial sentence.

S. 17 Furthermore, that although, going by the case of **Jack Chanda v The People**^o and **Simusokwe v The People**, supra, a failed defence of provocation would afford the appellant extenuation, the alleged provocation pleaded by the appellant herein was not supported by sufficient evidence to stand even as a failed defence. Counsel added that the unidentified man whom the appellant claims to have caught having carnal knowledge of his deceased wife is fictitious. Therefore, there being no extenuating circumstances, the court below was on firm ground in finding the appellant guilty of murder.

5.18 As regards the sentence, it was argued that since there were no extenuating circumstances, the court below was mandated to impose the death sentence as provided by s.204 of the Penal Code. As such, the sentence was not wrong in principle. The case of **Noah Kambobe v The People** was cited as authority that "**a sentence can only be interfered with if it is wrong in principle and shocking to the court**". The Court was

further referred to the case of *Benson Kalima v The People*¹² where the Supreme court stated as follows:

"This is but one of the many gender based domestic violence cases which are now becoming common place in our communities, where the man feels justified in inflicting harm on his spouse on trivialities such as mere suspicion, claiming that he had been provoked... There is no doubt that the 'ripple effect' of domestic violence is indeed far reaching in that, where it results in death, children of the couple, if any, are left without parents as one is dead while the other is incarcerated. As courts our role is not only to deal with the perpetrators of such violence, whether male or female but to also discourage those who are inclined to so act, by sounding to them an advance warning of our indignation to this scourge, expressed through befitting punishments... There is need here to alert would be offenders that domestic violence in all forms will not be tolerated and the courts will not spare persons who will involve themselves in committing such offences with light sentences."

5.19 In concluding the arguments, we were urged to uphold the conviction and sentence.

6.0 The Hearing

6.1 At the hearing of the Appeal, both parties relied on their written heads of argument.

7.0 **Issues on Appeal**

7.1 We have considered the evidence adduced at trial, the Judgment sought to be assailed and the competing submissions by counsel.

7.2 We are of the considered view that the issues arising are as follows:

7.2. 1 Whether on the facts of the case the appellant acted in self-defence and was provoked such that he should not have been convicted of murder as malice aforethought was not proved.

7.2.2 If not, whether the facts of the case permit a finding of a failed defence of provocation or self-defence which amounts to an extenuating circumstance and thus compel us to impose a custodial sentence.

8.0 **Consideration and Determination of the Issues on Appeal**

8.1 We have considered the Judgment appealed against, and the submissions by both counsel. We shall deal

with the two grounds of appeal simultaneously as they are interlinked.

8.2 We note that the circumstances of this case are such that the appellant does not deny inflicting injury on the deceased and particularly whipping her with a stick on the neck which caused her death. The appellant in his defence, testified that he hit the deceased in retaliation to her striking him on the left eye with the same stick. In essence suggesting that he acted in self-defence.

8.3 The law recognises that if a person is attacked, it is common sense that they may do what is reasonably necessary to defend themselves. However, the amount of force used should not be excessive. In **R v Clegg**¹³, it was held that:

"where a person kills another with the requisite intent for murder in circumstances in which he would have been entitled to an acquittal on the ground of self-defence but for the use of excessive force, the defence fails altogether and he is guilty of murder, not of manslaughter..."

8.4 Section **17 of the Penal Code** states that:

"Subject to any other provisions of this code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person, if the means he uses and the degree of force he employs in doing so are more than necessary in the circumstances to repel the unlawful attack."

8.5 Essentially, an act of self-defence consist of an attack by the accused person, who, on reasonable grounds, believes, that she or he is in imminent danger of death or serious bodily harm, and uses reasonable force necessary to repel the threat. **See: The People v Pelete Banda'**⁴ and **Mulenga v The People's.**

8.6 In terms of the burden of proof, **PJ Richardson and others (eds), Archibald Criminal Pleading, Evidence and Practice 2011** state at para 10-43 that:

"where a defence of self-defence is raised, the burden of negating it rests on the prosecution, but the prosecution are not obliged to give evidence in chief to rebut a suggestion of self-defence before that issue is raised, or indeed to give any evidence on that issue at all..."

8.7 As such, the justification of self-defence is not to be regarded as a defence in respect of which any onus

should rest upon the accused person but is a matter which the prosecution must disprove as an essential part of their case before a conviction can stand.

8.8 A careful perusal of the record reveals that the appellant only raised the explanation of self-defence at defence stage. None of the prosecution witnesses were cross-examined on the issue of self-defence.

8.9 The appellant's focus during cross examination of the prosecution witnesses was to raise an alibi. It was put to PW2 in cross examination (page 2 lines 4 to 7 of the record of appeal) that in fact on the material day, the appellant was not at his farm with the deceased but at his other wife's place. However, PW2 denied that the appellant was at his other wife's farm when the fight took place. Equally, PW4 denied that the appellant was apprehended at his other wife's place.

8.10 Similarly, the appellant only raised the issue that he was attacked and hit on the left eye until it bled; at defence stage.

8. 11 During cross examination, PW2 testified that she found the appellant beating up the deceased with a stick and when she asked why he was beating her, he told her that he had found her committing adultery.

8.12 PW2 was thus a credible witness unlike the appellant who in one breath said he was provoked and acted in self-defence and in the other totally denied being present at the scene. His story is contradictory an indication that he made it all up to save his skin.

8.13 We therefore, cannot fault the trial judge for finding him guilty of murder. We agree with the finding of the trial court that it was not possible that the appellant only hit the deceased once. His evidence was inconsistent with the post-mortem report which corroborates the observations made by the prosecution witnesses that the deceased suffered multiple injuries. The appellant hit the deceased until the stick he used broke into pieces.

8.14 Thus, we agree that the evidence speaks to the proportion of force used being excessive and cannot be said to have been reasonable. The trial court cannot be faulted for making a finding that the appellant repeatedly hit the deceased.

8.15 As such, we are of the considered view that the explanation of self-defence was an afterthought and in any event was negated by the prosecution. The elements of self-defence set out in **section 17 of the Penal Code** were not proven.

8.16 Therefore, the trial court was on firm ground in its finding that self-defence could not be availed to the appellant.

8.17 We are mindful that a failed defence of self-defence can amount to an extenuating circumstance. **See: Precious Longwe v The People**¹⁶. However, this can only arise where the defence is properly raised but fails to meet one of the elements which is not the case herein.

8.18 We therefore agree with the respondent's counsel that the defence of self-defence was not properly raised

and none of the elements proven. Accordingly, there can be no failed defence of self-defence to avail the appellant any extenuation on that account.

8.19 The appellants other explanation for beating the deceased was that he was provoked because he found his wife having sexual intercourse with an unknown man.

8.20 Provocation was defined in *R v Duffy*⁷ as follows:

"provocation is some act, or series of acts, done [or words spoken] [by the dead man to the accused] which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind".

8.21 Section 206 of the Penal Code provides as follows:

"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 the purpose of this section, an

ordinary person shall mean an ordinary person of the community to which the accused belongs."

8.22 The Supreme Court in **Simutenda v The People**, cited by counsel, guided that the elements necessary to prove provocation are the act of provocation; the loss of self-control (actual and reasonable); and the retaliation must be proportionate to the provocation.

8.23 The appellant's explanation that he was provoked did not pass the test for provocation because there was no evidence of a provocative act. In our previous **decision in the case of Precious Longwe v The People**, supra, the defence of provocation failed because the appellant shot her husband at point blank range not because she was triggered by the alleged provocative acts of the deceased sending SMSs to her parents but because the gun went off accidentally. Similarly, in **Malangisha Kapwepwe v The People's**, the defence of provocation could not succeed because there was no provocative act. In that case, the appellant's explanation that he found condoms in his wife's handbag was rejected as an afterthought which could

not justify the appellant's brutal attack on his wife, which caused her death.

8.24 In both the **Precious Longwe v The People**¹⁶ and **Malarigisha Kapwepwe v The People**⁸ cases, we made it clear that there must be a provocative act before the defence can be invoked. As the defence could not be properly invoked in those cases, there could be no failed defence of provocation to afford the appellants any extenuation.

8.25 In *casu*, the trial court rightly found that there was no concrete evidence that the appellant found his wife (deceased) committing adultery. And his evidence on the issue regarding the involvement of the unknown man was murky.

8.26 For instance, the appellant said that when he hit the deceased with a stick once, his daughter (PW2) was present but PW2 testified that he hit the deceased repeatedly and her testimony was corroborated by the postmortem report.

8.27 In PW2's cross examination the defence focussed on the fact that he was away at his second wife's place and did not contradict PW2's testimony that he hit her more than once. Even after he was apprehended by the police, he did not inform the police that he attacked the deceased because he found her having sexual intercourse with another man.

8.28 As we already stated, the appellant's testimony was contradictory, in cross-examination of prosecution witnesses, his focus was on the alibi, the issue of the unknown man only arose at defence stage. So, what was the Court to believe? Was he at his other wife's farm or was he at the deceased's farm where he found her committing adultery? Clearly, the defence was full of contradictions and the trial judge rightly rejected it.

8.29 There was no proof of the provocative act, as such the defence of provocation could not be invoked. Consequently, there can be no failed defence of provocation to avail the appellant any extenuation.

8.30 What is clear is that the appellant attacked the deceased and repeatedly slapped her with a stick on her neck. This caused injuries which lead to her death. This was witnessed by PW2 and injuries were confirmed by the post mortem report.

8.31 The appellant was apprehended by PW4 and others after he was found hiding. The trial judge was on firm ground when she convicted him.

8.32 In view of the fore going, the death sentence was properly imposed.

8.33 Consequently, both grounds of appeal are devoid of merit. The conviction and sentence are upheld.

8.34 The appeal is accordingly dismissed.

M.M. KONDOLO, Sc
COURT OF APPEAL JUDGE

F.M. CHISHIMBA
COURT OF APPEAL JUDGE

J.Z. MULONE 'TI
COURT OF APPEAL JUDGE