Free copy

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 04, 05, 06 OF 2020**

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

ISAAC SHAFWAMBA	**1st APPELLANT**
PETER KASHIKILA	**2nd APPELLANT**
KEDRICK MALAMBO	**3rd APPELLANT**
AND	
THE PEOPLE	**RESPONDENT**

CORAM: **Chashi, Makungu and Lengalenga, JJA**

ON: **18th June and 27th August 2020**

For the Appellant: *M. Kapukutula, Legal Aid Counsel, Legal Aid Board*

For the Respondent: *F.M. Sikazwe, Acting Principal State Advocate, National Prosecutions Authority*

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Haonga and Others v The People (1976) ZR, 200**
2. **Dickson Sembauke Changwe and Ifellow Hamuchanje v The People (1989) ZR, 144**
3. **Ndumba v The People (1975) ZR, 93**
4. **Barrow and Young v The People (1966) ZR, 43**
5. **Tembo v The People (1972) ZR, 220**
6. **Lengwe v The People (1976) ZR, 127**
7. **Victoria Kansembe v The People**
8. **John Mpande v The People (1977) ZR, 440**
9. **Coghlan v Cumberland (1898) 1 CH 704**
10. **Phiri and Others v The People (1978) ZR, 79**
11. **The People v Njovu (1968) ZR, 132**
12. **John Kunda v The People - CAZ Appeal No. 142 of 2018**
13. **Lovemore Hampongo v The People - CAZ Appeal No. 31 of 2019**
14. **Jack Chanda and Kennedy Chanda v The People SCZ - Judgment No. 29 of 2002**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the High Court, delivered by the Honourable Mrs. Justice P.K. Yangailo on 11th January, 2019. By that Judgment, the Appellants were convicted of the offence of murder contrary to section 200 of **The Penal Code**[1]. There being no extenuating circumstances, the Appellants were sentenced to suffer the death penalty.

2.0 CHARGE BEFORE THE TRIAL COURT

2.1 The three Appellants were jointly charged with one count of murder contrary to section 200 of **The Penal Code**[1]. The particulars of the offence being that the Appellants did, on the 25th March 2017, at Shibuyunji in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whist acting together, murder one Patrick Phiri (the deceased). The Appellants pleaded not guilty.

3.0 EVIDENCE BEFORE THE TRIAL COURT

3.1 This appeal has its origins from an incident that occurred on 25th March 2017, at the premises of Micheal Musakanwaya, (PW4), where the deceased was killed by the Appellants.

3.2 The prosecution's case was mainly premised on the testimony of two eyewitnesses, PW1 and PW2 who had known the Appellants prior to the incident of 25th March, 2017. The evidence disclosed that on the material day around 17:00 hours, PW1, PW2 and the 3rd Appellant convened at PW4's residence to drink some alcoholic beverage (Kachasu). Whilst there, another group, consisting of the 1st Appellant, 2nd Appellant and one Jones Lukuta Mweemba had also gathered while the deceased was seated alone.

3.3 Around 19:00 hours, PW1 and PW2 observed the deceased and one Chuki arguing, after which, Chuki left the premises. Shortly thereafter, Jones left his group and went to where the deceased was seated; the duo started arguing, in the course of which, the

deceased was seen pushing Jones, who fell to the ground and lapsed into unconsciousness. It is at this juncture that the Appellants assaulted the deceased, using hands and kicks to inflict injury and in the process, the deceased met with instantaneous death.

3.4 PW4, the owner of the premises was called to the scene and upon seeing what had befallen the deceased, he informed the headman, who went to the scene of incident and confirmed that the deceased was dead. The deceased's relatives were also told about what happened to the deceased and they rushed to the scene and verified what they had been told.

3.5 The matter was subsequently reported to Shibuyunji Police Station. The police visited the scene of incident on the same date and collected the deceased's inert body, which was deposited at UTH Hospital mortuary, where a post-mortem was carried out by a **Dr. T. Musakhanov**. The findings of the post-mortem examination recorded his death to have resulted from brain hemorrhage due to fatal blunt force head injury.

3.6 The police commenced investigations in the matter, which led to the apprehension of the Appellants. They were subsequently charged and arrested for the offence of murder.

3.7 In their defence, the Appellants denied any complicity in the offence. According to the 1st Appellant, on the date in question, he was drinking beer at PW4's premises in the company of the 2nd Appellant and Jones. At around 19:00 hrs, the deceased and Jones got into a scuffle, during which, the deceased pushed Jones who fell to the ground. Shortly thereafter, another fight ensued between the deceased and Chuki and in the process, the deceased was beaten and died.

3.8 The 1st Appellant alleged that PW1 and PW2 were seated behind the kitchen and could not see what was going on as there were no lights. All in all, the 1st Appellant alleged that the only role he and the 2nd Appellant played, was merely to separate the deceased and Chuki who were fighting and thereafter, Chuki ran away.

3.9 The 2nd Appellant's testimony was similar to that of the 1st Appellant in all material respects. He denied having participated in the beating of the deceased. In addition, he stated that when the headman arrived on the scene, he instructed the crowd that had gathered to look for Chuki. When Chuki was brought before the headman, he was beaten by the deceased's relatives and he informed them that he was provoked by the deceased. He then managed to escape the crowd.

3.10 The 2nd Appellant further testified that a few days after the incident, he had travelled to Mumbwa to collect money his uncle sent for his grandparents. H owever, when he arrived in Mumbwa, he was apprehended by vigilantes and taken to Mumbwa police on grounds that he had killed someone. After spending a day in the cells, he was conveyed to Shibuyunji Police Station, where he was detained together with the 1st and 3rd Appellant.

3.11 The 3rd Appellant confirmed being at the scene. He distanced himself from any implication in the beating

of the deceased by asserting that he was seated behind the kitchen at all material times and had no knowledge of how the deceased met his death. He claimed that he was only informed by PW4 that the deceased had fainted.

4.0 FINDINGS OF THE TRIAL COURT

4.1 In the ensuing Judgment, the trial court found as a fact that the deceased was beaten to death on 25th March 2017 at PW4's premises. This was confirmed by the post-mortem report which indicated that the cause of death was brain hemorrhage due to fatal blunt force head injury.

4.2 The lower court, relying on the evidence of PW1 and PW2, found that it was the Appellants who beat the deceased after the deceased pushed their friend Jones, who fell to the ground and fainted. She also found that it was Jones who left where he was seated with the Appellants and went to where the deceased was sitting alone.

4.3 She was of the view that, the fact that the Appellants descended on the deceased and beat him until he died, was enough to satisfy her that the ingredient of malice aforethought had been established. Further that, the Appellants testified that they were not drunk, as such they ought to have known that their actions would cause harm to the deceased.

4.4 The learned Judge then considered whether the Appellants had formed a common intention to cause the death of the deceased. Relying on the case of **Haonga and Others v The People**[1] and section 22 of **The Penal Code**[1], the trial Judge found that the Appellants jointly beat the deceased, after he had pushed their friend, Jones to the ground, thereby forming a common intention of causing the death of the deceased.

4.5 The learned Judge disbelieved the evidence proffered by the Appellants that Chuki beat the deceased on account that there was no reason advanced to show why PW1 and PW2 would falsely implicate the

Appellants. She was of the view that PW1 and PW2 had no reason to lie as they were in the group of the Appellants drinking beer together.

4.6 The learned Judge also found it odd that the 2nd Appellant left the village immediately after the incident occurred, without reporting the incident to the police. She opined that if indeed he had not participated in the beating and having witnessed the fight, he would have reported the matter to the police. According to the learned Judge, this confirmed the prosecution's case that he ran away.

4.7 With regard to the demeanour of the Appellants, the learned Judge opined that the 2nd Appellant was fidgeting whilst testifying and further that there were a lot of inconsistencies in the Appellants' testimonies. Therefore, the learned Judge discounted the evidence of the Appellants in preference to the evidence of PW1 and PW2, whom she found to be consistent. She was of the view that the evidence of the Appellants was not credible to cast doubt on that of PW1 and PW2.

4.8 Faced with the foregoing evidence, the trial court found the prosecution's case proved beyond reasonable doubt against the Appellants. She was satisfied that the danger of false implication had been excluded. On that account, the trial Judge found the Appellants guilty of the offence charged, convicted them and in the absence of extenuating circumstances, sentenced them to death.

5.0 GROUNDS OF APPEAL

5.1 Aggrieved by the trial court's decision, the Appellants now appeal against the conviction and sentence, advancing one ground of appeal couched as follows:

5.1.1 The learned Judge in the court below erred both in law and fact and misdirected itself by convicting the Appellants of the offence of murder when the prosecution evidence did not prove the ingredient of malice aforethought beyond all reasonable doubt.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 On behalf of the Appellants, Mr. Kapukutula, filed in and relied on the heads of argument. The main argument by Counsel is that the prosecution failed to establish malice aforethought which is a prerequisite mental element for one to be convicted of murder. In advancing the Appellants' case, Counsel submitted that the evidence on record revealed that the case against the Appellants rested squarely on the evidence of eye witness testimony to the effect that there was a fight between the Appellants and the deceased and that the deceased was the aggressor as he had beaten Jones, a friend of the Appellants.

6.2 According to Counsel, this evidence does not in a way prove the alleged malice aforethought as there was no evidence from the prosecution witnesses that the Appellants intended to cause grievous harm or had the specific intent to cause the death of the deceased. To buttress his submission, Counsel referred us to the case of **Dickson Sembauke Changwe and Ifellow**

Hamuchanje v The People[2] where the Supreme Court held inter alia that:

> *"As Sections 200 and 204 of the penal code show, murder is a crime which requires a specific intent or specific frame of mind and it is for the prosecution to adduce evidence which satisfies this requirement."*

6.3 It was submitted that the prosecution did not satisfy the element of malice aforethought. We were further referred to the case of **Ndumba v The People**[3] which we believe is for the position that the Appellants were provoked by the deceased, who was the aggressor and as such this did not suggest an intention on the part of the Appellants to kill the deceased.

6.4 It was Mr. Kapukutula's further contention and we assume this was in the alternative that on a perusal of the evidence on record, it revealed that there was information from two prosecution witnesses that the deceased was beaten by a person called Chuki. According to Counsel, this information ought to have

exonerated the Appellants. Counsel called into aid the case of **Barrow and Young v The People**[4] where it was held as follows:

> *"Where one prosecution witness gives evidence in favour of the defence, and one against, the court should resolve the doubt in favour of the accused in the absence of any good reason for preferring one witness's testimony."*

6.5 Counsel further argued in the alternative that in the event that we are not persuaded by the foregoing arguments, we must find that the Appellants are guilty of a lesser offence of manslaughter. Our attention was drawn to the case of **Tembo v The People**[5] where it was held that:

> *"An argument followed by a fight can amount to provocation sufficient to reduce from murder to manslaughter a fatal blow struck with a lethal weapon in the heat of such fight."*

6.6 Counsel further referred us to the case of **Lengwe v The People**[6], where it was held as follows:

"In the circumstances in this case a man cannot be expected to consider dispassionately precisely what force he may use or whether a weapon which happens to be ready to hand which he picks up and uses in the heat of the moment is or is not more than the occasion warrants."

6.7 Further in the case of **Victoria Kansembe v The People**[7], The Supreme Court stated as follows:

"In passing, we must mention that during the hearing, we raised issue regarding the appropriateness of the charge of murder preferred against the Appellant and her co-accused. Mr. Masempela agreed with us that having regard to the facts of this case, where death ensued from an altercation, followed by a fight between two people who were drunk, the appropriate charge should have been manslaughter."

6.8 According to Counsel, the evidence did not establish malice aforethought and that the lower court should have been alive to this. It was submitted that the

prosecution did not prove the offence against the Appellants and that they ought to be acquitted of the offence of murder. It is Counsel's contention that the finding by the trial court that the Appellants had the motive to cause the death of the deceased lacked evidential and factual backing.

6.9 Counsel urged us to acquit the Appellants and in the alternative substitute their conviction for the lesser offence of manslaughter.

7.0 ARGUMENTS OPPOSING THE APPEAL

7.1 Mr. Sikazwe, Counsel for the State, equally filed and relied on the heads of argument against the appeal. According to Counsel, the lower court did not err in law and fact when it convicted the Appellants for the offence of murder as there was overwhelming evidence that proved the offence beyond reasonable doubt. It was pointed out that PW1 and PW2, the two eyewitnesses who were present at the scene, saw the Appellants beating the deceased to death.

7.2 Further there was evidence from PW5, the arresting officer, who attended the postmortem examination that the deceased was found with head injuries. This was confirmed by the postmortem report which indicated that the injuries sustained by the deceased were severe.

7.3 According to Counsel, the evidence on record proved that the Appellants had the requisite malice aforethought as provided for under section 204 (a) and (b) of **The Penal Code**[1]. The injuries that were inflicted on the deceased were suggestive of the intention on the part of the Appellants to do grievous harm or indeed to cause the death of the deceased. According to Counsel, the Appellants knew that death would result from the act of beating the deceased.

7.4 It was further argued that there was neither a dispute between the deceased and the Appellants nor did the deceased attack the Appellants for him to have been considered as an aggressor. The Appellants only descended on the deceased, after the deceased pushed

Jones to the ground. Therefore, the Appellants could not rely on the case of **Tembo v The People[5].**

7.5 With regard to the argument that there were prosecution witnesses who gave evidence in favour of the Appellants to the effect that it was Chuki who assaulted the deceased, Counsel for the State argued that there was no conflict between the evidence given by the prosecution witnesses, neither was there any prosecution witness who gave evidence in favour of the Appellants.

7.6 It was pointed out that PW4 testified that when he inquired as to who had beaten the deceased, the 1st Appellant told him that it was Chuki. However, after making further inquiries, it was established that it was the Appellants who beat up the deceased and not Chuki and that the same can be said about PW3 and PW5. On that basis, the Appellants could not rely on the case of **Barrow and Young v The People[4].**

7.7 Mr. Sikazwe further submitted that the record reveals that the Appellants did not put up a defence of

provocation or intoxication but just bare denials. Therefore, the principles set out in the case of **Ndumba v The People**[3] cited by the Appellants cannot be relied on as the case is distinguishable from the present case. In the present case, the defences of provocation and/or intoxication were not set up, as such, the court cannot embark on an expedition of looking for defences for the Appellants.

7.8 Lastly, Counsel urged us to dismiss the appeal and uphold the Appellants' conviction and sentence.

8.0 ARGUMENTS IN REPLY

8.1 In reply, Mr. Kapukutula brought to our attention the case of **John Mpande v The People**[8] where the Supreme Court held as follows

> *"(i) The offence of manslaughter does not consist simply in an unlawful act resulting in death; the act must at the same time be a dangerous act, that is, an act which is likely to injure another person. Dictum of Humphreys, J, in R v Larkin [1] cited with approval.*

(ii) The unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to at least the risk of some harm resulting therefrom, albeit not serious harm.

Dictum of Edmund - Davies, J, in R v Church [2] cited with approval.

(iii) The likelihood of harm may stem not only from the violence of the unlawful act itself but may arise also because of the circumstances in which the violence took place."

8.2 According to Counsel, the above authority fits in with the circumstances under which the deceased in the present case met his death.

9.0 DECISION OF THIS COURT

9.1 We have considered the record, submissions by Counsel and the impugned Judgment.

9.2 Counsel for the Appellants advanced a number of arguments in support of the appeal. The first being that there was evidence from PW3 and PW5 to the

effect that the deceased was assaulted by Chuki. According to Counsel, this evidence ought to have been resolved in favour of the Appellants and exonerated them from the offence of murder.

9.3 We have appraised the evidence on record, and we agree with Counsel for the State that there is no evidence adduced by the prosecution that ought to have been resolved in favour of the Appellants. PW4, the owner of the premises testified that when he was alerted about the fight, he left his house and found the deceased unconscious under a tree. When he inquired about what happened, the 1st Appellant informed him that the deceased was fighting with Chuki. However, PW4 stated that the next day, he learnt that it was the Appellants who assaulted the deceased. Further PW3, the sister to the deceased, equally testified that on the material day, the initial report she received was to the effect that Chuki beat up the deceased, but was further informed by persons who were present at the scene that it was the Appellants. The same applies to

PW5, the arresting officer, who after thorough investigations discovered that the Appellants violently assaulted the deceased.

9.4 We are at pains to appreciate Counsel's argument that the prosecution witnesses testified that it was Chuki who beat up the deceased, when it is clear from their evidence that it was the Appellants who assaulted the deceased. The prosecution witnesses were categorical in their evidence that it was the Appellants who beat the deceased to death.

9.5 The trial court in arriving at its decision whether it was the Appellants who caused the deceased's death, believed the evidence of PW1 and PW2, that the Appellants descended on the deceased after the deceased pushed Jones, who fell to the ground and fainted. The lower court was of the view that PW1 and PW2 were credible witnesses and were consistent in their testimony.

9.6 The trial court disbelieved the evidence of the Appellants that it was Chuki who caused the death of

the deceased on account that the Appellants were not credible and did not adduce any evidence to cast doubt on that of PW1 and PW2. She was further not impressed with the demeanour of the Appellants during trial coupled with the inconsistencies in their evidence. In addition, the Appellants did not offer any reasons as to why PW1 and PW2 would falsely implicate them.

9.7 We have perused the proceedings in the lower court and we agree with the finding of the trial Judge that PW1 and PW2, who were the two eyewitnesses, were credible witnesses who, were not shaken in their testimony and their credibility was unimpeachable. We are also aware that as an Appellate Court we never had the advantage of seeing and hearing the witnesses which is the preserve of the trial court. In the case of **Coghlan v Cumberland**[9], it was stated as follows:

> *"...When as often happens much turns on the relative credibility of witnesses who have been examined and cross examined before the Judge,*

the Court is sensible of the great advantage he has had in seeing and hearing them, it is often very difficult to estimate correctly the relative credibility of the witnesses from written dispositions; and when the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is and must be guided by the impression made on the judge who saw the witnesses who stole. But there may obviously be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not and these circumstances may warrant the Court in differing from the judge when on question of fact turning on the credibility of witnesses whom the Court had not seen."

9.8 Further in the case of **Phiri and Others v The People**[10], where it was held that

"An appellate Court not having the advantage of seeing and hearing the witnesses will not interfere

with findings of fact of the trial Court, unless the finding is one which cannot be reasonably be entertained on the evidence."

9.9 In light of the holdings in the above cases, it is clear that the trial Judge did consider the evidence of the eyewitnesses and that of the Appellants and had the advantage of seeing and hearing all the witnesses. We cannot, therefore, fault the finding by the trial Judge that the evidence of the Appellants who tried to shift the blame from themselves to Chuki was not consistent and credible. She was entitled to arrive at the decision she did, and we see no reason to substitute that finding.

9.10 We also wish to state that upon a critical examination of the Appellants' evidence, we agree with the trial Judge that the evidence revealed some glaring discrepancies; firstly, whether PW1 and PW2 who were seated behind the kitchen could see what was happening on the other side. The 3rd Appellant testified that the two groups were facing each other and that

they could see what was happening on the other side, on the other hand the 2nd and 3rd Appellant claimed that PW1, PW2 and the 3rd Appellant sat behind the kitchen and could not see what was happening because it was dark.

9.11 Secondly, the 3rd Appellant testified that he was the only person who attended to Jones when he fainted, while the 1st and 2nd Appellant testified that they attended to Jones and even poured water on him in an attempt to resuscitate him. Thirdly, the 2nd Appellant testified that when Chuki was apprehended by the mob that had gathered at the crime scene, and when he was asked about the incident by the deceased's relatives, he informed them that he was provoked by the deceased. The 1st Appellant on the other hand, testified that after the fight, Chuki ran away.

9.12 In our view, these inconsistencies in the testimonies of the Appellants go to the root of their case and casts doubt on their evidence. We are fortified by the cases of **Dickson Sembauke Changwe and Ifellow**

Hamuchanje v The People[2] where the Supreme Court stated as follows:

> *"For discrepancies and inconsistencies to reduce or obliterate the weight to be attached to the evidence of a witness, they must be such as to lead the court to entertain doubts on his reliability or veracity either generally or on particular points."*

and further in the case of **Haonga and Others v The People**[1], where the Supreme Court stated, among other things, that:

> *"Where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of the evidence is reduced."*

9.13 In addition to the inconsistencies, the behaviour of the 2nd Appellant after the incident, of running away was not compatible with that of an innocent person. This behaviour confirms the prosecution's narrative of what transpired on that material day. We also note that the Appellants failed to offer any cogent explanation as to

why PW1 and PW2 would want to falsely implicate them.

9.14 Based on the foregoing, there is little room, if at all, for doubt that the deceased died as a result of the beating administered by the Appellants. This was confirmed by the post-mortem report which revealed that the cause of death was due to brain hemorrhage due to fatal blunt force head injury.

9.15 Another line of attack by the Appellants, which was argued in the alternative is premised on the position that, whilst the Appellants did in fact cause the fatal injuries which resulted in the death of the deceased, they did not do so intentionally or calculatedly. In other words, that one crucial ingredient for the offence of murder was not present, that is, *malice aforethought or mens rea* on their part.

9.16 The Appellants allege that their actions were actuated by the deceased's provocation, as he was the aggressor and thereby negatived the *mens rea.* As such, the Appellants contend that their conviction for the offence

of murder is not sound in law and they ought to have been acquitted or convicted of the lesser offence of manslaughter.

9.17 Considering that what has been raised is the issue of the absence of malice aforethought, recourse must be had to section 204 of **The Penal Code**[1]. *Malice aforethought* or *mens rea*, according to Section 204 of **The Penal Code**[1] means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused:

> *"204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not,*

although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

9.18 It is therefore clear from the above provision that for the prosecution to secure a conviction of murder, they must establish that the Appellants were possessed with the necessary malice aforethought to have caused the unlawful death of the deceased. We adopt the holding of the High Court in the case of **The People v Njovu**[11], where it was 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."

9.19 We have examined the evidence in the present case and it is clear that the deceased was violently pummeled by the Appellants, and kicked all over the body. This beating continued to the extent that the deceased met with instant death. In our view, the deceased was overpowered by the three Appellants who had ganged up on him, leaving no room for him to resist. This is a clear demonstration that the Appellants had an intention to cause death or grievous harm, which constitutes the necessary mental element for the offence of murder as envisaged in section 204 of **The Penal Code**[1].

9.20 We, therefore, have no hesitation in holding that the three Appellants were armed with the necessary knowledge and realisation that serious harm was a natural and probable consequence of beating someone with fists and kicks. From the injuries sustained by the deceased, the Appellants knew or ought to have

known, that their conduct of using fists and kicks targeted to a very delicate part of the body such as the deceased's head would, at the very least, cause serious bodily harm to the deceased or would be sufficient in the ordinary course of nature to cause death. The learned trial Judge was therefore on firm ground in finding that the Appellants had the necessary malice aforethought as envisaged in Section 204 of **The Penal Code[1].**

9.21 As regards the argument on behalf of the Appellants, that there was provocation, we do not find any provocation in the present case as defined in section 206 of **The Penal Code**[1]. There is no evidence to suggest that the deceased had at any point interacted or engaged with the Appellants or that there was any dispute between the deceased and the Appellants to warrant the vicious attack on the deceased. A clear intention to harm the deceased was formed the moment the Appellants observed that their friend Jones had been pushed to the ground and he fainted.

The Appellants' account that they were provoked by the deceased is unconvincing and implausible. We, therefore, find no merit in the Appellants' sole ground of appeal.

9.22 With regard to whether or not there were any extenuating or mitigating circumstances attending the unlawful act, we note that the Appellants were drinking on the material day from about 14:00 hours to 19:00 hours when the incident occurred. In considering whether intoxication could be an extenuating circumstance in the present case, we had recourse to our recent decisions in the cases of **John Kunda v The People**[12] and **Lovemore Hampongo v The People**[13] where we held that the evidence of drinking can amount to an extenuating circumstance as decided in the case of **Jack Chanda and Kennedy Chanda v The People**[14]. However, the standard has been set higher. An Accused person must not only show that he was drinking alcohol but must also show that he was impaired by the alcohol to such a degree

of mental incompetence that he suffered a diminished culpability.

9.23 The Appellants, in their own evidence testified that they were drinking but that they were not that drunk. Therefore, in our view, the Appellants were not so intoxicated that they had no appreciation of their surroundings or so as not to know what they were doing. Their actions were intentional, and had the effect of inflicting grievous harm, which culminated in the death of the deceased. Therefore, in the absence of circumstances which the law recognizes as sufficient to mitigate or extenuate the unlawful act, the death penalty imposed on them is hereby maintained.

10.0 CONCLUSION

10.1 All in all, we find that the offence of murder was proved to the requisite threshold of proof beyond reasonable doubt against the Appellants. We find no

merit in the appeal and the same is dismissed in its entirety.

J. CHASHI
COURT OF APPEAL JUDGE

C. K. MAKUNGU
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE