SCZ APPEAL No.175, 176 /2014

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

PENIUS MUSITINI **1ST APPELLANT**

LILIAN ZULU MUSITINI **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM; Phiri, Wanki and Malila, JJS.

On the 2nd December, 2014 and 30th September, 2020

For the Appellants: Mr. W. Mutofwe of Messrs Douglas and Company.

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

J U D G M E N T

Phiri, JS: delivered the judgment of the Court.

Cases and other works referred to:

1. **Simutenda v The People (1975) ZR. 294**
2. **Dickson Sembauka Changwe and Ifellow Hamuchanje v The People (1988 – 89) ZR. 144**

Legislation referred to:

The Penal Code, Chapter 87 of the Laws of Zambia

When we sat to hear this appeal, Mr. Justice M. E. Wanki was with us. He has since retired and elevated to the higher Bench. This is therefore, the majority judgment.

The background of this appeal is that both appellants, who are husband and wife, were tried and convicted by Justice Chashi, J (as he then was) for the offence of Murder and each one of them was sentenced to serve life imprisonment.

In this appeal, Mr. Mutofwe canvassed a single ground of appeal on behalf of both appellants; namely, that the learned trial Judge erred in fact when he sentenced the appellants to life imprisonment without full consideration of the extenuating circumstances that would have allowed him to pass a lesser sentence other than the sentence of life imprisonment.

The evidence which was not in dispute was that the deceased was a known mental patient on out patient treatment. He strayed into the appellants' property during the night. He was seen loitering within the

yard. The appellants suspected him to be a thief and confronted him with extreme violence.

There is specific evidence on the record to establish that the 1st appellant assaulted the deceased with his home-made weapons including an axe handle, while the 2nd appellant scorched him with boiled water and what looked like boiling cooking oil. Some people from the neighbourhood came to the scene and took part in the assault. During the assault, the deceased kept uttering incoherent statements. He sustained a deep cut on his head, multiple cuts on his face and scorched hands. Both his legs had fractured bones; and both his hands were broken. The 1st appellant took the deceased to David Kaunda Police Post where he lodged a report of theft of wheels from his car which was parked within his yard. The Police refused to detain the deceased in Police cells because of the poor state of the injuries to his body. Instead, the Police issued a medical report form and advised his guardian (PW4) to convey him to the hospital, which he did. However, the deceased succumbed to the injuries that very morning. Following a Police investigation, the appellants were subsequently arrested and charged with the offence of Murder.

At the trial, the appellants denied taking part in assaulting the deceased. They each claimed that he was assaulted by the mob that gathered to witness the incident. The incident was witnessed by PW1, PW2 and PW3 who saw the deceased in the appellants custody. Although the events took place at night, the place was well lit with electric security lights. The learned trial Judge accepted the evidence given by PW1, PW2 and PW3 and discounted the appellants' defence for lacking credibility in the face of evidence from eye witnesses who testified against them. Their defence was that they acted to protect their property.

At the conclusion of the trial, both appellants were found guilty and convicted of Murder, on the basis that there was convincing evidence of a common purpose and intention to cause grievous harm to the deceased. However, the learned trial Judge did not impose the mandatory death sentence on the premise that the appellants assaulted the deceased because they suspected him to be a thief who stole from their parked car; and that the appellants had a constitutional right to defend their property. Hence the trial court

concluded that the felony was committed under extenuating circumstances.

In this appeal, Mr. Mutofwe submitted that the life sentence was not sufficiently less in view of the appellants' belief of their right to defend and protect their property from being stolen. Mr. Mutofwe alleged that the learned trial Judge did not sufficiently consider the extenuating circumstances, and that the sentence of life imprisonment was 'hash'.

In response, Ms. Kawimbe submitted that the life sentence meted out on the appellants was correct because there were no extenuating circumstances and that the evidence on record established that the appellants' acts were planned, deliberate and passionate. They had all the malice aforethought as they committed their offence on a defenseless person in a cold and merciless manner. In support of this argument, we were referred to the cases of **Simutenda v The People** [1] and **Dickson Sembauka Changwe and Ifellow Hamuchanje v The People** [2] regarding what a reasonable person must know or foresee as a natural and probable consequence of their action to satisfy **section 204 of the Penal Code Chapter 87 of the Laws of Zambia** which defines malice aforethought.

We have considered the evidence on record as well as the submissions exchanged by both parties. It is settled law that the force that is permitted in defence of property should not be out of proportion to the necessity of the situation. It follows that when no danger or peril remains, then the employment of force exhibits revenge or deliberate punishment or aggression which may no longer be linked to the necessity of the defence of the property.

The evidence on record from PW1, PW2, PW3 and PW5 clearly establishes that the deceased was not found to have either stolen any tyre or caused any damage to property. He was not found with any tools and had already been effectively taken into custody by the appellants before they began their marathon assault. The 1st appellant used an axe handle which became blooded at its head. The 2nd appellant had sufficient time to boil water and cooking oil during the night for the sole purpose of using it on the deceased. All this took place over a prolonged period of time from about 01:00hours to about 05:00 hours when the deceased was in the appellants' custody.

In our view, the failed defence put up by the appellants does not fall within the contemplation of **section 201(1) (b) of the Penal Code**

which provides for extenuating circumstances. We accordingly find that the commuting of the mandatory death sentence to life imprisonment was a misdirection and wrong in principle. We thus vacate the sentence of life imprisonment and substitute it with the mandatory death sentence. We dismiss this appeal.

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G.S. Phiri

SUPREME COURT JUDGE

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M. Malila

SUPREME COURT JUDGE