

IN THE COURT OF APPEAL OF ZAMBIA CAZ APPEAL NO. 15,16,17/2020
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

KELVIN KAJOBA
HERBERT MUSANKABANTU
CHRISTOPHER MWIINGA



1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM : Kondolo, Chishimba and Mulongoti, JJA
On 21st July, 2020 and 18th November, 2020

For the Appellant : Mr. K. Kadazo of Messrs Legal Aid Board
For the Respondent : Mr. M. Libakeni of Messrs National Prosecution
 Authority

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Muvuma Kambanje Situna vs The People (1982) ZR 115 (SC)
2. Njunga and Others v The People (1988-1989) ZR
3. Saluwema vs The People (1965) ZR 4
4. Dorothy Mutale and Richard Phiri v The People (1997) SJ 51 SC
5. Kambarange Mpundu Kauda v The People (1990-1993) ZR 215
6. George Misupi v The People (7978) ZR 304
7. Yokaniya Mwale vs The People Appeal No. 285/2014
8. Chillombo and Others vs The People 1982 ZR 205



9. **Mwiimbe v The People (1986) ZR15**
10. **Tembo vs The People (1980) ZR**
11. **Liyumbi v The People ZR (1978) ZR 25**
12. **Charles Ntembwe v The People Appeal 100/2019 (CA)**
13. **Kalinda v The People (1966) ZR 29**
14. **Jack Chanda and Another vs The People (2002) ZR 124**
15. **Anayawa and Sinjambi v The People Appeal No. 143/2011**
16. **Makomela v The People (1974) ZR**
17. **Mulenga v The People (1966) ZR 118**
18. **Simutenda v The People (1975) ZR 294**
19. **Mbomena Mool v. The People (2000) ZR 148**
20. **Mwape Kasongo v. The People CAZ Appeal No. 36 of 2016**
21. **Yokoniya Mwale v The People SCZ Appeal 285 of 2014**
22. **Patford Mwale v. the People CAZ Appeal No. 8 of 2016**
23. **The People v Njovu (1968) ZR 132**

LEGISLATION AND OTHER WORKS REFERRED TO:

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

- 1.0 **INTRODUCTION**

- 1.1 This is an appeal against the decision of Justice Egispo Mwansa sitting at Lusaka. The Appellants were charged and convicted of the offence of Murder, contrary to **Section 200 of the Penal Code** and sentenced to death.

- 1.2 The particulars of the offence alleged that they jointly murdered Alex Shamenda on the 24th of November 2018.

2.0 **EVIDENCE IN THE COURT BELOW**

- 2.1 The summary of the evidence adduced by the prosecution is as follows; Ester Shikabeta, (PW1) wife of the 1st Appellant testified that on her way home, she met the 2nd and 3rd Appellants near an unoccupied house structure. When she asked them whom they were waiting for, she was told that they were waiting for someone who was in the house. After walking a short distance past them, she saw the 2nd and 3rd Appellants start to beat the deceased with sticks. She informed a Mr. Mbewe about what she had witnessed and was told to go home.

- 2.2 She stated that the 1st Appellant was not part of the people that were beating the deceased. PW1, last saw the 1st Appellant when picking up relish from him earlier that day around 16:00 hours but had not seen him since. She was later informed that the 1st Appellant had been arrested in connection with the death of the deceased who was her grandfather.

2.3 In cross examination, Ester Shikabeta denied having an affair with the deceased and that the Appellants had beaten the deceased because she had been found having sexual intercourse with him. She stated that she had seen another woman who was carrying a baby on her back exiting the structure in which the deceased was.

2.4 Moses Kangala (PW2) testified that on the 24th of November 2018 around eighteen hours as he was going home, by passing a tavern, he heard a person crying by the name of Alex Shamenda, who was being beaten by the Appellants. The 1st Appellant was using a stick to beat the deceased on the head and his legs. The Appellants took turns beating the deceased. The 2nd Appellant was kicking the deceased with his boots. When queried, the 2nd Appellant asked him whether he would be happy if he found his wife with another man?

2.5 PW2 maintained that Alex Shamenda was beaten by the Appellants who all took turns beating him up. The Appellant's wife was not at the scene, though the 2nd Appellant alluded to the fact that the deceased was caught with the 1st Appellant's wife.

2.6 Syliva Ngobola (PW3) an in-law to the deceased, testified that on the 24th of November 2018, she was at home when she heard commotion of people shouting words to the effect that "you have killed him". She found Alex Shamenda beaten. She further saw the 1st Appellant holding a stone, whilst the 2nd and 3rd Appellants had sticks which they used to beat the deceased.

2.7 PW3 restrained the 1st Appellant from stoning the deceased. She told the appellants to stop beating Alex Shamenda who was not breathing properly. When she switched on her touch, she observed that Alex had no shirt on and his body was covered in blood stains and his head was bleeding. His leg was fractured. PW3 looked for a vehicle to take Alex to the Lukologo Clinic and from there they proceeded to Kafue General Hospital where he was pronounced dead on arrival. The deceased was suspected of having an affair with PW1. The deceased sustained injuries on his head, body and had a fractured leg. In addition, he was bleeding. When other persons started arriving at the scene, the Appellants fled.

- 2.8 PW4, the arresting officer testified that he was allocated the docket of murder in which PW3 reported that the deceased had died after being assaulted by the Appellants on 24th November 2018. The post-mortem report indicated that Alex Shamenda had died due to traumatic shock. He sustained a fractured leg, head injuries and bruises on the chest. His investigations revealed that the deceased was beaten because he was found having sexual intercourse with the 1st Appellant's wife, Ester, by the 2nd and 3rd Appellants who beat and took him to the 1st Appellant. None of the instruments or sticks used were recovered from the scene.
- 2.9 In their Defence, the Appellants gave similar version of events. The evidence by the 1st Appellant was that, on the fateful day he had been at the market stall working. His wife, Ester, came to the market around 16:00 hours to collect relish from the 1st Appellant. Upon knocking off, the 1st Appellant passed through a tavern to drink alcohol before heading home.
- 2.10 On his way home, he used a shortcut and passed by a house structure made of straw where he heard people inside. He stood by the door and switched on his torch. When he looked

inside the house, he saw the deceased and his wife. Upon seeing him, his wife hid behind the deceased, then run away from the premises.

2.11 According to A1, Alex Shamenda asked for forgiveness for the terrible act he had committed. When A1 attempted to collect some clothes from Alex, Alex resisted and started punching him with fists. A1 was enraged by this conduct and a fight ensued. Though Alex run away, A1 got his clothes, a chitenge material and scandals belonging to his wife as evidence of adultery.

2.12 In the process of running away, Alex fell into a ditch. The 2nd and 3rd Appellants joined the 1st Appellant, who explained to them what had transpired. The 2nd Appellant advised the 1st Appellant to go home since he had obtained Alex's clothes in his possession. The 1st Appellant proceeded home and slept. The next day he was apprehended around nineteen hours. The 1st Appellant testified that Alex was the first to punch him, hence his retaliation. He never used any sticks to beat Alex. The 3rd Appellant was sent to call Alex's relatives to check on him in the ditch.

2.13 In cross examination, the 1st Appellant refuted attempting to stone the deceased or using instruments such as sticks to beat him. He further disputes seeing PW3 at the scene. The noise heard by the 1st Appellant appeared as sounds of people having sexual intercourse, hence his decision to see what was going on. The 1st Appellant used fists when fighting with Alex Shamenda, who run away and fell into a ditch. The 1st Appellant testified that he was furious that Alex had sexual intercourse with his wife and had the audacity to punch him. Prior to that; the 1st Appellant was okay.

2.14 He surmised that the injuries sustained by the deceased must have been caused by the fall. The 1st Appellant denied beating the deceased using sticks with the 2nd and 3rd Appellants.

2.15 The 2nd and 3rd Appellants stated that they had been together earlier that day. On their way to the market they found the 1st Appellant and Alex Shamenda fighting. When they asked the 1st Appellant why he was fighting, they were informed that he had found Alex having sexual intercourse with his wife.

2.16 The 2nd Appellant stated that he advised the 1st Appellant to go home as he had already obtained their clothes from the scene

which was evidence enough of his wife's infidelity. The 1st Appellant was led to his home by the 2nd Appellant while the 3rd Appellant was asked to go to the tavern to look for the deceased's relatives as he had been injured from the fall.

2.17 The 2nd and 3rd Appellants denied taking part in beating the deceased and denied having inflicted the injuries revealed in the post-mortem report. They maintained that they only arrived at the scene after the fight had ensued and only tried to stop the fight.

3.0 **DECISION OF THE LOWER COURT**

3.1 The trial Judge disregarded the evidence of Esther, the 1st Appellant's wife as it was at variance with the evidence of the other eye witnesses who placed all three Appellants at the crime scene. The court stated that the decision to disregard Esther's testimony was fortified by the fact that even the 1st Appellant himself did not dispute that he was at the scene; the court found that in fact his wife was also at the scene.

3.2 The trial court found that Esther was not a credible witness and her testimony should not be believed. The court relied on the evidence of the two eyewitnesses PW2 and PW3 who both

maintained that all Appellants were at the scene hitting Alex Shamenda with sticks.

3.3 The court rejected the argument that the witnesses had an interest of their own to serve because they were related to the deceased as there was no evidence before him to suggest their intention to fabricate a story to falsely implicate the Appellants.

3.4 The trial Judge rejected the version of events by the Appellants as it was not reasonably true considering the nature of the injuries suffered by the deceased. He found that the injuries sustained could not have been inflicted by mere fists and a fall in a ditch. He further found that it was odd that the Appellants were seen beating the deceased and later he sustained fatal injuries.

3.5 In conclusion, the trial Judge found that there was sufficient direct evidence pointing to the fact that the Appellants beat up the deceased leading to his eventual death. Consequently, all three Appellants were convicted for the subject offence and sentenced to death.

4.0 **GROUND OF APPEAL**

4.1 Three grounds of appeal are raised;

- (i) **That the trial court erred in law and fact when it held that the prosecution had proved beyond reasonable doubt that the Appellants caused the death of the deceased, Alex Shamenda on the 24th of November 2018, based on the evidence of PW2, PW3 and the Post-mortem Examination Report by PW4.**
- (ii) **That the trial court misdirected itself in law and fact when the court neglected to consider the defence of self-defence and/ or provocation raised by the 1st Appellant.**
- (iii) **In the alternative, the trial court misdirected himself in law and fact when the court sentenced the Appellants to death despite there being extenuating circumstances.**

5.0 **ARGUMENTS ADVANCED BY THE PARTIES:**

5.1 The Appellants filed heads of arguments dated 18th May 2020. The Appellant in ground one submits that the trial court did not adequately address his mind to all the contents of the post mortem report relied upon in respect of the cause of death. It was further submitted that it is settled law that a trial court must give adequate consideration to all material placed before

it failing that, a judgment may be reversed. The case of ***Muvuma Kambanje Situna v The People*** ⁽¹⁾ was cited where it was held that:

“.....the judgment of any trial court must show on its face that adequate consideration has been given to all the relevant material that has been placed before it, and if no or insufficient consideration has been given to evidence favourable to an accused person the verdict becomes assailable”.

- 5.2 The contention by the Appellants being that the post mortem report (P1) for Alex Shamenda indicates the date of death as 4th November 2018 twenty days earlier than the date in issue and the body was identified by his brother in law also named Alex Shamenda. According to the Appellants the post-mortem report appears to be of another deceased person and not the deceased in casu. Therefore, there was no medical report as to cause of death of the deceased before the trial court. The version of events leading to the death of the deceased given by the Appellants at trial is reasonable and plausible; that while trying to escape Alex fell in a ditch. The case of ***Njunga and Others v The People*** ⁽²⁾ was cited where it was held that:

“it was [is] not necessary in all cases for medical evidence to be called to support a conviction for causing death. Except in

borderline cases, laymen are quite capable of giving evidence that a person had died. Where there is evidence of assault followed by a death without the opportunity for a novus actus interveniens, a court is entitled to accept such evidence as an indication that the assault caused the death”.

5.3 It was contended that the fall into the ditch offers a novus actus interveniens to the fist fight between the 1st Appellant and the deceased and the death of the deceased being caused by the 1st Appellant. The issue of causation of death of the deceased ought to have been resolved in favour of the Appellants. As authority, the cases of ***Saluwema vs The People*** ⁽³⁾ and ***Dorothy Mutale and Richard Phiri v The People*** ⁽⁴⁾ were cited on the principle of law that where two or more inferences are possible, the court should adopt one favourable to the accused if there is nothing in the case to exclude such reference, and where there is reasonable doubt the burden of proof has not be discharged.

5.4 In respect of the evidence tendered by PW2 and PW3, the Appellants contend that being relatives of the deceased, they qualified to be considered as witnesses with an interest of their own to serve. Therefore, their evidence required corroboration or something more, in order for the court to safely convict

based on their evidence. The case of ***Kambarage Mpundu Kaunda v The People*** ⁽⁵⁾ was cited on the issue of friends and relatives of the deceased with a possible interest of their own to serve. The cases of ***George Misupi v The People*** ⁽⁶⁾, ***Yokaniya Mwale vs The People*** ⁽⁷⁾ and ***Chillombo and Others vs The People*** ⁽⁸⁾ were cited on the category of witnesses such as family and friends with a bias or motive to falsely implicate an accused person being considered suspect witness and whose evidence requires corroboration. Further that the evidence of a suspect witness cannot be corroborated by another suspect witness. It was submitted that there was no corroborative evidence to rely upon by the court.

- 5.5 In ground two, the Appellants argue that the court below misdirected itself by neglecting to consider the defences of self-defence and provocation raised by the 1st Appellant. It was submitted that the 1st Appellant acted reasonably in repelling an unlawful attack. **Section 17 of the Penal Code** was cited in addition to the case of ***Mwiimbe v The People*** ⁽⁹⁾ where Ngulube D.C.J (as he then was) stated that:

“in our view the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation which

the accused found himself, including the peril was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to him or another."

- 5.6 Reference was also made to the case of ***Tembo vs The People*** ⁽¹⁰⁾ in respect of the defence of self-defence being absolute.
- 5.7 In the alternative, it was submitted that the 1st Appellant had raised a defence of provocation and his reaction in the circumstances of this case falls within **Sections 205 and 206** of the **Penal Code**. The cases of ***Liyumbi v The People*** ⁽¹¹⁾ and ***Charles Ntembwe v the People*** ⁽¹²⁾ on provocation were cited, particularly on the elements of provocation, being the act itself, the loss of self-control and reasonable retaliation proportionate to the provocation.
- 5.8 It was submitted that the deceased was found in flagrante delicto committing adultery with the 1st Appellant's wife PW1, which according to the case of ***Kalinda v The People*** ⁽¹³⁾ is considered one of the gravest forms of provocation. The contention being that the 1st Appellant lost self-control and his reaction was proportionate to the provocation. Reference was

made to the case of **Liyumbi** (supra) where the Supreme Court stated that:

“if a man kills another in consequence of reacting to sudden provocation and he so kills in the heat of passion and before there is time for his passion to cool he is guilty of manslaughter only.”

5.9 It was argued that the court below ought to have instead convicted the 1st Appellant of manslaughter as his defence satisfies the elements of provocation. Therefore, his conviction for murder be quashed and replaced with manslaughter and that a light sentence be imposed on him. There being no evidence against the 2nd and 3rd Appellants, the conviction be quashed accordingly.

5.10 The third ground relates to the death sentence imposed by the court, despite there being extenuating circumstances. The contention being that even if the defence of provocation had failed, the court below should have found that the failed defence was in fact an extenuating circumstance in the circumstances of this case. The case of **Jack Chanda and Another vs The People** ⁽¹⁴⁾ was cited as authority. It was prayed that the death sentence imposed on the 1st Appellant be quashed and a custodial sentence be imposed due to

extenuating circumstances. As regards the 2nd and 3rd Appellants that, they be acquitted.

5.11 The Respondent relied upon its heads of arguments dated 17th June 2020. In respect of the alleged inconsistencies, perceived errors of P1 the post-mortem report and that the record pertains to another person called Alex Shamenda and not the deceased herein, the Respondent contends that the variances in the date of death and the person identifying the deceased cannot be a basis to impeach P1. The discrepancies do not go to the credibility and authenticity of the post-mortem report. Neither do they go to the roat of the case. The case of **Anayawa and Sinjambi v The People** ⁽¹⁵⁾ was cited where the Supreme Court held that:

“while we agree that the trial judge should have addressed the contradiction relating to how long the 1st Appellant was in custody before the statement was recorded, we take the view that the contradiction did not go to the core of the prosecution case. Clearly, the court was more interested in the circumstances that prevailed during the recording of the warn and caution statement than the length of days that he stayed in custody.”

5.12 In any event, it was contended that there was evidence of an assault by the Appellants after which Alex Shamenda died. As

regards the cited case of ***Dorothy Mutale and Richard Phiri v The People, (supra)*** it dealt with circumstantial evidence and rested on the drawing of inferences, whereas in casu, there is direct evidence.

5.13 As regards the finding by the lower court that PW2 and PW3 were credible witnesses, the same cannot be faulted. There is no ground for the appellate court to interfere.

5.14 In respect of the contention by the Appellants that PW2 and PW3 must be found to be suspect witnesses because they are relatives of the deceased, and the cited case of ***Yokoniya Mwale, (supra)*** the Respondents submits that the authority was cited out of context.

5.15 It was submitted that a conviction based on uncorroborated evidence of friends and relatives will be safe provided that the witnesses cannot be said to have had a basis or motive to falsely implicate the accused or any interest of their own to serve. This fact was addressed by the court and ruled out. There being no evidence to suggest bias or interest of their own to serve, the ground should be dismissed.

5.16 In response to ground two, Counsel for the Respondent submits that adequate consideration was given by the trial court of the possible defences of provocation raised by the Appellant. Reference was made to the evidence in the court below. The defence of self-defence was not available as the 1st Appellant's life was not in real danger, as the evidence shows that the deceased ran away. The case of **Makomela v The People** ⁽¹⁶⁾ was cited on the elements to be proved on self-defence, that one's life must be in immediate danger and reasonable grounds to believe so. The fact that all three Appellants descended upon Alex Shamenda makes the action taken by the Appellants unreasonable.

5.17 On the raised defence of provocation, the Respondent conceded that finding a spouse with another person in the act of adultery is one of the gravest forms of provocation. However, the third ingredient of the defence has not been met, namely proportionality. The case of **Mulenga v The People** ⁽¹⁷⁾ was cited where it was held that:

"where the force was grossly excessive it would be strong evidence that the acts were not done in good faith, but in the earlier words of Briggs F.J; showed an intention to take violent and murderous revenge."

5.18 The beating with sticks is contended not proportionate but one filled with violent and murderous revenge.

5.19 The Respondent went on to argue further that the defence of intoxication is inapplicable as the 1st Appellant was aware of his actions and lucid. The holding in ***Simutenda v The People*** ⁽¹⁸⁾ was cited where it was stated that evidence of heavy drinking is not sufficient in itself. The contention by the Respondent being that there was no evidence led to the effect that the 1st Appellant was inebriated, and lost control of his faculties and was unable to form the necessary intent to murder the deceased.

5.20 In conclusion, it was contended that there are no extenuating circumstances to warrant a reduction to manslaughter. The appeal must be dismissed.

6.0 **DECISION OF THIS COURT**

6.1 We have considered the grounds of appeal, the written heads of arguments and the submissions advanced by learned Counsel. We have also considered the evidence adduced in the court below and authorities cited. We will deal with the grounds of appeal as raised.

6.2 **Section 200 of the Penal Code** provides for the offence of murder and sets out the following ingredients that ought to be proved beyond all reasonable doubt;

(a) *that the accused person caused the death of the deceased person*

(b) *that the death was caused by an unlawful act*

(c) *that there was malice aforethought.*

6.3 We stated in the case of *Mwape Kasongo v. The People* ⁽¹⁹⁾ that malice aforethought is generally established by proving either an express intention to kill or to cause grievous harm to the deceased or that the person knew that what he was doing was likely to cause death or cause grievous harm to someone.

6.4 The contention by the Learned Counsel in ground one is that because of the discrepancies such as the date of death of the deceased being indicated as twenty days earlier and the body being identified by a person named Alex Shamenda, the report is of another person.

6.5 It is not disputed that the Post-Mortem report at page 123 of the record indicates the date of death as 4th November 2018 instead of 24th November 2018. The person who identified the

body is listed as Alex Shamenda, brother in-law to the deceased also named Alex Shamenda.

6.6 In our view, the discrepancies in the date of death and name of person identifying the deceased does not refute the fact that Alex Shamenda died. There was evidence by PW2 and PW3 that Alex Shamenda was assaulted by the Appellants. Further the 1st Appellant conceded fighting with Alex Shamenda after catching him with his wife committing adultery. A1 does not refute punching the deceased. The same day Alex Shamenda was pronounced dead on arrival at the hospital. Even assuming for arguments sake that the report pertained to another deceased person, it is not necessary in all cases for medical evidence to be called to support a conviction for cause of death.

6.7 As stated in the cited case of ***Kashenda Nyunga and Others v The People (supra)*** except in border line cases, laymen are quite capable of giving evidence that a person has died and a court is entitled to accept such evidence as an indication that the assault caused the death. In casu, we reject the idea by the 1st Appellant that falling into a ditch was a novus actus

interveniens and that it was part of the chain of events arising from the assault. We refer to the case of **Mbomena Mool v. The People** ⁽¹⁹⁾ where it was held that;

“it is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Where there is evidence of assault followed by death without opportunity for a novus actus interveniens, a court is entitled to accept such evidence as the cause of death”

6.8 The cause of death in the post-mortem report (P1) is indicated as traumatic shock due to fatal blunt force head, chest abdominal and left leg injury. This is in tandem with the evidence by PW3 who testified that she observed that there was blood stains on Alex’s body and his head was bleeding. His leg was also fractured.

6.9 The court in the cited case of **Njunga and Others** took judicial notice that ***“shock can be a cause of death and that persons who are as was the deceased, can suffer from shock.”***

6.10 The Appellants also assailed the finding by the court below that PW2 and PW3 were not witnesses with a motive of their own to serve. They countered that being relatives of the deceased, they qualified to be considered as witness with an

interest to serve and that their evidence required corroboration.

6.11 At page 145 of the record of appeal, the learned trial judge did consider the issue whether PW2 and PW3 can be considered to have a motive to give false evidence. The trial judge held that the evidence did not show that PW2 and PW3 had any reason to randomly fabricate such a story against the accused person. The court further stated that even if the witnesses were related to the deceased, there is no general rule that states this category of witnesses cannot corroborate others.

6.12 We are of the view that in order for witnesses to be considered ones with their own interest to serve, there must be evidence before the Court to show that such witnesses are bent on implicating the accused persons. In ***Yokoniya Mwale v The People*** ⁽²⁰⁾ the Supreme Court stated that:

“The point in all these authorities is that these categories of witnesses may, in particular circumstances, ascertainable on the evidence, have a bias or an interest of their own to serve, or a motive to falsely implicate the accused the accused. Once this is discernible, and only in these circumstances, should the court treat those witnesses in the manner we suggested in the Kambarage case A conviction will thus be safe if based on the uncorroborated evidence of witnesses who are friends

or relatives of the deceased or the victim, provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is key in our view, is for the court to satisfy itself that there is no danger in the implication.”

6.13 As an appellate court we also had occasion to deal with the issue of witnesses with an interest to serve in **Patford Mwale v. the People** ⁽²¹⁾. We stated in that case that a trial court can safely rely on uncorroborated evidence of relatives or friends of the deceased provided the court is satisfied that there is no danger of false implication.

6.14 We have perused the evidence before the lower court. There is no evidence suggesting that the prosecution witnesses PW2 and PW3 had any intention to falsely implicate the Appellants. We cannot therefore, fault the trial Judge for relying on the evidence of the PW2 and PW3 who were relatives to the deceased.

6.15 As regards the 2nd and 3rd Appellants the evidence adduced is that they took part in beating Alex Shamenda who had been caught committing adultery with the 1st Appellant's wife. PW2 and PW3 testified that the Appellants took turns in beating the

deceased. The 2nd Appellant was kicking the deceased with his boots because he was found with A1's wife committing adultery. PW3 testified that she saw the 2nd and 3rd Appellants beating the deceased with sticks. They later fled the scene. He was covered in blood and his head was bleeding. In addition the deceased's leg was fractured.

6.16 The 2nd and 3rd Appellants denied taking part in the beating of the deceased. They stated that they only arrived at the scene after the fight had ensued.

6.17 As regards whether the 2nd and 3rd Appellants caused the death of the deceased, we are of the view that there was evidence beyond reasonable doubt that the 2nd and 3rd Appellants took part in the beating of the deceased who subsequently died. The said death was caused by an unlawful act namely the beating inflicted on Alex Shamenda, who sustained the injuries to which he succumbed.

6.18 The issue is whether malice aforethought was proved in respect of the 2nd and 3rd Appellants. We hold the view that malice aforethought was established. The 2nd and 3rd Appellants knew that by beating the deceased with sticks and

kicking him with boots, the act was likely to cause death or cause grievous harm to the person. See the case of ***The People v. Njovu (supra)*** where it was held as aforestated.

6.19 All the ingredients of murder having been established and proved beyond reasonable doubt, we cannot fault the trial judge for convicting the 2nd and 3rd Appellants for murder. Having found that A1 participated in beating the deceased with sticks but accepting the defence of provocation on account of *flagrante delicto*, we must clearly state that the defence was not available to A2 and A3. The defence of provocation does not apply to them being mere friends of A1. There having been no extenuating circumstances applicable to the 2nd and 3rd Appellants, the court below was on firm ground to sentence them to death.

6.20 We will deal with ground two and three together as they are connected. The 1st Appellant has raised two defences, namely self-defence and provocation. As regards self-defence, it was submitted that the 1st Appellant acted reasonably in repelling an unlawful attack. We do not accept the defence of self-defence. The evidence before court does not show that the 1st

Appellant found himself faced with a moment of unexpected anguish or peril that it was reasonable and necessary to take the action that he took to prevent grave danger. The 1st Appellant testified that Alex Shamenda punched him first. Thereafter the fight ensued, the deceased ran away and fell into a ditch. The evidence by PW2 and PW3 was that the Appellants were beating Alex Shamenda with sticks.

6.21 We therefore, hold that the defence of self-defence fails because, the 1st Appellant was not in real danger threatening his life as the deceased had ran away. His life was not in imminent danger and there was no reasonable ground to believe so.

6.22 The second defence raised by the 1st Appellant is provocation.

Sections 205 and 206 of the Penal Code set out the statutory law on provocation. **Section 205** stipulates that:

“when a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder does the act which caused death in the heat of passion caused by sudden provocation and before there is time for passion to cool, is guilty of manslaughter only.”

6.17 The act causing the death must bear a reasonable relationship to the provocation. Section 206 proceeds to define the term

provocation, and includes any wrongful act done to a person whom he stands in conjugal relation. In the case of ***Liyumbi v The People*** ⁽¹¹⁾ the Supreme Court stated in reference to the principle on provocation, that if a man kills another in consequence of reacting to sudden provocation and he so kills in the heat of passion and before there is time for his passion to cool, he is guilty of manslaughter only. His mode of resentment must bear a reasonable relationship to the provocation.

6.18 It is trite that the wrongful act, when done to an ordinary person of the community to which the accused belongs, would deprive him of the power of self-control and induce him to act, and the assault must be committed before there is time for the aroused passion to cool. The burden of proof to negative the defence of provocation is on the prosecution. We refer to the case of ***The People v Njovu*** ⁽²²⁾.

6.19 The test of provocation is an objective one. The three elements to be proved are as follows; the act of provocation, the loss of self-control and reasonable retaliation proportionate to the provocation. The undisputed evidence before the lower court

was that the 1st Appellant found his wife Ester with the deceased in an abandoned structure, where he had heard sounds of people having sexual intercourse. He shone his torch into the structure and, he saw his wife with the deceased, whom she hid behind, and subsequently ran away. When he confronted the deceased, the 1st Appellant was punched by the wrong doer and a fight ensued.

6.20 It is trite that catching one's spouse committing adultery with another person constitutes an act of provocation. In the earlier cited case of ***Kalinda v The People, (supra)*** Doyle JA observed that being found in adultery has always been considered one of the gravest forms of provocation.

"in Zambia and Other African Territories, a confession of adultery has been held to be equivalent to being found in adultery and to be grave and sudden provocation."

Therefore, we do not doubt that this wrongful act was both sudden and grave.

6.21 The 1st Appellant testified that he became enraged after the deceased added salt to the injury by punching him first. Though in cross examination, the 1st Appellant stated that he was not angry when he found his wife in flagrante delicto with

Alex Shamenda (deceased), we do not accept that a reasonable man would not be angry and enraged. The 1st Appellant was enraged and lost self-control. Further any reasonable man of his standing or community would have lost self-control and reacted. The only issue is whether the retaliation was proportionate to the provocation or bore a reasonable relationship to the provocation.

6.22 The evidence before court as to the retaliation is that the 1st Appellant and deceased were fighting. PW2 and PW3 stated that they saw the Appellants beating the deceased with sticks who fell into a ditch and fractured his leg.

6.23 In our view, the sense of betrayal was intense and the 1st Appellant rained blows upon the deceased and beat him with sticks that proved fatal. The retaliation in our view cannot be considered disproportionate to the provocation. We hold the view that the defence of provocation succeeds. The lower court ought to have convicted the 1st Appellant for the offence of manslaughter. We therefore quash the conviction of murder and substitute it with manslaughter.

6.24 We now revert back to the sentence imposed by the trial judge on the 1st Appellant. Having found that the raised defence of provocation had succeeded and our setting aside the conviction for murder, which we have substituted with manslaughter, we equally set aside the imposed sentence of death. **Under Section 202 of the Penal Code**, the punishment for manslaughter is as follows; any person who commits the felony of manslaughter is liable to imprisonment for life.

6.25 We accordingly sentence the 1st Appellant to 3 years imprisonment with hard labour with effect from date of being in custody. The appeal in respect of the 2nd and 3rd Appellants fails and is hereby dismissed.

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M. M. Kondolo, SC
COURT OF APPEAL JUDGE

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F.M. Chishimba
COURT OF APPEAL JUDGE

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J. Z. Mulongoti
COURT OF APPEAL JUDGE