

**IN THE COURT OF APPEAL OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
*(Criminal Jurisdiction)*

**APPEAL NO. 50/2020**

**BETWEEN:**

**MIRRIAM MULENGA**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: CHISANGA, JP, SICHINGA, AND NGULUBE, JJA.**  
***On 22<sup>nd</sup> September and 18<sup>th</sup> November, 2020.***

***For the Appellant:*** Mrs L. Z. Musonda – Legal Aid Counsel,  
Legal Aid Board

***For the Respondent:*** Mrs M. Kamwi, Senior State Advocate,  
National Prosecution Authority

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## **J U D G M E N T**

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NGULUBE, JA delivered the judgment of the court.

**Cases referred to:**

1. *Kayombo vs The People* SCZ Appeal Number 65 of 2017
2. *Penry vs Lynaugh*, 492 US 305 (1989)
3. *Kahale Kanyanga vs The People*, SCZ Judgment Number 145 of 2011
4. *John Musonda Mwanamwenge vs The People* (2012) ZR 1
5. *S vs McBride* 40/88 (1988) ZASCA 40 (30<sup>th</sup> March, 1988)
6. *Beatrice Mwala Hangwende and 3 Others vs The People*, SCZ Selected Judgment Number 13 of 2016



**Legislation referred to:**

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

**Other works referred to:**

1. *Nolo's Plain English Law Dictionary, 1<sup>st</sup> Edition, Berkeley, CA (2009)*

**INTRODUCTION**

1. The appellant was charged with and convicted of two counts of the offence of murder, contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the first count are that Mirriam Mulenga, on 24<sup>th</sup> January, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia murdered Mwiche Nakazwe. The particulars of the second count are that Mirriam Mulenga, on 24<sup>th</sup> January, 2017 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia murdered Dason Sikazwe. The lower court tried the appellant for the two counts of murder, convicted her and sentenced her to death. She now appeals against sentence.
2. The prosecution's case was anchored on the evidence of five witnesses. PW1, Gosta Chisala Sikazwe was the father of the



two children who died. His testimony was that on 24<sup>th</sup> January, 2017, he took his two children, Ruth and Mwiche to school in the morning and then proceeded to work. He returned home at about 17:00 hours but left soon thereafter to purchase some items. After a while, he saw his nephew Joseph Siwakwi rushing to where he was and he informed PW1 that his aunt, the appellant herein, had given the children poison to drink and that she had also drank some poison. PW1 rushed back home and took his children to the hospital at Chingwere but was informed that two children, Mwiche and Dason, had died.

3. Subsequently, the Police went to PW1's home with him and upon conducting a search, they found a small bottle and a cup in the bedroom. The said small bottle was labelled "Doom". In cross-examination, PW1 stated that he was married to the appellant for four years and in his opinion, they had a happy marriage. He denied having been promiscuous or violent towards the appellant.
4. PW2, Memory Nawakwi was PW1's niece. Her testimony was that on the material day at about 18:00 hours, the appellant took her three children Ruth, Dason and Mwiche to the

bedroom and after a while, the children started crying and called PW2, asking her to go and get them. Due to the persistent calls, she went to the bedroom where she found her aunt, the appellant crying. When PW2 asked what the problem was, she told PW2 that she had given the children doom pesticide to drink and that she too had taken some of the pesticide. PW2 tried to call people in the neighbourhood but failed to get any help. Eventually, the appellant and the three children were taken to the hospital where PW2 learnt that the two children, Mwiche and Dason had died.

5. PW3, Joseph Siwakwi was PW1's nephew. On the material day, in the evening, Memory, PW2 rushed to where he was and informed him that their aunt had given doom pesticide to her children, Ruth, Dason and Mwiche. Upon rushing home, PW3 found Ruth lying down near the kitchen. The three children were taken to the hospital at Chingwere.
6. PW4, Francis Subukeni Kowa, a public analyst at the Food and Drugs Control Laboratory testified that he analysed the samples that were taken from the two children who died, these being Mwiche and Dason. The toxicology results revealed that the



pesticide for killing insects, Dichlor Vos an Orsan Ophosphate was found in the samples. The public analyst's opinion was that the said pesticide, if ingested can cause death.

7. PW5, Paul Siwo, Detective Sargent was assigned a docket of murder to investigate. He visited the crime scene where he collected a bottle labelled "Doom" from the appellant's bedroom. The contents of the bottle were taken to the Food and Drugs Laboratory for analysis. He charged and arrested the appellant for the two counts of the offence of murder which she denied. He testified that prior to the commencement of trial, the appellant was taken to Chainama Hospital for psychiatric examination because she behaved strangely. However, the psychiatrist found that she was fit to stand trial.
8. The court analyzed the evidence before it, including the two postmortem examination reports which revealed that the cause of death was poisoning. The court further found that the appellant gave doom pesticide to her three children on the fateful day, and that this led to their death. She was accordingly convicted for maliciously administering doom to the children

and was sentenced to death on both counts. The appellant now appeals against sentence.

## **THE APPEAL**

9. The sole ground of appeal is that –

***“The learned trial Judge erred in law and in fact when the court failed to find extenuating circumstances so as to impose any other sentence other than the mandatory death penalty on the facts of this case.”***

10. In arguing the sole ground of appeal, Mrs. Musonda submitted that section 201(1)(b) of the Penal Code, Chapter 87 of the Laws of Zambia provides that –

***(1) Any person convicted of murder shall be sentenced to death;***

***(b) Where there are extenuating circumstances to any sentence other than death.***

Counsel referred to ***Nolo’s Plain English Law Dictionary***, in which extenuating circumstances are described as -

***“Surrounding or mitigating factors that reduce a party’s level of responsibility or guilt.”***

This court is referred to the case of ***Kayombo vs The People***<sup>1</sup> where the Supreme Court stated that –



***“Section 201 (1)(b) of the Penal Code was clearly crafted to benefit a convict who is a member of the community in which the crime occurred and there are factors which diminish morally the degree of guilt of the convict.”***

11. Counsel further refers to the case of ***Penry vs Lynaugh***<sup>2</sup>, where the United States of America Supreme Court held that –

***“Under the eighth and fourteenth Amendment, juries must be instructed that they consider mitigating circumstances such as the defendant’s youth, mental capacity or childhood abuse so that they may reach a reasoned and moral sentencing.”***

12. According to Counsel the medical report from Chainama Hills Hospital issued by the Consultant Psychiatrist Dr F. Simenda, reveals that the appellant stated that what caused her to attempt to commit suicide was her husband’s behaviour. It is submitted that the record shows evidence of extreme mental, psychological or emotional abuse that was inflicted on the appellant by her husband and that this should have been taken to amount to extenuating circumstances.
13. Counsel argued that the facts surrounding the commission of the two counts of murder raise extenuating circumstances which make the appellant’s criminal actions less blameworthy.

This court is urged to allow the appeal, quash the sentence of death and give the appellant another sentence.

14. In response, Mrs Kamwi, on behalf of the respondent refers to section 201 (2) (a) and (b) of the Penal Code which are that –

*(2) for the purpose of this section. . .*

*(a) an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt.*

*(b) In deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.*

We are further referred to the case of ***Kahale Kanyanga vs The People***<sup>3</sup> where the Supreme Court observed that –

*“Where extenuation is being pleaded, the necessary intent has been established, but the defence is saying due to circumstances like an accusation of witchcraft, which is a stigma, the accused committed the murder, so that should diminish his culpability. The plea is therefore mitigatory against the ultimate sentence. In other jurisdictions they call it diminished responsibility.”*

15. On the issue of extenuation, Counsel submits that the appellant did not adduce sufficient evidence to justify extenuating



circumstances save for the claim that she committed the offences because of her husband's behaviour.

16. Counsel submits that a person who falls in the category of one who attempts murder-suicide is not a mental patient. It is argued that after she gave her children doom to drink, the appellant asked PW2 to call the neighbours and that this was an indication that she was in a normal state even as she committed the offence.
17. According to Counsel, the prosecution witnesses were not examined on the mental status of the appellant as well as on how she lived with his husband, meaning that the psychological and mental abuse was not an issue. Further, that the appellant's actions were extreme and did not warrant the poisoning of the children which resulted in their death.
18. It is submitted that the alleged psychological and mental abuse does not diminish the culpability of the appellant and that as such, the learned trial court was on firm ground when it sentenced the appellant to death. We are urged to dismiss the appeal for lack of merit.

**CONSIDERATION OF THE MATTER BY THIS COURT AND VERDICT**

19. We have considered the evidence on record, heads of argument, oral submissions made by Counsel, and the authorities to which we were referred. Section 201 of the Penal Code provides that –

*(1) any person convicted of murder shall be sentenced –*

*(a) death; or*

*(b) where there are extenuating circumstances to any sentence other than death provided that paragraph of this sub-section shall not apply to murder committed in the course of aggravated robbery with a firearm under section 294.*

*(2) for purposes of this section –*

*(a) an extenuating circumstance is any fact associated with the offence which diminishes morally the degree of the convicted person's guilt;*

*(b) in deciding whether or not there are extenuating circumstances the court shall consider the standard of behaviour of an ordinary person or class of the community to which the convict belongs.”*

20. The appellant is relying on the medical report from Chainama Hills Hospital issued by the Consultant Psychiatrist, Dr. F. Simenda, which report states that the appellant confirmed the account of the offences she committed although she did not



express any remorse or any other emotion. The report further reveals that the appellant only stated that her husband's behaviour caused her to commit the offences.

21. It has been argued that the record shows evidence of extreme mental, psychological and emotional abuse that was inflicted on the appellant by her husband and that it should have been taken to amount to extenuating circumstances. The thrust of the appellant's contention is that the facts surrounding the commission of the offences in this matter raise extenuating circumstances which make the appellant's criminal actions less blameworthy.

22. In the case of *John Musonda Mwanamwenge vs The People*<sup>4</sup>, the Supreme Court defined an extenuating circumstance as -

***“The mitigating circumstance or fact or situation that does not justify or excuse a wrong act or offence but reduces the degree of culpability and this may reduce the damage (in case of a civil case) or the punishment (in a criminal case). A fact or situation that does not bear on the question of the defendant's guilt but that is considered by the court in imposing punishment and especially in lessening severity of the sentence.”***

23. The Supreme Court has also explained in the case of *Kahale Kanyanga vs The People (supra)*, that -

*“Where extenuation is being pleaded, the necessary intent has been established, but the defence is saying due to circumstances like an accusation of witchcraft, which is a stigma, the accused committed the murder, so that should diminish his culpability. The plea is therefore mitigatory against the intimate sentence. In other jurisdictions they call it diminished responsibility.”*

24. We wish to state at the outset, that the burden of proving that there were extenuating circumstances associated with the commission of the murder rests upon the accused person. This was espoused in the South African case of **S vs McBride**<sup>5</sup>, where it was held that:

*“...The burden of proving, on a balance of probabilities that there were extenuating circumstances associated with the commission of the murders rests upon the accused...”*

*The determination of the presence or absence of extenuating circumstances involves a three-fold enquiry: (1) whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation; (2) whether such facts or circumstances in their cumulative effect, probably did influence the accused's state of mind in doing what he did; and (3) whether his influence was of such a nature as to reduce the moral blameworthiness of the accused in doing what he did. In deciding (3) the*



*trial court passes a moral judgment.... This and other similar formulations are no doubt helpful and conducive to clarity of thought on the topic, but they should not be treated as if they are statutory injunctions. What is essentially a flexible enquiry should not be so shackled."*

25. The Court went on to elaborate the principles which govern extenuating circumstances as follows:

*"As to what constitute extenuating circumstances, various descriptions have been given...*

*'In our view an extenuating circumstance...is a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt. The mentality of the accused furnishes such a fact.... No factor, not too remote or too faintly or indirectly related to the commission of the crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration."*

26. The plethora of authorities we have cited demonstrate that the factors which the Court takes into account are those associated with the offence and factors too remotely connected to the offence should be disregarded.
27. In this case before us, the appellant is relying on the medical report of the Consultant Psychiatrist. His expert opinion was that the appellant's mental state was normal at the time of the

offence. The Consultant Psychiatrist came to the conclusion that the appellant was fit to take plea, stand trial and follow the court proceedings. Clearly, no extenuating circumstances existed at the time the appellant committed the offences which could have affected her state of mind or mental faculties.

28. Although she has claimed that her husband's behaviour caused her to commit the offences, the evidence on record shows that her actions were unprovoked and unwarranted in the circumstances. Further, she elected to remain silent in her defence. We take the view that there was no evidence on which the trial Court could have found extenuating circumstances to warrant the imposition of a sentence other than death. We are fortified by the case of **Beatrice Mwala Hangwende and 3 others vs The People**<sup>6</sup>, in which the Supreme Court held that-

*"Whether or not the situation here presents an extenuating circumstance which the trial judge ought to have taken into account at the time of sentencing the appellants, depends in our view, on two factors. First, the evidence as marshaled by the defence ought to point to some situation suggesting extenuation. In other words, the defence advanced must tend to show one of the factors that we referred to in Jack Chanda and Kenneth Chanda v. The People(17). And here, we well understand the predicament faced by an accused person who denies the actus reus as his line of defence if he has*

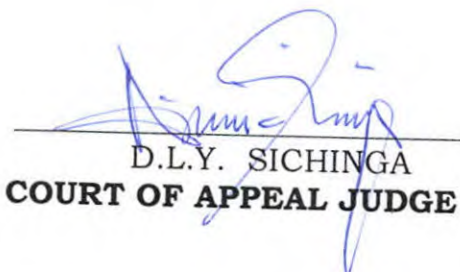


*to rely on extenuating circumstances as a mitigation. It in a way amounts to reprobation and approbation of the charges. Second, and more importantly, whether the facts fit in the interpretation of the Penal Code (Amendment) Act No. 3 of 1990 which introduced provisions which allowed the imposition of a lesser sentence than that of death following a conviction for murder.”*

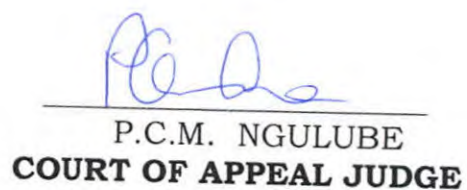
29. The appellant in this case denied having committed the offences but failed to prove any defence, or fact associated with the commission of the offences which diminishes morally the degree of her guilt. In other words, there are no extenuating circumstances in this case and the appeal against sentence cannot stand.
30. We do not find merit in the sole ground of appeal. The appeal against sentence having failed, the appellant's conviction and the sentence imposed by the trial Court, are accordingly upheld.



F. M. CHISANGA  
JUDGE PRESIDENT - COURT OF APPEAL



D.L.Y. SICHINGA  
COURT OF APPEAL JUDGE



P.C.M. NGULUBE  
COURT OF APPEAL JUDGE