IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 72 OF 2020**

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

VONERT NYIMBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

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

ON: **10th and 19th November 2020**

For the Appellant: *K. Tembo, Legal Aid Counsel, Legal Aid Board*

For the Respondent: *R. L. Masempela, Deputy Chief 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. **Sitali v The People (1972) ZR, 139**
2. **The People v Njobvu (1968) ZR, 132**
3. **Philips v R (1969) CR. APP. R 132**

4. **Nyambe Mubukwanu Liyumbi v The People (1978) ZR, 35**

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 Hon. Madam, Justice C. B. Maka-Phiri, sitting as High Court Judge, delivered on 22nd November 2019. In the said Judgment, the learned Judge convicted the accused, now the Appellant of the offence of murder and sentenced him to death.

2.0 BACKGROUND

2.1 The Appellant was charged with the offence of murder contrary to Section 200 of **The Penal Code**[1]. The particulars of the offence being that, the Appellant, on 11th November 2018 at Chikankata in the Chikankata district, Southern Province in the Republic of Zambia, did murder Child Mwenda (the deceased).

3.0 EVIDENCE IN THE COURT BELOW

3.1 In pursuit of the case, the prosecution called four witnesses. The evidence of Kendrick Mwanza (PW1) and Cheelo Hakoma (PW2) was in consonance. According to their evidence, they were in the early evening of 3rd November 2019, around 19:00 hours drinking at the Appellant's Tavern. They then witnessed the deceased taking a bottle of wine, worth K2.00 which he started drinking. The Appellant accosted the deceased for payment, but the deceased refused to pay. The Appellant agitated by the deceased's conduct, grabbed a cooking stick and pushed the deceased outside. Whilst outside, he hit him once at the back of the head with the stick and twice in the rib cage.

3.2 According to their further evidence, the deceased then left for his house. The deceased fell sick and never recovered, until his demise on 11th November 2019.

On 4th November 2018, PW1 found the Appellant at his tavern, beating PW2. When he separated them and they heard about the deceased's illness, the Appellant left for Lusaka, presumably on the run.

3.3 Of interest, the deceased was the father in law to the Appellant, the Appellant having married his step daughter. PW1 is the cousin to the Appellant and PW2 was also a father in law to the Appellant.

3.4 There was also evidence from Mapenzi Mwenda (PW3), the son to the deceased, which evidence the court treated as *res gestae*, and was excluded by the court, and therefore is not relevant for purposes of the appeal.

3.5 PW4, Constable Albert Kakompe, dealing officer, narrated how he investigated the case, after it was reported to the police. He testified that, he got statements from the witnesses and attended the post mortem at Mazabuka General Hospital which indicated, severe head and chest injuries as the cause of death.

According to PW4, he was informed of the apprehension of the Appellant by Mazabuka Police. When he interviewed him under warn and caution, the Appellant denied committing the offence.

3.6 In his defence, the Appellant denied any knowledge about assaulting the deceased and claimed that the deceased had all along been complaining of being sick. According to the

Appellant, he only met the deceased on 3rd November 2018 around 15:00 hours and gave him a bottle of wine, as the deceased claimed it would help him sleep.

The Appellant called his wife Jennifer Mwenda (DW2) as his witness, who testified that when he queried the deceased about being assaulted by the Appellant, the deceased refused. It was also her evidence that the Appellant went to Lusaka as he wanted to cool off after the incident with PW2, over fertilizer which incident had hurt him.

4.0 DECISION OF THE COURT BELOW

4.1 After considering the evidence and the submissions by the prosecution and the defence, the learned Judge in the court below, was of the view that the following facts were not in dispute:

(i) That on 3rd November 2018, the deceased had gone to the Appellants tavern to drink beers; which fact was supported by the evidence of PW1 and PW2, who were also at the tavern drinking on the material day;

(ii) That on 4th November 2018, the Appellant severely assaulted PW2, who was only rescued by PW1, which was confirmed by DW2. That the Appellant therefore lied, when he testified that he did not assault PW2.

(iii) That after the deceased left the Appellants tavern, he complained of being unwell and was visited by PW2 and DW2. That on 8th November, the deceased was taken to the clinic by PW3, but thereafter his condition deteriorated.

(iv) That the deceased died on 11th November 2018 from severe head and chest injuries. That the injuries that caused the death of the deceased were consistent with an assault.

(v) That PW1, PW2 and PW3 are all relatives to the deceased and they knew the Appellant prior to the incident, as he is related to them through marriage.

4.2 In determining the question as to whether, it was the Appellant who assaulted and caused the death of the deceased, the learned Judge relied on the

evidence of PW1 and PW2, who saw the Appellant hit the deceased. That the two witnesses were able to clearly see as there was lighting from the solar bulbs; the two witnesses had sufficient time to identify the Appellant who was well known to them. That the evidence of PW1 and PW2 was not a fabrication.

4.3 The learned Judge disbelieved the evidence of the Appellant and was satisfied that PW1 and PW2 were credible witnesses and accepted their evidence as the truth.

On the other hand, she found the Appellant not credible.

The learned Judge found no evidence upon which she could conclude that PW1 and PW2 falsely implicated the Appellant in the matter. She found that both witnesses had no motive to falsely implicate the Appellant and therefore, were not witnesses with an interest to serve.

4.4 The learned Judge concluded that it was the Appellant who assaulted the deceased and caused

his death and that he had the requisite malice aforethought when he committed the offence.

5.0 THE APPEAL

5.1 Disenchanted with the Judgment, the Appellant has now appealed to this Court against conviction advancing one ground of appeal couched as follows:

> *"The trial court erred in law and fact when it convicted the Appellant for the offence of murder when the facts clearly pointed to the offence of manslaughter."*

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 In support of the sole ground of appeal, Mr. Tembo, Counsel for the Appellant submitted that the facts of this case are very unfortunate: That in hitting the deceased once on the head and twice on the ribs, the Appellant had no intention of killing the deceased. Our attention was drawn to the case of **Sitali v The People**[1], where it was held that:

> *"It has never been the law that the man who completely loses his temper on some trivial provocation and recounts with gross and savage violence which kills his victim can*

hope for a jury to find a verdict of manslaughter on grounds of provocation."

6.2 Counsel further referred us to the case of **The People v Njobvu**[2] where it was stated that; *"to establish malice aforethought, the prosecution must prove either that the accused had the 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."*

6.3 In addition Counsel called into aid the provisions of Sections 205 and 206 of **The Penal Code**[1] which provides that:

> *"(1) 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 as hereinafter defined and before there is time for passion to cool, is guilty of manslaughter only.*
>
> *(2) The provision of this Section shall not apply unless the court is satisfied that the act which caused*

death bears a reasonable relationship to the provocation."

6.4 Counsel cited the case of **Philips v R**[3] where Lord Diplock stated as follows:

"What the jury have to consider, once they have reached the conclusion that the person charged was in fact provoked to lose his self-control, it is not necessary whether in their opinion, the provocation would have made a reasonable man lose self-control, but also whether, having lost his self-control he would have retaliated in the same way as the person charged, in fact did."

6.5 According to Counsel, there was enough provocation for the Appellant to act the way he did because the beer he was selling was stolen by the deceased who had no intention of paying.

6.6 It was Counsel's further submission that once the issue of provocation is raised in defence, there is no burden on the accused to establish it; the burden squarely lies on the prosecution to negate it convincingly that the court can be sure beyond reasonable doubt that the

accused was not provoked in the manner spelt out in Section 206 of **The Penal Code**[1].

7.0 ARGUMENTS IN OPPOSING THE APPEAL

7.1 In opposing the appeal, Mr. Masempela, Counsel for the Respondent submitted *viva voce* that the trial court did not err when it convicted the Appellant of the offence of murder as the evidence proved the offence of murder. Counsel cited the case of **Nyambe Mubukwanu Liyumbi v The People**[4] where the Supreme Court set out the three inseparable elements to the defence of provocation; being the act of provocation, the loss of self-control and retaliation proportionate to the provocation. That all three elements must be present before the defence is available. According to Counsel all three elements were not available and therefore the defence was not available to the Appellant.

7.2 It was Counsel's submission that, there was no evidence of loss of self-control and the retaliation being proportionate to the act of provocation.

7.3 It was further submitted that the act of the Appellant hitting the deceased on the head and when he fell down, hitting him

twice in the ribs was not proportionate to what the deceased had done. According to Counsel, the sole ground of appeal lacks merit.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have considered the sole ground of appeal, the arguments by the parties and the Judgment being impugned. The sole ground of appeal attacks the trial courts conviction of the Appellant for the offence of murder instead of manslaughter. According to Counsel for the Appellant, there was no malice aforethought on the part of the Appellant. It is further contended that the Appellant was provoked and therefore, he should have been availed the defence of provocation.

8.2 In respect to the issue of the absence of malice aforethought, as earlier alluded to, the learned Judge in the court below, concluded that the Appellant in causing the death of the deceased had the requisite malice aforethought. In arriving at the aforestated conclusion, the learned Judge took into consideration the findings in the post mortem report and the injuries that were caused and opined that they were as a result of an assault. According to the learned Judge, an assault is an unlawful act and that the assault which was

inflicted on the deceased, was so severe, an indication that the Appellant had an intention to kill or cause grievous harm to the deceased.

8.3 It was the view of the learned trial Judge that the Appellant ought to have known that by brutally assaulting a person in the manner that he did would cause grievous harm. That this was so especially that the deceased was an elderly man.

8.4 We see no basis on which to fault the trial Judge. There was evidence before the court that the Appellant used a cooking stick to hit the deceased at the back of the head, which is a delicate part of the body. Even when the deceased had fallen, he proceeded to hit him twice in the ribs culminating into serious injuries as revealed by the post mortem report. The action of the Appellant shows that if he was not intent to kill, at least he was intent to cause grievous harm, in line with the provisions of Section 204 of **The Penal Code**[1]. From the evidence in the court below, malice aforethought was established as the Appellant had knowledge that the act he engaged into, which caused the death would probably cause the death of the deceased or grievous harm.

8.5 On the issue of the defence of provocation, we note that the defence was not raised in the court below. Neither was there any evidence adduced by the Appellant, pointing to provocation. In the court below, the Appellant denied that the deceased stole a bottle of wine. According to the Appellant's evidence in the court below, the deceased went to the Appellant's tavern around 15:00 hours. And the following was his evidence:

> *"...as their habit to come to the tavern, when the deceased came, he told me that he was not feeling well and complained of chest and stomach pains and no one knew that he was sick. He said since I am not feeling well, give me a bottle of beer so that I go and drink from home and he went with that bottle home and that was on the 3rd. As regards the issue of fighting, that never happened, not even at any point ... since he was complaining of not feeling well, according to me, I was not in the condition of being mad or tied in chains to start beating someone who was sick.*
>
> *That is how Child Mwenda left. If I had beaten him, since his relatives stay nearby, they would have heard."*

8.6 We find it inconceivable how in the circumstances of the case and in particular the story in defence by the Appellant, how the defence of provocation would have been available.

8.7 Even assuming that the defence was available, we see no act of provocation which would have made the Appellant react in the manner he did by retaliating in a very unproportionate manner after loss of self-control. The Supreme Court in the Liyumbi case stated that Section 205 of **The Penal Code**[1] advocates an objective test and places emphasis on whether a reasonable man of the society in which the accused belongs would have acted in that manner.

8.8 In our view, applying the objective test, no reasonable man would have assaulted his father in law, in the manner the Appellant did, for taking a bottle of wine costing K2.00. In that respect, the case of **Sitali** cited by Counsel for the Appellant does not aid the Appellant's case as the holding by the court therein is totally contrary to the Appellant's submissions.

9.0 CONCLUSION

9.1 In the view that we have taken, the Appellants sole ground of appeal has no merit and is accordingly dismissed. The conviction of the lower court and the sentence are both upheld.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

B. M. MAJULA
COURT OF APPEAL JUDGE