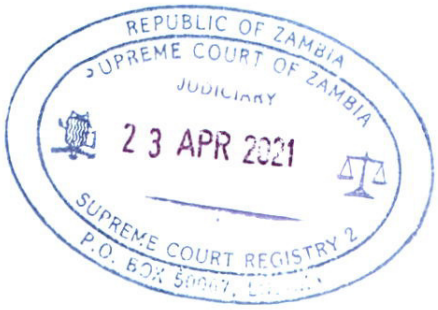
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 18/2021**
HOLDEN AT KABWE
(Criminal Jurisdiction)



BETWEEN:

THOMAS MBULO **APPELLANT**

And

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Malila and Kaoma, JJS
On 13th April, 2021 and 23rd April, 2021

For the Appellant : Mrs S.C. Lukwesa, Principal Legal Aid Counsel

For the State : Mrs F. L. Shawa - Siyuni, Director of Public Prosecutions

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JUDGMENT

HAMAUNDU, JS, delivered the judgment of the Court

Cases referred to:
1. **Tembo v The People (1972) ZR 220**
2. **Mutale and Phiri v The People (1995/1997) ZR 227**
3. **Imusho v The People (1972) ZR 77**
4. **D.P.P v Ng'andu and Others (1975) ZR 253**

The appellant appeals against his conviction by the High Court, presided by Chashi, J, as he then was, for the offence of murder instead of the lesser offence of manslaughter. Although the appellant appears to be unaware of the case, it is clear that this appeal is based on a decision by the Court of Appeal (the predecessor to this court) in **Tembo v The People**[1] which holds 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".**

The background to this case is this: The appellant was charged before the High Court with the offence of murder, contrary to **section 200** of the **Penal Code, Chapter 87** of the **Laws of Zambia**. It was alleged that between the 1st January, 2009 and the 1st December, 2010 at Chipata in the Eastern Province of Zambia the appellant did murder Kamunkwani Phiri, the deceased herein. The case for the prosecution in the court below was that on the 2nd August, 2009 (according to the facts found by the learned judge) the appellant, in the company of his uncle, Aaron Mbulo (PW3) and the deceased, all of whom lived at PW3's farm in the Chiparamba area of Chipata, went to the home of Monica Mbewe (PW1) within the area. As they were drinking beer at that home, the appellant was seen beating the

deceased repeatedly on the face, and particularly on the nose. The deceased became weak and was taken home. He died about four days later. The appellant was eventually arrested, after almost three years, and charged with murder.

The appellant told the court that he did not beat the deceased at all, but that it was in fact his uncle Aaron Mbulo who had a confrontation with one of his (Aaron Mbulo's) workers.

The learned judge found the evidence of Monica Mbewe and Aaron Mbulo overwhelming, and found as a fact that it was the appellant who beat the deceased. It is on that finding that the appellant was convicted of murder.

Before us, the appellant has changed his position and now argues that the learned judge should have considered the fact that the appellant fought with the deceased so that, at most, he was only guilty of manslaughter. Mrs Lukwesa, who argued the appeal on behalf of the appellant at the hearing, submitted thus: that while the testimony of Monica Mbewe (PW1) was that the appellant beat the deceased, who was not retaliating, the testimony of Aaron Mbulo (PW3) and that of the arresting officer (PW4) brought in evidence of a fight between the appellant and the deceased. Counsel then argued that from those two sets of testimony, two inferences could be drawn,

namely; first, that the appellant battered a person that was not retaliating to the beating at all (an inference which was detrimental to the appellant) and, secondly, that the appellant and the deceased were engaged in a fight wherein the appellant was the stronger of the two and, therefore, overcame the deceased (an inference which was favourable to the appellant). Taking that line of argument further, Mrs Lukwesa referred us to the case of **Mutale and Phiri v The People**[2], with particular emphasis on that part of the decision in that case which holds that:

> **"where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one that is more favourable... to an accused if there is nothing to exclude that inference."**

Counsel then argued that, in the circumstances of this case, the learned judge should have adopted the inference that the appellant and the deceased fought, which inference was more favourable to the appellant.

With those arguments, learned counsel urged us to allow the appeal.

When we exclude the arguments which are not on point with the issue raised by the appellant in this appeal, the response by the

learned Director of Public Prosecutions was brief. She referred to the testimony of PW1 to the effect that the witness saw the appellant hitting the deceased on the nose with fists, and that the deceased did not fight back. The other testimony of PW1 which was referred to by the learned Director of Public Prosecutions was to the effect that PW1 and other women tried to pull the appellant away from the scene of the beating, but that the appellant overpowered them, went back to the deceased who was lying on the ground and continued beating him. It was the argument by the Director of Public Prosecutions that this testimony clearly showed that there was no fight between the appellant and the deceased, but instead there was a beating which the former administered on the latter.

On that argument we were urged to dismiss the appeal and uphold the High Court's conviction of the appellant for murder.

The first flaw in the argument by the appellant is that the point being raised before us was not raised in the court below. This is because the appellant's line of defence before the learned judge was to distance himself from the assault on the deceased; as such the question whether what took place was a fight or a beating did not arise. In fact, going by eye-witness accounts of what took place, it was not disputed that what the deceased received was a beating: and

that he did not fight with his assailant. The only question that the learned judge was called upon to resolve was whether the beating was administered by the appellant or someone else; and, upon accepting the testimony of PW1 and PW3, the judge found that it was the appellant who beat the deceased.

The second flaw lies in the ground of appeal itself; this is couched as follows;

> **"The trial court erred by convicting the appellant for murder despite the totality of the evidence qualifying the lesser offence of manslaughter".**

It cannot be disputed that the question whether what took place was a fight or a beating was one of fact. So, to succeed, the appellant's ground is dependent on there being a finding of fact that the appellant and the deceased fought. However, the finding of fact that the learned judge made was that the appellant beat the deceased. The weakness in the appellant's appeal, therefore, is in the fact that there is no ground before us which challenges that finding of fact. That, in itself, defeats the appeal *ab initio*.

From the above two points, the appeal ought to fail. However, we will go further and assume that the finding of fact had been

properly challenged. In the case of **Imusho v The People**[3], this courts' predecessor (the then Court of Appeal) held:

> **"An appellate Court will not interfere with a finding of fact if there was reasonable ground for it, but such finding will be set aside if it was made on a view of the facts which could not reasonably be entertained".**

We applied this principle in the case of **D.P.P v Ng'andu and Others**[4] where we held:

> **"A finding of fact is a question of law on which the Director of Public Prosecutions can appeal under S.12(4) of the Supreme Court of Zambia Act 1973 only if it be alleged that it was made without any evidence or on a view of the facts which could not reasonably be entertained".**

Of course, in that case, we were considering the question whether the Director of Public Prosecutions is permitted to appeal on a point of fact only. However, the underlying principle upon which an appellate court may interfere with a trial court's finding of fact remains the same.

Coming back to this case, Monica Mbewe (PW1) and Aaron Mbulo (PW3) were the only eye-witnesses to the assault; they spoke of the appellant beating the deceased, and that the latter did not retaliate. The only witness who talked about there having been a fight was the arresting officer, (PW4), who was not present at the scene of

the assault. This witness told the trial judge that he took conduct of the docket some three years after the incident, and that he interviewed some witnesses who, in his view, confirmed having seen the appellant fighting the deceased. The trial court's finding is based on the testimony of the witnesses who actually witnessed the assault and not on PW4 who, in our view, was expressing in his own words what he was told by the witnesses. We cannot say that a finding of fact which is arrived at in this manner can be said to be made without any evidence or on a view of the facts which could not reasonably be entertained.

In conclusion, we can only say that the learned judge did not err when he convicted the appellant for murder, instead of manslaughter, because he made a finding of fact that the appellant beat the deceased who was not even retaliating. We, therefore, find no merit in the appeal. It stands dismissed.

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E. M. Hamaundu
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE