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

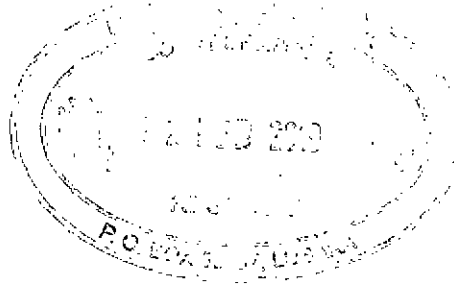
APPEAL No. 136/2018

B E T W E E N:

KELVIN MAYANGA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM : Mchenga DJP, Chishimba and Mulongoti, JJA
On 19th February, 2019 and 22nd February, 2019

For the Appellant : Miss K. Chitupila – Senior Legal Aid Counsel – Legal Aid Board
For the Respondent : Mrs. A. K. Mwanza – Senior State Advocate – National Prosecution Authority

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **Simutenda Vs. The People (1975) ZR 294**
2. **Whiteson Simusokwe Vs. The People (2002) ZR 63**
3. **Jack Chanda and Another Vs. The People SCZ Judgment No. 29 of 2002**
4. **Justin Mumbi Vs, The People (2004) ZR 106 SC**
5. **Lemmy Bwalya Shula Vs. The People (1996) S. J. (SC)**
6. **James Chibangu Vs. The People (1978) ZR 37**
7. **Simutende Vs. The People (1975) ZR 294**
8. **Jose Antonio Golliadi Vs. The People SCZ Appeal No. 26 of 2017**
9. **Kanyanga Vs. The People SCZ Appeal No. 145 of 2011**
10. **Mwape Kasongo Vs. the People CAZ Appeal No. 367 2016**
11. **Liyumbi Vs. The People (1978) Z.R. 25**
12. **Precious Longwe Vs. The People CAZ Appeal No. 182 of 2017**
13. **Malangisha Kapwepwe Vs. The People CAZ Appeal No. 59 of 2018**
14. **Lubendae Vs. The People (1983) ZR 54 S.C**

LEGISLATION AND OTHER WORKS REFERRED TO:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **Black's Law Dictionary 8th Edition**

The Appellant was charged and convicted of the offence of Murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**. The particulars of offence were that the Appellant, on 11th December, 2017, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia did murder Mulowa Mayanga.

The summary of the prosecution's evidence is as follows; Judith Mayanga (PW1), testified that she is the sister to the appellant and Mulowa (deceased). She recalled witnessing a quarrel between the appellant and the deceased a day before the deceased was found dead. She informed the court that the quarrel was over their late father's estate. During the quarrel, the appellant had threatened Mulowa.

Judith further stated that in the early hours of 11th December, 2017, she was informed by Lisca Sianchimwa (PW4) that Mulowa was lying unconscious near the door way of his house. Upon arrival, she observed that Mulowa and Morgan Munalula (PW3) had been injured. PW1 sent for the appellant, who merely came to the

scene, collected his T-shirt and left. According to the witness, the appellant denied killing the deceased.

Melinda Maboshe (PW2) testified that on the 10th of December 2017 a fight had ensued between the appellant and Mulowa Mayanga (deceased) after they had both returned from a drinking spree around 22:00 hours. Melinda witnessed, the deceased being slapped on the face by the appellant and he subsequently fell to the ground hitting his body badly. Mulowa refused to be taken to his house after the fall. PW2 further testified that she could still hear the appellant and the deceased quarrelling as she retired to bed. Though, the deceased and the appellant enjoyed a good relationship, they often quarrelled when they were drunk. According to Melinda, there were no death threats issued or threatened.

Morgan Munalula (PW3) testified that he had been drinking with the late Mulowa and the appellant on 10th December, 2017. Upon the deceased requesting him for a cigarette, he went into his room to get it. Whilst there, he heard the appellant hurling insults at the late Mulowa. Though PW1, warned the appellant to stop, insulting, but the appellant continued. Shortly thereafter, Morgan heard the late Mulowa scream, stating that he had been stabbed by

the appellant. As he came out of his room, Morgan saw the late Mulowa fall down at the door of his room. In addition, Morgan saw the appellant holding a knife. When Morgan attempted to grab the knife away from the appellant, he was equally stabbed and lost consciousness. Four days later, upon regaining his consciousness, he learnt that Mulowa had died. Morgan also informed the court that though the deceased and the appellant did not quarrel whilst drinking alcohol, they often quarrelled about their late father's estate when drunk.

Lisca Sianchimwa (PW4) testified that she only found the deceased laying on the ground. Further that PW3 who alleged to have been stabbed by the appellant was at his house at the time. She had only observed a small cut on his forehead and he was taken to the hospital.

Detective Constable Chinyanta Nicholas (PW5), the arresting officer, testified that he visited the crime scene on 11th December, 2017. He found the deceased in a pool of blood. Following investigations, the appellant was detained in connection with the murder. The post-mortem was conducted on 14th December, 2017. Further, that he had issued a medical report form to Morgan

Munalula (PW3) who had been stabbed by the appellant. PW5 at the time he went to the scene of the crime, did not find PW3. A few days later, upon Morgan Munalula regaining consciousness, PW5 interviewed him. The said Morgan informed him that the appellant had stabbed the deceased and him.

In his defence, the appellant denied killing the late Mulowa and gave a different version of events. The appellant stated that he had been drinking at Kasamba Bar with his wife and left at 22:00 hours. When he got home, he found the late Mulowa quarrelling over a cigarette with PW3. Thereafter, he asked Morgan and the late Mulowa to leave. The appellant then went to bed.

The following morning he was accused of murdering the deceased. Judith Mayanga (PW1) accused him of the murder because he was against the idea of selling their late father's house. He denied stabbing PW3. He however conceded that Morgan was unconscious at the time he was rushed to the hospital.

In a nutshell, the Appellant denied murdering the late Mulowa and testified that the prosecution witnesses had invented stories to implicate him.

The trial court found that the cause of death was not disputed, namely, internal bleeding due to stab injuries. The court relied on the evidence of Morgan Munalula (PW3) who had witnessed the appellant murder the deceased. The possibility of PW3 falsely implicating the accused, was dismissed by the lower court. She found PW3 to be a more credible witness than the appellant. The court found that PW3 indeed had heard the deceased shout that he had been stabbed by the appellant. The trial court also found that the evidence of PW3 had been corroborated by that of PW1, PW2 and PW5.

The court further ruled out the possibility of false implication by PW1 and PW2. She dismissed the appellant's defence as being illogical, unreliable as well as it being an afterthought. The appellant was consequently convicted and sentenced to death.

The Appellant, being dissatisfied with the decision of the trial court now appeals against conviction and sentence. The grounds of appeal raised are as follows;

- 1. The learned trial judge erred in law and in fact in her failure to consider the availability of the defence of provocation on the evidence on the record.***

2. In the alternative to ground one the learned trial Judge erred in law and in fact when she failed to find the existence of extenuating circumstances so as to impose any other sentence other than the mandatory death penalty on the facts of this case.

The appellant filed heads of argument dated 12th February, 2019. In ground 1, the appellant argues that the trial court ought to have considered the availability of the defence of provocation to the appellant, as revealed in the evidence on record.

The appellant contends that had the trial Court considered the availability of the defence of provocation the charge would have been reduced to the offence of manslaughter.

According to the appellant, the quarrel regarding the house was provocative. We were referred to the definition of provocation as per **Section 206 of the Penal Code**. The appellant added that the fact that the appellant slapped Mulowa attests to the fact that the claim, by the deceased, of the house provoked the appellant. We were referred to the case of **Simutenda Vs. The People** ⁽¹⁾ regarding what, at law, constitutes provocation. Further, that during the argument the appellant did not have time to cool down. In addition, that the evidence on the record shows that both the appellant and Mulowa had been very upset following their quarrel.

Ground 2 was argued in the alternative. The appellant argued that the trial court ought to have found that a failed defence of provocation and the evidence of consumption of alcohol are extenuating circumstances. We were referred to the case of **Whiteson Simusokwe Vs. The People** ⁽²⁾ where the court held that a failed defence of provocation is extenuating.

The appellant contends that his intoxication may have led him to react in the manner that he did. We were referred to the provisions of **Section 13 of the Penal Code** which provides for the defence of intoxication. We were referred to the cases of **Jack Chanda and Another Vs. The People** ⁽³⁾, **Justin Mumbi Vs, The People** ⁽⁴⁾ and **Lemmy Bwalya Shula Vs. The People** ⁽⁵⁾ where the Supreme Court considered what circumstances may be deemed extenuating.

It is the appellant's contention that the trial court made findings of fact, that the appellant and the deceased had argued and the appellant was provoked. According, to the appellant, the trial court only considered the defence of provocation but failed to address its mind on the defence of intoxication.

The court was urged to set aside the conviction for murder and substitute it with a conviction for manslaughter because the

defence of provocation was proved. In the alternative, that the sentence of death be interfered with considering the fact that the evidence revealed extenuating circumstances.

The respondent in the heads of argument dated 17th February, 2019, contends that **Section 206 of the Penal Code** on provocation relates to the reaction that any ordinary person would have. We were referred to the case of **James Chibangu Vs. The People** ⁽⁶⁾ and **Simutende Vs. The People** ⁽⁷⁾ relating to the defence of provocation. According to the respondent, the elements of provocation were not satisfied by the appellant. Further, that the statements by Mulowa were not provocative and the reaction by the appellant was excessive and not proportional to the 'provocation'. In addition, that the fact that the appellant stabbed PW3 indicated that he was ready to cause grievous harm to anyone who tried to stop him.

The respondent in the second instance argued that the defence of provocation, in any event, was never raised by the appellant at trial and is only being canvassed for the first time on appeal. Further, that the trial court had analysed the evidence and found that the appellant was not provoked.

In response to the argument regarding extenuating circumstances, the respondent referred us to the provisions of **Section 201 of the Penal Code** and the definition of extenuation as defined in **Black's Law Dictionary 8th Edition**. According to the respondent, the appellant did not adduce sufficient evidence to justify the circumstances of the case to be considered extenuating as envisaged in *Jack Chanda and Another Vs. The People* ⁽³⁾. We were referred to the case of *Jose Antonio Golliadi Vs. The People* ⁽⁸⁾ where the Supreme Court discussed when drunkenness should be considered an extenuating circumstance.

The respondent contends that the trial court addressed its mind to the fact that the appellant had been drinking and still found that his actions were in no way impaired by the consumption of alcohol. We were referred to the case of *Kanyanga Vs. The People* ⁽⁹⁾ where the court discussed instances when an appellate Court may interfere with findings of fact. We were urged to dismiss the appeal for lack of merit.

We have considered the grounds of appeal, the written heads of arguments and the submissions by learned Counsel. We have

also considered the evidence adduced in the court below as well as the Judgment.

It is not in dispute that the appellant and deceased quarrelled after consuming alcohol on the night before his demise. **Under section 200 of the Penal Code**, the following elements must be proved by the prosecution beyond reasonable doubt;

- (I) *That the accused person caused the death of the deceased person*
- (II) *That the death was caused by unlawful act*
- (III) *That there was malice aforethought.*

Malice aforethought is 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. We refer to our decision in ***Mwape Kasongo Vs. the People*** ⁽¹⁰⁾

The evidence before the court was essentially that on the 10th of December 2017, Judith Mayanga heard her brothers namely Mulowa (deceased) and Kelvin (the appellant) quarrelling over the estate of their late father. The appellant issued threats to his brother. The next day, she confirmed seeing her late brother laying

unconscious near the door of his home, whilst PW3 also lay injured and unconscious. PW2 recalled seeing the appellant slap the deceased who subsequently fell down badly. The brothers continued quarrelling.

The eye witness to the alleged murder, Morgan Munalula, testified that he heard the late Malowa scream, saying that he had been stabbed by the appellant who he found still holding a knife. As he attempted to get the knife, the appellant stabbed him and he lost consciousness. The appellant denied the charge and stated that the stories were concocted by PW1 because he had refused to agree to sell their father's house. Further, that it was actually Morgan Munalula who had been fighting with the late Malowa.

We will start with the issues raised in the two grounds of appeal. The appellant has raised the defence of provocation and intoxication. On that basis assails the sentence of death contending that the court ought to have convicted for manslaughter.

The alleged act of provocation being the quarrel about the house left by their father which the deceased claimed. The test for provocation is an objective one and consists of three elements, the

act of provocation, the loss of self-control, the reasonable retaliation proportional to the provocation.

Provocation under **Section 206 of the Penal Code** is defined as follows;

“...means and includes...any wrongful act or insult of such nature as to be likely, when done, to offered to an ordinary person, or in the presence of an ordinary person to another who is under his immediate care to who he stand in... fraternal relation to deprive him of self-control and to induce him to assault the person whom the act or insult is done or offered...an ordinary person means an ordinary person of the community to which the accused belongs.”

In the case of *Liyumbi Vs. The People* ⁽¹¹⁾ the court stated that where a man kills another in consequence of reacting to sudden provocation, and he kills in the heat of passion before there is time to cool, he is guilty of manslaughter. The retaliation must bear reasonable proportion to the provocation.

We considered the defence of provocation in the cases of *Precious Longwe Vs. the People* ⁽¹²⁾ and *Malangisha Kapwepwe Vs. The People* ⁽¹³⁾. In these cases, we guided that there must be evidence of a provocative act before the defence can be called upon by an accused person. We further stated that in the event that the court finds that there was a provocative act, it must then proceed to determine

whether or not an ordinary person in the community would react the same way having been provoked.

We have considered the alleged provocative act or insult by the deceased to the appellant, namely; the claim of the house, and the quarrel in connection with the house between them. This is contended to have been provocative to the appellant.

We hold the view that the alleged provocation was not of such a nature as to be likely to deprive an ordinary person of the community to which the appellant belongs, of his power of self-control. In the absence of a provocative act, the question of the retaliation being disproportionate does not arise. We find that the defence of provocation was not available and the learned trial court was on firm ground by convicting the appellant for the offence of murder.

The appellant in the alternative has raised the defence of intoxication. The only evidence on record alluding to alcohol consumption is that the appellant and the deceased had been drinking with PW3 and went back home. The appellant was hurling insults at by the deceased. According to the appellant he was at Kasamba Bar with his wife and left at 22 hours.

It is trite law that intoxication is an accepted defence in criminal law. In the case of *Lubendae Vs. The People* ⁽¹⁴⁾, the Supreme Court held that

“Evidence of heavy drinking, even to the extent affecting the co-ordination of reflexes is insufficient in itself to raise question of intent unless the accused person's capacities were affected to the extent that he may not have been able to form the necessary intent.”

The evidence before the court was that the appellant had consumed some alcohol. But there was no evidence whatsoever that his capacities may have been affected or impaired by the alcohol drink. In the case of *Precious Longwe Vs. The People* ⁽¹²⁾ we stated that for the defence of intoxication to succeed, it is not enough that there was evidence that the appellant had been drinking. It is our view that for the defence to succeed, the evidence must show that the appellant was so drunk that he could not comprehend his actions or that, because of his drunken state, he could not possibly form the intention to kill his brother, Mulawo.

Therefore, we hold the view, from the evidence on record, that the appellant was not drunk to the extent of being incapable of knowing that what he was doing was wrong or forming an intention

to kill. The defence of intoxication was not available to the appellant.

We find no merit in ground one.

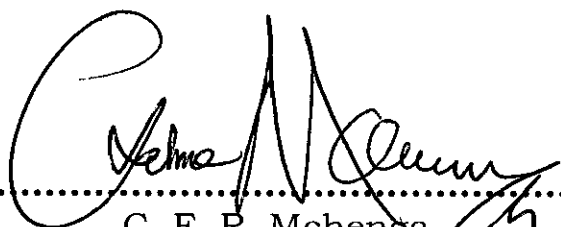
In ground two, the appellant contends that the failed defences of provocation and intoxication created extenuating circumstances thereby affecting the sentence to be imposed as per **Section 201 of the Penal Code**.

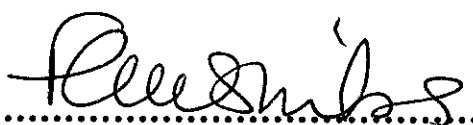
In *Precious Longwe Vs. The People* ⁽¹²⁾ we said a failed defence of provocation becomes an extenuating circumstance where a provocative act and loss of self control are proved but the retaliation is found not to be proportionate. In this case we have found that the provocative act was not proved; that being the case, there is no question of a failed defence of provocation.


As regards drinking being an extenuating circumstances, the Supreme Court held, in the case of *Jose Antonio Golliadi Vs. the People* ⁽⁸⁾, that it is not enough to merely saying he was drinking, the evidence must show that he was adversely affected and failed to appreciate what he was doing. There is no evidence that it was the case in this matter. Consequently, we find that the defence was not available.

We find, from the evidence adduced in the court below, that the learned judge was on firm ground by holding that the appellant did unlawfully cause the death of Mulowa Muyanga, with malice aforethought in that he knew that what he was doing i.e stabbing the deceased in the stomach would likely cause death or cause grievous harm. We hold that all ingredients of the offence were proved beyond reasonable doubt. The lower court was on firm ground by convicting the appellant.

We accordingly uphold the conviction by the trial court. There being no extenuating circumstances, we equally uphold the sentence meted out by the trial court.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL JUDGE


.....
F. M Chishimba
COURT OF APPEAL JUDGE


.....
J. Z. Mulongoti
COURT OF APPEAL JUDGE