IN THE SUPREME COURT OF ZAMBIA **SCZ/APPEAL NO. 95 OF 2006**
HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN: **JUSTINE MULUMBI** - **APPELLANT**

VS.

THE PEOPLE - **RESPONDENT**

Coram: Chirwa, Chibesakunda and Mushabati, JJS.
On 6th March, 2007 and 7th June, 2007.

For the Appellant: Mr. W. K. Cheelo – Legal Aid Counsel.
For the Respondent: Mrs. J. C. Kaumba – Deputy Chief State Advocate.

JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

Cases referred to:

1. *Whiteson Simusokwe vs. The People (2000) Z. R. 63.*

The appeal is against sentence only imposed on the appellant upon conviction on a charge of murder.

The appellant was charged and convicted of one count of murder contrary to Section 200 and three counts of attempted murder contrary to Section 215 of the Penal Code.

The appellant was sentenced to death on the first count of murder which is the subject of this appeal and 20 years imprisonment on each of the three counts of attempted murder of which he has not appealed against.

We shall therefore just consider his appeal against the death sentence on the charge of murder.

The ground of appeal is: ***that the learned trial judge misdirected himself when he imposed death sentence on the appellant when the evidence clearly indicated that there was a failed defence of provocation which should have been taken into account as an extenuating circumstance.***

In his submission the learned counsel Mr. Cheelo argued for the appellant that the appellant set fire on P.W.1's house because there was a serious dispute over the re-payment of his dowery. The appellant's demand for the refund of his dowery emanated from suspected sexual relationship between P.W.1 and one Barnabas Kayala, as per appellant's own evidence on record. He further argued that though she was involved in this love affair, P.W.1 was still appellant's wife. This, according to the learned counsel, amounted to provocation though as a defence it failed. This failed defence amounted to an extenuating ground which the court below should have exercised in his favour and in this regard he cited this court's decision in the case of ***Simusokwe vs. The People (1).***

In reply the learned Deputy Chief State Advocate briefly said she supported the sentence imposed on the appellant because he killed an innocent child. She argued that there was no failed defence of provocation because the deceased did not provoke the appellant. Even if P.W.1 had provoked the appellant, there was enough time for his passion to cool down.

The question before us is whether there was any extenuating circumstance which the court below ought to have taken into account in favour of the appellant.

After conviction the appellant's counsel was invited to address the court and in his address he merely said: **My Lord, the convict is 52 years of age and looks after his aged parents. That is all.**

In sentencing the appellant the learned trial judge did address his mind to possible existence of any extenuating circumstances and he did say **"I have found no extenuating circumstances to make me impose any other sentence than the mandatory sentence."**

The trial court found no extenuating circumstances hence the appellant was sentenced to death.

In our view it is first worth-while for us to give a brief back ground of what transpired on the fateful night.

The appellant had first visited his former wife to demand for refund of his dowery but was told that he, in fact, had already been refunded back the said dowery. He and P.W.1 even went to see P.W.1's mother who still told him the same thing. The appellant went away but later went back to P.W.1's house and entered inside. He blocked the door with some chairs, ground-nut bags and cardboards. He then set the house on fire. In the mean time P.W.1 and her children, including the deceased, were sleeping in the said house. Those who survived, among them the appellant, managed to escape through the hole which Charles Kaunda made through the wall with a pounding stick. The deceased did not escape the inferno.

Given these brief facts of the case we must relate them to the arguments advanced by Mr. Cheelo.

The appellant and P.W.1 were once husband and wife but had divorced. According to the evidence of P.W.1 they had parted company in 2002 but this incident happened on 16th May, 2004, some two years down the line. It would appear the appellant was just jealous of his former wife's alleged love affairs with one other man, if any at all. Can jealous based on past relationship be deemed as an extenuating circumstance, more so this was two years after their separation?

At the time the appellant set fire to the said house, it was not only his former wife who was sleeping in there but their children. He blocked the door with some objects so as to prevent any of the occupants of the house from escaping. At some point he was seen lying on top of his wife after he had already set the house ablaze. This must have been intended to stop her from escaping the inferno.

In view of the facts that we have outlined above we find no provocation that prompted the appellant to act in the manner he did. Had the defence of provocation been negatived by the fact that excessive force was used then we would have held that the plea of failed provocation had succeeded as an extenuating circumstance to the charge of murder. The cited case of ***Simukokwe*** (supra) is distinguished.

The trial judge was therefore, justified in holding that there were no extenuating grounds to have persuaded him to impose a different sentence on the appellant other than the death sentence.

We up-hold the trial judge's sentence and dismiss the appeal.

D.K. Chirwa
SUPREME COURT JUDGE

L.P. Chibesakunda
SUPREME COURT JUDGE

C.S.Mushabati
SUPREME COURT JUDGE