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**IN THE SUPREME COURT OF ZAMBIA SCZ Judgment No.12 of 2012**

**HOLDEN AT NDOLA** **APPEAL No. 238/2011**

**(CRIMINAL JURISDICTION)**

**BETWEEN:**

**NDALA KASANGA APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

**CORAM: Sakala, CJ., Mwanamwambwa and Wanki, JJS.**

 **on 1st November, 2011 and 22nd March, 2012**

**For the Appellant Mr. A. Ngulube, Acting Director of Legal Aid**

**For the State Mrs. R.M. Khuzwayo, Deputy Chief State Advocate**

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**Sakala, CJ., delivered the Judgment of the Court.**

**Cases referred to**

1. **Muyenga V The People [2009] ZR144**

2. **Simusokwe V The People [2002] ZR 63**

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 The Appellant was tried and convicted on a charge of murder contrary to Section 200 of the Penal Code, Cap.87 of the Laws of Zambia. The particulars of the offence alleged that the Appellant, on 2nd day of July, 2002, at Mwanambuyu area in the Kaoma District of the Western Province of the Republic of Zambia, murdered Mbambi Kashenda.

 The prosecution case centred on the evidence of three witnesses, PWs 1, 2 and 3. The evidence of the prosecution established that the Appellant did murder the deceased. This fact was admitted by the Appellant himself on oath while giving evidence in his defence.

 The evidence of PW1 was that on 2nd day of July, 2002, at about 20.00 hours, she saw her elder sister, the deceased, passing by going in the direction of the garden. She was curious as to where the deceased was going at that late hour. She decided to follow her. After walking for some distance, she noticed that the deceased was walking alongside the Appellant.

 PW1 explained to the Court that she knew the Appellant as her sister’s lover, who had been staying with the deceased, but that at the time she saw him with the deceased, he had escaped to the forest, hiding from the neighborhood watch committee who were looking for him on suspicion that he had stolen a goat. According

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to PW1, she followed the deceased and the Appellant at a distance. But later, she drew closer and then hid herself under a shrub. She could hear them from where she hid herself. She heard the deceased tell the Appellant that amongst his property, she had handed over a pair of trousers, a shirt, a travelling bag and some plates to the members of the neighborhood watch. She also heard the Appellant ask the deceased why she had given his belongings away. She then saw the Appellant brandishing a small axe with which he hit the deceased on the forehead. She also later saw the Appellant stab the deceased on the throat with a knife. PW1 explained that she screamed at the Appellant; but the Appellant threatened her that if she said anything, he was going to kill her as well. PW1 then ran back to the village and reported to PW2. PW1 subsequently led PW2 to the scene where PW2 saw the deceased lying dead on the ground.

 PW3 was a police officer who investigated the matter and subsequently arrested the Appellant.

 The Appellant gave evidence on oath in his defence. He explained that the deceased was his wife, whom he befriended while doing piece work in the area; that he had a love affair with her; that he was known to her parents; and that he had lived with the deceased for two months.

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 The Appellant testified that on the day in issue, he had gone to the forest. He returned at 15:00 hrs. The deceased then informed him that the neighborhood watch members had come home looking for him in connection with a goat that he had slaughtered which was said to be a stolen animal.

 The Appellant further explained that he quarreled with the deceased for having given away his belongings to the neighborhood watch members; that he became annoyed because the deceased told him that he could not be keeping stolen property in her house. He testified that the first quarrel with the deceased took place at about 15:00 hrs after he returned from the forest; but that at about 19:00 hrs, he quarreled again with the deceased and later both of them went to the outskirts of the village where he got annoyed and picked an axe and chopped the deceased on the head; that he also stabbed the deceased four times with a knife, after which he fled from the scene. He was caught three days after he had killed the deceased. The Appellant also testified that when he was interviewed by the Police, he told them that he had killed the deceased over his property.

 The Appellant’s evidence in cross-examination was that when the neighborhood watch members came to the village, he was away in the forest until 15:00 hrs; when he came back. He again explained that the deceased informed him that she had given away

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his things. He admitted in cross-examination that he went away to the outskirts of the village with the deceased at 19:00 hrs so that he could kill her.

 The learned trial Judge considered the evidence. He found that it was not in dispute that the Appellant murdered the deceased in a most brutal manner as the Appellant himself admitted on oath in open court; while being led in evidence by his Counsel, that he killed the deceased using his own axe and his own knife which were with visible blood stains. According to the trial Judge, the only question for the determination of the Court was whether the defence of provocation was available to the Appellant.

 The trial Judge observed that the Appellant alleged that he was provoked by his girlfriend, the deceased, when she informed him that she had surrendered his belongings which he brought into her house to the members of the neighborhood watch; that according to the Appellant, he was annoyed at 15:00 hrs, when he learnt about his belongings being surrendered; that he quarreled with his girlfriend over his surrendered property until the quarrel died down; but that four hours later, he went away to a place where he fatally attacked the deceased. The trial court pointed out that in these circumstances, there could not have been any provocation from the deceased to the accused; that the whole scenario was a clear manifestation of premeditation or malice aforethought on the

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part of the Appellant; who could not be said to have acted in the heat of the moment.

 The trial Court rejected the Appellant’s suggestion that he was provoked, accepted the prosecution’s evidence in its entirety; and found the Appellant guilty of murder and convicted him accordingly.

 The trial Judge considered the possibility of extenuating circumstances in relation to sentence; but found none and sentenced the Appellant to death by hanging.

 The Appellant appealed to this Court. On behalf of the Appellant; the learned Acting Director of Legal Aid filed heads of argument based on one ground of appeal, namely; **that the court below erred in law by rejecting the Appellant’s suggestion of provocation as a defence and yet decided that there was no extenuating circumstances and thereby imposing the mandatory death sentence for murder.**

 In our view, this appeal is essentially an appeal against the death sentence only.

 The gist of the written heads of argument is that the Appellant was convicted on a murder charge based on the evidence of the

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prosecution and on the Appellant’s own evidence by which he admitted of having caused the death of the deceased and was sentenced to death.

 It was submitted that there was clear evidence of provocation in this case of being accused of having stolen a goat; of being accused of being in possession of stolen property and of having his property given away.

 It was contended that the provocation was not remote and could not be said to have ceased because the accusation of theft of the goat, the accusation of being in possession of stolen property; which property was unjustly given away without the Appellants’ knowledge or consent were the subject of a quarrel at 15:00hrs on the fateful day; and about 19:00 hrs on the same day at which the assault occurred.

 It was submitted that it was in the course of the quarrel at about 19:00 hrs or 20:00 hrs that the Appellant assaulted the deceased. It was also submitted that as in the case of **Muyenga V The People (1)**; the deceased caused the provocation. It was pointed out and conceded that the reaction of the Appellant was not proportionate to the provocation with the result that the evidence of excessive force defeats the defence of provocation to reduce the

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murder charge to manslaughter. The case of **Simusokwe V The People(2),** was cited in support of these submissions.

 It was also pointed out that the trial court in this case did consider the defence of provocation; but rejected it. It was thus submitted that a failed defence of provocation affords extenuating circumstances on a charge of murder as held in the case of **Simusokwe V. The People (2).**  It was contended that where there is extenuation, the mandatory capital sentence ought not to be imposed. This Court was urged to set aside the death penalty and impose a custodial sentence.

 On behalf of the State, Mrs. Khuzwayo, the Chief State Advocate, pointed out that the Appellant confessed to the Police and to the Court as to how he killed his girlfriend; that the Appellant committed the crime four hours after the incident narrated by the deceased sister of how she gave his belongings to the neighborhood watch members. She submitted that by that time, he had cooled down; and that the Appellant’s reaction was not proportionate to the injuries caused. She also cited the case of **Muyenga V The People(1)** in support of her submissions.

 As we have already observed, this appeal is against the sentence of death only. The contention is that the trial Court erred

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in law by rejecting the Appellant’s suggestion of provocation as a defence; and yet deciding that there were no extenuating circumstances and thereby imposing the mandatory death sentence.

 We have examined the judgment of the trial Court. We note that the trial Judge was alive to the issue of provocation as a defence. In dealing with the defence of provocation, the trial Court observed that the Appellant admitted to inflicting the multiple stab wounds on the body of the deceased and killing the deceased. The Court then pointed out that the only question for it to determine was whether the defence of provocation was available to the Appellant.

 The Court noted that the defence of provocation is legally available to a charge of murder where the accused was so provoked that he acted in the heat of the moment; thereby causing a fatal injury and that the reaction was commensurate with the provocation. In rejecting the defence of provocation, the trial Judge had this to say:

“ ***In the present case, the Accused alleges that he was provoked by his girlfriend, now the deceased, when she informed him that she had surrendered his belongings which he brought into her house to members of the local***

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***neighborhood watch. According to him, he was annoyed at 15:00 hours when he learnt of this. He quarreled with his girlfriend over it until the quarrel died down. Four hours later at 19:00 hours, he went away to the exact spot where he had hidden the murder weapons and fatally attacked the deceased with the same weapons after she followed him. In my view, there could not have been any provocation in this case from the deceased to the accused and the whole scenario was clear manifestation of premeditation or malice aforethought on the part of the accused person who cannot by any measure of reason be said to have acted in the heat of the moment. I reject the accused person’s suggestion that he was provoked.”***

 In dealing with the issue of extenuating circumstances, the trial Judge had this to say:

***“I have in this case examined the possibility of extenuating circumstances in order to see if the accused person could draw the benefit of the law regarding to sentence. I have seen none and my hands are tied by statutory limitation and I must pronounce that the***

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***accused person shall at the appointed date and time be hanged by the neck until he is pronounced dead.”***

 On behalf of the Appellant, the submission was that there was clear evidence of provocation in that the Appellant was accused of stealing a goat, accused of being in possession of stolen property; and having his property given away by the deceased.

 It was, however, conceded on behalf of the Appellant that there was excessive force in this case which defeated the defence of provocation; but it was contended that a failed defence of provocation is an extenuating circumstance.

 The facts of the case before us are almost on all fours with the case of **Simusokwe V. The People(2)**, a case relied upon by Counsel for the Appellant. On account of the similarity of facts in that case with the present case, it is necessary to set out the facts as per headnote: These facts are:

***“The Appellant was tried and convicted on a charge of murder. The particulars alleged that somewhere between December 1998 and March 1999, at Kalulushi, in the Kalulushi District of the Copperbelt Province, he murdered Nondo Sanfolosa. The Appellant informed the***

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***trial court that he had killed the deceased and claimed that the deceased had become his mistress. On the fateful day he found her with another man in the act of intimacy. He fought the other man who ran away and then he turned on the deceased whom he beat with a stick. When she died, he secretly buried her. The learned trial Judge considered that this was a straight forward murder case and imposed the ultimate penalty on the Appellant. In the appeal it was argued forcibly that the case should be considered to have been manslaughter and not a capital murder case. Held:***

1. ***If a man and woman who are not married are nonetheless in a stable relationship of intimacy, they will be treated on the same footing as married persons.***
2. ***In a claim of provocation the reaction of the accused person must be proportionate, with the result that any evidence of excessive force defeats the defence.***
3. ***A failed defence of provocation affords extenuation for a charge of murder.”***

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 In the instant case, the defence of provocation failed. We, thus, uphold the conviction of murder. But we also accept that a failed defence of provocation nonetheless affords extenuation of the murder charge.

 There was here evidence of two quarrels; at the village and at the outskirts of the village, when the deceased followed the Appellant; there was evidence of the Appellant being accused, by the deceased, of having stolen a goat; and there was evidence of the deceased accusing the Appellant of being in possession of stolen property; and there was evidence of the deceased having the Appellants’ property given away. All these were a subject of the quarrel at 15:00 hrs in the village and at 19:00 hrs followed by another quarrel; which ended up by the Appellant axing and stabbing the deceased several times.

 We accept that the force was excessive and provocation was properly rejected as a defence. But the extenuating circumstances enumerated above justify the non-imposition of a mandatory capital sentence. In the circumstances, we quash the death sentence.

 From the facts of this case; a very suitable sentence to impose is one of twenty-five years imprisonment with hard labour from the

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date the Appellant was arrested. The appeal against sentence succeeds to that extent.

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**E.L. Sakala**

**CHIEF JUSTICE**

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 **M.S. Mwanamwambwa M.E. Wanki**

**SUPREME COURT JUDGE SUPREME COURT JUDGE**