

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA

APPEAL NO. 192 OF 2014

(Criminal Jurisdiction)

B E T W E E N:

**DAUDI PHIRI**

APPELLANT

AND

**THE PEOPLE**

RESPONDENT

CORAM: **PHIRI, WANKI, AND MALILA, JJS.**

On 4<sup>th</sup> November, 2014 and 3<sup>rd</sup> February, 2015

For the Appellant: Mrs. K.M. Simfukwe - Senior Legal Aid  
Counsel (LAB)

For the Respondent: Mrs. M.M. Kawimbe - Deputy Chief  
State Advocate (NPA)

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**J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFFERED TO:-

1. **Chibeka -Vs- R (1959) 1 R and N 476.**
2. **James Chibangu -Vs- The People (1978) 37.**
3. **Nyambe Mubukwanu Liyambi -Vs- The People (1978) ZR 25.**
4. **Jack Chanda and Kennedy Chanda -Vs- The People SCZ Judgment No. 29 of 2000.**

LEGISLATION REFERRED TO:-

5. **The Penal Code Chapter 87 of the Laws of Zambia.**

The appellant was sentenced to suffer death following his conviction by the Chipata High Court on one count of murder, contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

The particulars of the offence alleged that the appellant on 6<sup>th</sup> November, 2009 at Chipata in the Chipata District of the Eastern Province of the Republic of Zambia, did murder Sizzi Jere.

The appellants' conviction was based on the evidence of three witnesses, namely; PW1, Moses Nyirongo; PW2, Dingani Henry Sakala; and PW4, Detective Inspector Thomas Shimanyika. The brief facts of this case are that the appellant confronted his wife about the rumors of her love affair with the deceased. When the appellant threatened to beat her she confessed that indeed she had a love affair with the deceased. The appellant's wife said that each time the appellant was not at home the deceased would come home, sleep with the appellant's wife and have sexual intercourse.

To prove the confession she arranged with the appellant to beep the deceased who would then call back and she would invite him to come over to the house on pretext that her husband was not at home. This was around 23.30 hours. The appellant's wife beeped and the deceased came to the appellant's house. The deceased proceeded straight to the bedroom when he entered the house and the appellant's wife followed behind. Later the appellant followed and found the deceased and his wife naked on the bed fondling. When the appellant asked the deceased what he was doing the deceased responded rudely and a fight ensued. In the process of the fight the appellant used a hammer to hit the deceased twice. Subsequently the deceased met with his death. Following the death of the deceased, the appellant took the body to the road side where it was found by the police who took it to Chipata Hospital. A postmortem examination was later conducted on the body of the deceased. The appellant was subsequently arrested for the subject offence under warn and caution in Nyanja language, the appellant denied the charge.

In his evidence on oath the appellant confirmed that acting on information he had received, on 5<sup>th</sup> November, 2009 he questioned his wife about the information; and that his wife confessed to having a love affair with the deceased. On his request, his wife rang and invited the deceased to their house. Subsequently the deceased went to their house around 23.00 hours, and went in their bedroom. His wife followed. When he went into the bedroom a minute later he found both his wife and the deceased naked and fondling. The deceased then hit him with a blow. Thereafter, he held the deceased and they started fighting. In the course of the fight, he hit the deceased with a small hammer on the forehead twice and he fell on the bed. The trial Court found the appellant guilty of the subject offence and sentenced him to the mandatory death sentence. The appellant now appeals against the said conviction and sentence. He has advanced two grounds of appeal as follows:-

1. **The learned trial Judge erred in law and in fact when he held that the defence of provocation was not available.**
2. **In the alternative the learned trial Judge erred in law and in fact when he held that there were no extenuating circumstances**

**in this case to justify a sentence other than death.**

Counsel on both sides submitted in writing and we are highly indebted to Counsel for the industrious arguments. However, we propose not to reproduce the said submissions here save to conveniently refer to them in this judgment.

The offence herein for which the appellant was convicted and handed a capital punishment is created by **Section 200 of the Penal Code**. The said section provides that:-

**“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”**

Murder is simply the killing of person by another with intention. It is committed when a person causes the death of another person by an unlawful act or omission with malice aforethought. Malice aforethought or simply intention is established by showing that an intention to cause the death of or to do grievous harm to any person; or knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person; and an intent to commit a felony among others existed on the part of the suspect.

It was argued in the first ground that the appellant unlawfully caused the death of the deceased because the deceased had provoked the appellant by his verbal, physical attack on the appellant and the adulterous affair he had with the appellant's wife. It was argued that the appellant should have been found guilty of manslaughter instead. The response was that the appellant was not entitled to the defence of provocation because this was a case of senseless calculated murder. Before we state our position on this ground we wish to make the following comments.

The unlawful killing of a person by another in a situation where there is provocation reduces murder to manslaughter. The term provocation is defined in **Section 206 of the Penal Code**. Provocation, where it is successfully pleaded, operates to reduce murder to manslaughter. The essence of provocation is that the accused person kills another in the heat of passion before there is time for the passion to cool. There is momentary loss of self-control and the test applied by the Courts in this jurisdiction is that of an ordinary person in the accused person's community. It

is not for the accused to establish provocation as a defence. If there is any evidence of provocation, the Court cannot convict of murder unless it is satisfied that the prosecution has proved beyond all reasonable doubt either that there was no provocation as defined in the Penal Code, or if there was provocation, that what was done in the assault could not be regarded as what an ordinary person of the community to which the accused belonged, who had lost self-control, might have done on the provocation given. The case of **CHIBEKA -VS- R** <sup>(1)</sup> is instructive on this point.

The elements of provocation include killing in the heat of passion and without time to cool, sudden provocation, a wrongful act or insult, loss of self-control which is what would happen to an ordinary member of the community to which the accused belongs and reasonable retaliation bearing a relationship to the provocation.

The Court is entitled to take all the circumstances of the case into account in determining whether there is sufficient provocation but all the elements above must be shown to exist.

**a) Wrongful Act or Insult.**

There must be a wrongful act or insult. This refers to provocative conduct as envisaged by **Section 206(1) of the Penal Code**. In terms of the above section as read with **Sub-section 2**, the provocative conduct may either be directed to the accused person or to any person related to the accused in his presence.

The wrongful conduct must be sudden and must cause actual loss of self-control in the accused person. The test to be applied is an entirely subjective one. The requirement of loss of self-control entails that the accused person must suddenly and temporarily lose his self-control, rendering him subject to intense passion as to make him at that moment not master of his mind. Mere loss of temper will not suffice; and those who easily get annoyed by the slightest oversight are excluded. The imperative thing is that the accused person was unable to restrain himself from doing what he did. Thus, a carefully planned revenge against an aggressor after lapse of considerable time from the time of the provocative conduct negatives the defence of provocation.

**a) Loss of Self-control by Ordinary Person.**

It is necessary not only to show that the accused person lost his self-control but also that an ordinary person in the accused person's community would have lost his self-control in the circumstances. The test applied is an objective one as deduced from **Section 206(1) of the Penal Code** where an ordinary person is defined as an ordinary person of the community to which the accused belongs.

This concept of the ordinary person under the Penal Code encompasses the diverse backgrounds of the people of Zambia. Therefore, local traditions, beliefs and conditions can be taken into account in assessing the reaction of the ordinary person to the particular situation. The case of **JAMES CHIBANGU -VS- THE PEOPLE** <sup>(2)</sup> is in point. In that case we said that:-

**"In Zambia the test for provocation is objective but only in a limited sense in that it is of a parochial nature, namely, faced with similar circumstances can it be said that an ordinary person' of the accused's community might have reacted to the provocation as the accused did?"**

Before leaving this element we must re-echo what we said in **NYAMBE MUBUKWANU LIYAMBI -VS- THE PEOPLE** <sup>(3)</sup>. In the said case we stated that:-

**“The question is not merely whether an accused person was provoked into losing his self-control, but also whether a reasonable man would have lost his self-control and, having done so, would have reacted as the accused did.”**

**b) Reasonable Relationship Between Retaliation and Provocation.**

The Penal Code does not define this concept. However, it means that the act which caused death must have borne a reasonable relationship to the provocation. The retaliation must not be excessive. Thus a man who killed his former mistress by inflicting four blows on her head with a machete on the ground that she slapped him and spat at him when he suspected her of having made off with a considerable sum of money can be convicted of murder as his mode of resentment is out of all proportion to the provocation.

Although the arguments for the appellant were very tempting we have not been swayed. We opine that in the circumstances of this case the defence of provocation could not stand. Therefore the trial Court was on firm ground when it ruled out provocation. It is our firm view that this was a case of failed defence of provocation. We find no merit in ground one.

In respect of ground two, it was argued for the appellant in the alternative that there were extenuating circumstances in this case and the appellant should have been given a sentence other than death. The response was that the trial Court rightly held that there were no extenuating circumstances in this case as the appellant planned the death of the deceased. We must state that ground two has directed our attention to the law on extenuating circumstances.

The law regulating extenuating circumstances comprises **Section 201 of the Penal Code** and a plethora of our previous decisions. **Section 201 of the Penal Code** provides thus:-

**“(1) Any person convicted of murder shall be sentence-**

**(a) To death; or**

**(b) Where there are extenuating circumstances, to any sentence other than death:-**

**Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under Section Two Hundred and Ninety-four.**

**(2) For the purpose of this Section-**

**(a) An extenuating circumstance is any fact associated with the offence which would**

**diminish morally the degree of the convicted person's guilt;**

- (b) **In deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs."**

The foregoing Section has not listed facts which are regarded as extenuating circumstances. However, in the case of **JACK CHANDA AND KENNEDY CHANDA -VS- THE PEOPLE** <sup>(4)</sup> we held that:-

**"A failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances."**

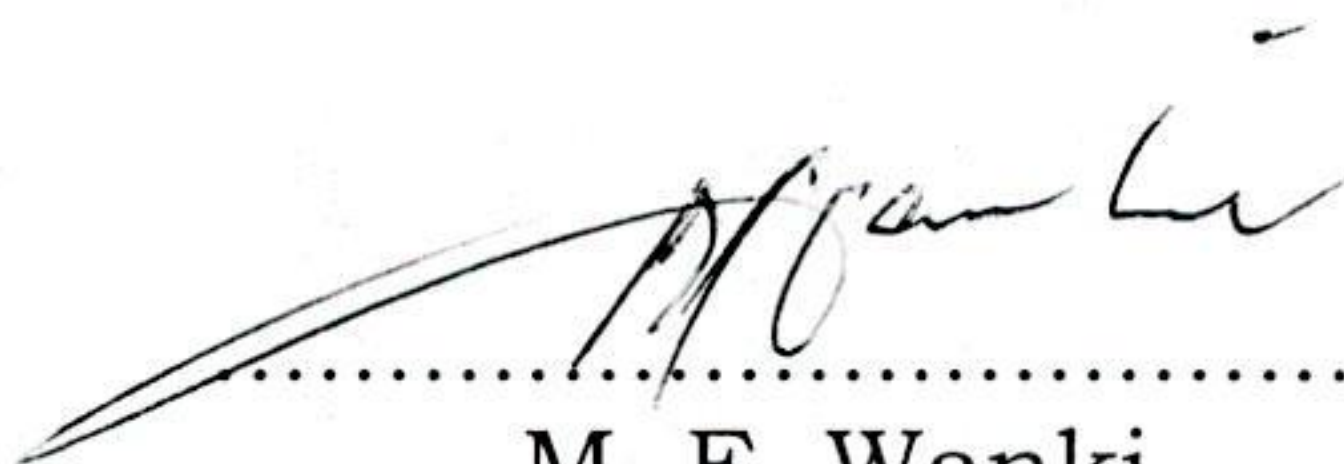
It is clear from what we said in the above case that a failed defence of provocation amounts to an extenuating circumstance and entitles the sentencing Court to met out any sentence other than death. We have already observed that this was a case of failed defence of provocation. Therefore, the sentencing Court in this case should have sentenced the appellant to any sentence other than death. Therefore, the lower Court erred in not doing so. We find merit in the second ground of appeal. We set aside the

death sentence and in its place impose 25 years Imprisonment with hard labour.

The appeal against conviction is therefore dismissed.



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G. S. Phiri,  
**SUPREME COURT JUDGE.**



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M. E. Wanki,  
**SUPREME COURT JUDGE.**



.....  
M. Malila, <sup>SC</sup>  
**SUPREME COURT JUDGE**