IN THE SUPREME COURT OF ZAMBIA **Appeal No. 19/2017**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

GEORGE CHOMBAOMBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS
on the 1st August, 2017 and 11th September, 2017

For the Appellant: Mr. J. Zulu, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. M.S. Ziela, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

Muyovwe, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Whiteson Simusokwe vs. The People (2002) Z.R. 63**
2. **Jack Chanda and Kennedy Chanda vs. The People (2002) Z.R. 124**
3. **Kanyanga vs. The People Appeal No. 145 of 2011**
4. **Kenmuir vs. Hattingh (1974) Z.R. 162**
5. **Malawo vs. Bulk Carriers (Zambia) Ltd (1978) Z.R. 185**

The appellant was convicted by the Kitwe High Court on one count of murder contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia. The particulars of the offence alleged that on the 9th April, 2012 at Chililabombwe in the Copperbelt Province of Zambia he murdered Mwelwa Phiri (hereinafter called "the deceased").

The brief facts from the nine witnesses called by the prosecution is that on the 9th April, 2012 around 11:30 hours the appellant, the deceased and one Simukoko were playing pool at Twaiteka Bar (popularly known as TT Bar). An argument erupted between the appellant and the deceased arising from the fact that the appellant insulted the deceased after the deceased offered greetings. However, the argument was quelled and the appellant apologised and even bought the deceased a beer thereafter. The deceased accepted the apology.

Around 13:00 hours the same day, Albert Mwewa who was in the company of two friends met the appellant and Simukoko. The appellant, who was unknown to Albert, invited him to accompany him (the appellant) to his house to collect a new overall which he

said he had reserved for Albert as he was hard working and had encouraged him with the word of God and prayer. When they reached the appellant's house, Albert and Simukoko went with the appellant into the yard. Before the appellant could enter the house, he saw the deceased who had now entered the yard. This angered the appellant who shouted at the deceased asking him why he was following him and what he wanted from him. The deceased did not respond. The appellant went into his house and got the overall which he handed over to Albert. As Albert was about to leave, the appellant again asked the deceased what he wanted from him. The appellant then hit the deceased on the head with a pestle before Albert and Simukoko could intervene. The deceased was rushed to the hospital and he passed on the same day around 23:00 hours. The appellant was apprehended the same night and was charged with the murder of the deceased.

The postmortem examination revealed that the deceased died of head injuries as he had suffered multiple fractures of the skull.

The summary of the appellant's defence is that he had an argument with the deceased which they resolved following his

apology to the deceased. However, the deceased followed him to his home and that he threatened to assault him and that he actually did assault him and that it was in the process of the scuffle that he pushed the deceased who fell and hit his head at the edge of the door frame where there was a piece of timber protruding which had a sharp edge. He took him to the hospital, informed the deceased's wife but unfortunately the deceased passed on during the night and he was apprehended and charged with the subject offence which he denied. The appellant's position was that Albert's testimony was a pack of lies.

In her judgment, the learned trial judge accepted that the appellant and the deceased had earlier on had an argument which was resolved following the appellant's apology. She found as a fact that the deceased followed the appellant home and that Albert was a reliable witness who had no motive to falsely implicate the appellant as he had just given him a gift. She found that the appellant was the aggressor as the deceased did not respond to him as he shouted at him. The learned trial judge found that the deceased died as a result of head injuries he sustained at the hands

of the appellant. The learned trial judge was of the view that the appellant ought to have known that hitting a person on the head with a pestle would cause death or grievous harm. And due to the nature of the injuries, the learned trial judge found that the appellant intended to cause death to the deceased. The learned trial judge convicted the appellant and sentenced him to the mandatory death sentence.

The issue raised by Mr. Zulu in his lone ground of appeal is that the defence of provocation having failed, the learned trial judge should have found the appellant guilty of murder with extenuation. Counsel leaned heavily on our decision in **Whiteson Simusokwe vs. The People**[1] where we held that a failed defence of provocation affords extenuation for a charge of murder. It was submitted that in this case, it was not in dispute that the appellant and the deceased had quarreled earlier at the bar. Counsel argued that the fact that the deceased followed the appellant to his house was provocative. It was submitted that the appellant's version that the deceased followed him home and not only threatened to beat him but actually hit him with a fist was not shaken in cross-

examination. According to Counsel, the appellant put up the defence of provocation as provided under Section 205(1) of the Penal Code and the court should have accepted that this was a case of a failed defence of provocation. It was submitted that the finding that there were no extenuating circumstances in this case was erroneous. We were urged to interfere with the sentence of the lower court by quashing the death sentence and instead impose an appropriate sentence.

In her response, Ms. Ziela submitted that the lower court cannot be faulted for failing to find that the defence of provocation failed. She submitted, *inter alia*, that in this case, the question of diminished responsibility did not arise and that we had guided in the case of **Jack Chanda and Kennedy Chanda vs. The People**[2] and **Kanyanga vs. The People**[3] that each case must be considered on its peculiar facts. She argued that in considering whether there were extenuating circumstances in accordance with Section 201(2) of the Penal Code, the question is whether an ordinary person of a class of the community to which the appellant belongs would have behaved in the same manner. Ms. Ziela submitted that the

appellant attacked the deceased who was unarmed and that his reaction was unreasonable and uncalled for given the behaviour of his opponent (the deceased). She submitted that the appellant failed the test of a reasonable man.

We have considered the evidence in the court below, the judgment of the lower Court and the submissions by learned Counsel for the parties.

The facts of this case reveal that there was a quarrel between the appellant and the deceased while they were playing pool in the bar. The appellant was the aggressor who had insulted the deceased and there after apologised and went as far as buying the deceased a beer which showed that he was remorseful. According to Albert, the eye witness, who was found by the deceased as he entered into the appellant's yard, for some unexplained reason, the appellant was angered by the deceased's appearance at his home. This was during the day and Albert saw the appellant pick a pestle which he used to hit the deceased on the head. In his heads of argument, Mr. Zulu attacked Albert's evidence as being unreliable

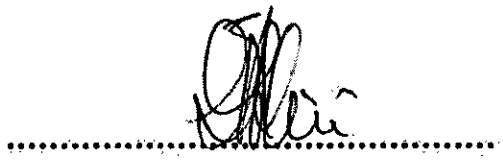
compared to that of the appellant. Below is part of Albert's testimony in the court below:

> **"It was around 13:00 hours. The one I didn't know asked me whether I was working for Chiwamwe Company. I answered him that I work at Chiwamwe Lashing. By that I meant that I do the job of driving wheel burrows with copper. He told me that he really had been looking for me. He asked me whether I remembered that he was working at the same company.... He said I had encouraged him a lot with the Word of God and prayer. He said since then he had reserved an overall for me as a gift. He said lets go so that you collect it. We then went to his house...."**

We have chosen to refer to the above portion of Albert's evidence to show that the appellant was a total stranger to him. The eye witness found himself at the appellant's house at the invitation of the appellant. We have stated in a plethora of cases including **Kenmuir vs. Hattingh**[4] and **Malawo vs. Bulk Carriers (Zambia) Ltd**[5] that where questions of credibility arise, an appellate court which has not had the advantage of seeing and hearing witnesses will not interfere with findings of fact made by a trial judge unless it is clearly shown that he has fallen into error. In this case, the trial court rightly rejected the appellant's story that he was attacked or provoked by the deceased. There appears to be no reason for Albert to concoct a story against the appellant a stranger

to him who had just offered him a gift. The suggestion by Mr. Zulu that the fact that the deceased followed the appellant to his home was an act of provocation is unacceptable and stretching the defence of provocation completely out of bounds. The two had reconciled and the appellant who was the aggressor had apologised to the deceased for the insults he had hurled at the deceased. And we agree with Ms. Ziela that the appellant's conduct was irrational, unreasonable and totally uncalled for and it led to the death of the deceased who at the time was unarmed and non-violent towards him. Of course, it remains a mystery as to why the deceased followed the appellant to his home because he was not given an opportunity to explain his presence at the appellant's home. We have combed the evidence and we have found no trace of provocation and therefore the question of the defence of provocation failing cannot arise. We take the view after considering all the evidence, that the learned trial judge was on firm ground when she found that there were no extenuating circumstances in this case. The lone ground of appeal fails.

We therefore uphold the judgment and sentence of the court below and we dismiss the appeal accordingly.



G.S. PHIRI
SUPREME COURT JUDGE

E.N.C. MUYOVWE
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE