

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

APPEAL NOs 30, 31, 32/2018

BETWEEN:

**AARON NGOSA**

1<sup>st</sup> Appellant

**KELVIN MWEWA**

2<sup>nd</sup> Appellant

**LYSON KUNDA**

3<sup>rd</sup> Appellant

VS

**THE PEOPLE**

Respondent



CORAM: **Chashi, Lengalenga and Siavwapa, JJA**  
on 21<sup>st</sup> and 23<sup>rd</sup> August, 2018 and 20<sup>th</sup> October, 2018

For the Appellants: Mr. H. M. Mweemba – Principal Legal Aid Counsel  
(standing in for Mr. A. Ngulube – Director of Legal  
Aid Board)

For the Respondent: Miss C. Soko – Deputy Chief State Advocate

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## J U D G M E N T

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**LENGALENGA, JA delivered the Judgment of the Court.**

Cases referred to:

- 1. MBOMENA MOOLA v THE PEOPLE (2000) ZR 148**
- 2. ABEDINEGO KAPESHI & ANOR v THE PEOPLE (SCZ SELECTED JUDGMENT NO. 35 OF 2017)**
- 3. CHISHIMBA v THE PEOPLE – APPEAL NO. 17 OF 1999 (unreported)**
- 4. BWALYA v THE PEOPLE (SCZ JUDGMENT NO. 29 OF 2010)**
- 5. MWIBA MUKELA v THE PEOPLE (2012) 2 ZR 387**

Legislation referred to:

- 1. The Penal Code, Chapter 87 of the Laws of Zambia – Section 200.**

This is an appeal against sentence only. On 8<sup>th</sup> January, 2018 the appellants were convicted on one count of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia and sentenced to death.

The particulars of offence are that the appellants on the 6<sup>th</sup> day of April, 2017 at Serenje in the Serenje District of the Central Province of the Republic of Zambia, jointly and whilst acting together, did murder Jean Bangwe.

The case for the prosecution was based on the evidence of PW1, Charles Kunda, PW2, Oscar Musanda, PW3 Maxwell Mpundu Chisenga and PW4, Godfrey Katoka.

The brief facts of the case are that the deceased, Jean Bangwe was suspected of being a witch who caused the deaths of her brothers and the illness of PW2, Oscar Musanda. This was according to the evidence of PW1, Charles Kunda and PW2, Oscar Musanda, both of Nakalengule village, Chief Maila's area in Serenje District.

PW1's testimony was to the effect that on 2<sup>nd</sup> April, 2017 after the church service, he was approached by PW2, Oscar Musanda who asked him to go to his house so that he could tell him what happened when he went to a witch finder. After church, PW1 went to PW2's house where they gathered with about seven other family members including PW2. According to PW1's evidence, PW2 told them that he had been bewitched by Jean Bangwe, who was PW1's mother, according to what he was told by the witch finder. Jean Bangwe who was present at the meeting denied the allegation and it was agreed that they would go back to the witch finder.

PW1 testified further that, however, after a day passed when he went to visit his mother at her house, he found that she had been taken to PW2's house. He, thereafter, proceeded to PW2's house where he heard PW2 telling her to find the charm so that he could recover. PW1 further testified that even on that day, she denied the allegation and still insisted

on being taken to a witch finder. After that, PW2 told her that she would not leave his house that day until they were able to see the way forward. Thereafter, they dispersed and went back to their homes and left the deceased there.

It was PW1's further testimony that on 5<sup>th</sup> April, 2017 he went to see his sister, Esinele Bangwe and he asked her to go and see their mother at PW2's house. On 6<sup>th</sup> April, 2017, his sister went to PW2's house and picked up their mother and took her back to her house but she was later dragged back to PW2's house by the appellants who were drunk. They threatened to kill her if she did not cure PW2.

PW1's evidence was further to the effect that from his mother's house where he stood watching, he was able to see and actually saw the appellants leading his mother into the bush. He observed that A1, Aaron Ngosa and A2, Kelvin Mwewa were armed with a hoe and an axe whilst A3, Lyson Kunda held and led PW1's mother to the bush. PW1 did not follow them because the appellants had weapons and after about two hours, he saw the appellants return with his mother. According to PW1's evidence, as the appellants were passing, A2 announced to the people who were present at the deceased house that they had killed their mother and that

they could start mourning. Thereafter, PW1 went and informed the other family members and the headman what had transpired. The neighbourhood watch members made a follow up of the report by going to the bush. PW1's mother was found buried in a grave and she was dead.

PW2 testified that he fell sick in March and that after he was treated at the clinics and Serenje Hospital without success, he sought help from traditional methods by going to a witch finder in Samfya. She told him that he had been bewitched by his aunt, Jean Bangwe. From there, he consulted another witch finder from Congo and a third one who all told him the same thing.

PW2 testified further that it was only after that, that he confronted his aunt, Jean Bangwe who he claimed, admitted being responsible for his illness. He also stated that she promised to provide the healing. He further testified that on 6<sup>th</sup> April, 2017 around 14:00 hours, the appellants approached him and asked him where his mother, Jean Bangwe was and he told them that she had gone back to her house. He said that they went to pick her up but he was not with them and he later learnt from Lovemore that she was buried and she died.

The evidence from PW3, Maxwell Mpundu Chisenga, a member of the neighbourhood watch, on their role in locating the deceased's body and that of PW4, Godfrey Katoka, the dealing officer who investigated the case is not in dispute.

At the close of the prosecution case, the appellants were found with a case to answer and they were put on their defence.

In their defence, the appellants informed the court that the deceased admitted causing the death of her siblings and PW2's illness and that she told them that the deaths would only stop if she died.

A1, Aaron Ngosa, testified that the deceased told them that she was ready to die to stop the deaths in the family. Whilst A2, Kelvin Mwewa testified that after they dug the grave, the deceased told them that it was not deep enough and that they dug further before she entered it. He said that she covered herself with a chitenge wrapper and then they buried her alive.

At the close of the defence case, Defence Counsel submitted by relying on the case of **MBOMENA MOOLA v THE PEOPLE**<sup>1</sup>, where the Supreme Court had earlier held that belief in witchcraft by many

communities in Zambia is very prevalent and is held to be an extenuating circumstance.

He submitted further that it was established that the appellants were drunk at the time they committed the offence. He relied on the defence of drunkenness attendance at the commission of an offence as an extenuating circumstance.

The learned trial Judge found the appellants guilty as charged and convicted them accordingly. They were sentenced to the mandatory death penalty.

The appellants being dissatisfied with the sentence meted out now appeal against the said sentence. They have advanced only one ground of appeal as follows:

- 1. The trial court erred in law by imposing a death sentence and by so doing went against the principle of sentencing which requires a court to impose a sentence other than death when there is an extenuating circumstance in a murder case.**

The appellants' heads of argument were filed into court and they relied on them.

By way of introduction, Counsel for the appellants gave a very brief background to the case. He submitted that after being convicted of the offence of murder contrary to section 200 of the Penal Code, the appellants in mitigation relied on two extenuating circumstances, namely belief in witchcraft and drunkenness in a bid to avoid the ultimate penalty of death. The two defences failed and they were sentenced to death.

In support of the sole ground of appeal Mr. H. M. Mweemba, Principal Legal Aid Counsel argued that there is no dispute that the appellants caused the death of Jean Bangwe. The appellants' contention is on the mandatory death sentence and they wonder whether they could have been given a custodial sentence. He submitted that it was clear that the jurisprudence in sentencing seems to have shifted with the advent of the case of **ABEDINEGO KAPESHI & ANOR v THE PEOPLE**<sup>2</sup>.

It is the appellants' contention that the trial court applied the case without considering whether this case was within what the Supreme Court envisaged as exceptional circumstances where a plea of belief in witchcraft would suffice as an extenuating circumstance for murder and lead to a custodial sentence being imposed as opposed to the death penalty.



He submitted that witchcraft is a dark and evil practice and that it is spiritual with effects or consequences of physical manifestations. He argued that it is not just a matter of belief by unsophisticated human beings or the educated who have a superficial belief or understanding of it.

Appellants' Counsel argued that belief in witchcraft is as reasonable as belief in God. He submitted that the verdict for a witch in the old testament in the bible was death and he quoted Exodus chapter 22, verse 18 where God instructed his servant Moses in these terms:

**"Thou shall not suffer a witch to live."**

He submitted that in the present case, the deceased was identified as a witch by several witch finders and linked to the deaths of her six brothers. He submitted further that according to the appellants' evidence, Jean Bangwe told them that the only way to stop the witchcraft was for her to die.

He referred to the trial court's finding at page 76, lines 6 to 9 of the record of appeal that:

**"the killing was not spontaneous, it was premeditated, alcohol cannot be used as an excuse, they were not intoxicated so as to impair their mental responsibility, it is**

**my considered opinion that the accused persons had the ability to form rational judgment and exercise self control."**

It is the appellants' contention that the position enunciated in the **KAPESHI** case amounts to saying that the extenuating circumstance under consideration will no longer hold absolutely. Appellants' Counsel argued that the exceptional circumstance envisaged by the Supreme Court for a belief in witchcraft to stand is available in this case. He submitted that this case goes beyond a mere belief in witchcraft but is abounding with occurrences that demonstrate that the deceased, was a witch who had caused the deaths of her own six brothers.

It was further submitted that this case has two extenuating circumstances, namely, belief in witchcraft and drunkenness and that the trial court erred in law by imposing the death penalty on the appellants.

In conclusion, Appellants' Counsel prayed that this Court allows the appeal, sets aside the death sentences and substitutes them with custodial sentences.

In response to the arguments advanced by the appellants' Counsel, Miss Cassandra Soko, Deputy Chief State Advocate submitted that since it was an appeal against sentence only she would ordinarily have left it to the

wisdom of the court. However, she asked to be allowed to address the Court on the reasoning of the Court below.

She submitted that in addition to the comments by the court at J5 of its judgment, she observed with interest from the evidence on record, how the appellants narrated the turn of events with clarity as they explained how the other people who were in the crowd extricated themselves from the crowd as it turned into a cold blooded murder. She further submitted that it is hard to believe that the appellants were intoxicated as they went through the motions of dragging and burying the deceased alive.

With regard to the **ABEDINEGO KAPESHI** case cited by appellants' Counsel, Miss Soko submitted that the Supreme Court in this case sought to address the contradiction that the belief in witchcraft is contrary to the Witchcraft Act. She further submitted that the belief in witchcraft is not an extenuating circumstance but that a mere belief in witchcraft may be an extenuating circumstance in some cases. She stated that however in this case it is not because there was nothing to show that the appellants' action was motivated by a belief in witchcraft. She submitted that she believed that they used PW2's illness to get rid of the deceased. Miss Soko argued

that it is difficult to believe that the appellants were motivated by the belief in witchcraft because they claimed to believe in God and not witchcraft.

She concluded by submitting that since the **ABEDINEGO KAPESHI** Supreme Court judgment was delivered last year in 2017 they as prosecuting Counsel had noticed a decline in cases of murder involving witchcraft.

We have considered the evidence on record, the judgment appealed against, submissions advanced on behalf of the appellants and the respondent respectively.

In the sole ground of appeal appellants' Counsel has challenged the imposition of the death penalty on the basis that the principle of sentencing requires a court to impose a sentence other than the death penalty where there is an extenuating circumstance in a case of murder.

In this case, the appellants sought to rely on previous Supreme Court cases where the Court acknowledged that a belief in witchcraft, though unreasonable, is prevalent in our communities and held that such belief is an extenuating factor or circumstance that justified the non-imposition of the death penalty.

We acknowledge that that was the Supreme Court's position in the cases of **CHISHIMBA v THE PEOPLE**<sup>3</sup>, **MBOMENA MOOLA v THE PEOPLE**<sup>4</sup>, **BWALYA v THE PEOPLE**<sup>5</sup> and **MWIBA MUKELA v THE PEOPLE**<sup>6</sup>. In the **CHISHIMBA** case, the deceased who was suspected of being a wizard was approached at his house by the appellant and he was severely beaten and he died as a result of the severe injuries he sustained. The Court imposed a ten (10) years sentence after accepting that a belief in witchcraft is an extenuating factor in a case of murder.

In the **MBOMENA MOOLA** case the Court followed its earlier decision by imposing a 15 years sentence on the appellant who killed the deceased, his father whilst operating under the belief that he was a wizard who was responsible for the deaths of his children and that his belief was confirmed by witchdoctors.

In the **BWALYA** case, the appellant suspected the deceased of being a wizard who had killed his wife and he went in search of him. He found him, struck him with an axe handle, beat him to death and buried him before he went home where he waited for the neighbourhood watch members to apprehend him. The Court imposed a 15 years sentence.

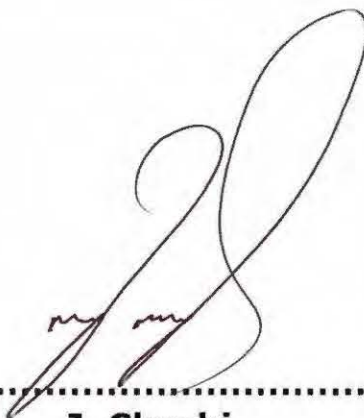
In the **MWIBA MUKELA** case where the appellant hired caravinas to shoot the deceased who he suspected of being a wizard who had killed three of his relatives using a traditional gun and the deceased was gunned down and he subsequently died of gunshot wounds, the Court meted out a stiffer punishment by handing down a thirty (30) years imprisonment sentence.

Our reference to how the previous cases were handled by the Supreme Court serves to demonstrate that each case is dealt with according to its own facts and circumstances. Therefore, the argument that the principle of sentencing requires a court to impose a sentence other than death when there is an extenuating circumstance or factor in a murder case can be assailed.


With the Supreme Court's shift in its approach to murder cases involving belief in witchcraft as demonstrated in its recent judgment in the **ABEDINEGO KAPESHI** case, we find that the principle relied on by appellants' Counsel is not cast in stone. Whilst we commend Counsel for his spirited and fervent arguments, we are not swayed such as to disregard a decision of the highest court in the land and which Court gave a very sound reasoning, for its departure from its previous decisions.

For the reasons stated, we find no merit in this ground of appeal and it, therefore fails.

The net effect is that the appeal is dismissed and the death sentence is accordingly upheld.



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**J. Chashi**  
**COURT OF APPEAL JUDGE**



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**F. M. Lengalenga**  
**COURT OF APPEAL JUDGE**



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**M. J. Siavwapa**  
**COURT OF APPEAL JUDGE**