

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

APPEAL NO. 59/2018

BETWEEN:

MALANGISHA KAPWEPWE

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: MAKUNGU, KONDOLO SC, MAJULA JJA

For the Appellant : Mrs. Marabesa Mwenya, Legal Aid Counsel- Legal Aid Board

For the Respondent : Ms. P. Nyangu, State Advocate, National Prosecution Authority

J U D G M E N T

Kondolo SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Joe Banda v The People Appeal No. 183/2013**
2. **Donald v The People SCZ Appeal No.476/2013**
3. **Simutenda v The People (1975) ZR 294**
4. **Precious Longwe v the People Appeal No. 82/2017 (delivered 22nd August, 2018)**
5. **Nyambe Mubukwanu Liyumbi v The People (1978) Z.R. 25 (S.C.)**
6. **Makomela v The People (1974) Z.R. 54.**

LEGISLATION REFERRED TO:

1. **The Penal Code, Chapter 87, Laws of Zambia**

The Appellant was charged and convicted of the offence of Murder contrary to Section 200 of the Penal Code. The Particulars were that he did on 28th June, 2017 in Ndola murder his wife Susan Chipulu Kapwepwe.

The backdrop to this Appeal is that on 28th June, 2017, around 23:45 hours, the Appellant called his sister-in-law (PW2) telling her that he had a problem but she brushed him aside because it was late and a coherent conversation didn't seem possible because he sounded drunk. The Appellant then called his Mother-in-law (PW1) around 01:00 hours, informing her that he had beaten his wife because she had come home drunk and she was now unable to walk.

The following morning at around 06:00 hours PW3, Roydah Kapwepwe, the Appellant's sister was sweeping in her yard when she heard a group of people discussing her brother and a fight he had with his wife and she proceeded to the couple's home.

In the meantime, PW5, Mercy Mwaba, who was the deceased's sister-in-law and Appellant's sister-in-marriage had learnt of the incident and she went to the Appellant's house where she found Lingson at the door. PW3 arrived just about then and they entered the house and found the deceased lying on the sitting room floor whilst the Appellant was sitting in the bedroom. PW3 stated that the Appellant told them that the couple had been fighting because the deceased showed up at home drunk.

PW5 observed blood on the deceased's head, on her wig and in her mouth and they all observed that she was unable to walk. PW3 then suggested that they rush the deceased to the hospital for examination because she saw a cut on her face. The deceased was unable to walk and was lifted and placed in a vehicle she died before the doctor could even attend to her and this was around 07:00 hours. PW1 was informed about her daughter's death and she in turn informed PW2.

PW4, Constable Singogo, investigated the crime and at 11:00 hours he went to the Appellant's home and found the house locked but he managed to enter because the door was broken. He searched the house and collected a cupboard door, an aluminum pot, mattress cover, a mop and other items which were all produced in evidence. PW4 searched the house further and apprehended the Appellant whom he found hiding under the bed. The Appellant had no injuries on his body even though blood stained items were recovered from the house.

The arresting officer, Detective Chief Inspector Tembo attended the postmortem on 10th July, 2017 at Ndola Teaching Hospital mortuary and observed numerous wounds on the deceased's body which included a deep cut on her head. The arresting officer later decided to charge the Appellant with the offence of murder.

In his defence, the Appellant stated that he didn't find his wife when he got home at 21:00 hours and when she showed up at 22:50, she said she had gone to collect money from her debtors. An argument ensued and she admitted

that she was drinking with her friends and the Appellant searched her bag to see the money so collected but found female condoms instead. He said that a fight erupted during which he pushed her and she fell on a table. He told the court that he called her sister telling her that the deceased had gone home drunk and that they had a fight but the sister cut the line and he called his mother-in-law. He testified that they retired to bed and when he woke up at 06:00 he checked on his wife but she was not responding and he went back to bed until his sister (PW3) arrived at his home at 07:00 hours.

When asked why he hid under the bed, he said it was because a mob had damaged the door to his house. He denied using any sharp object to inflict injuries on his wife and the nucleus of the rest of his evidence was that he had gone out drinking and his wife showed up late and drunk and a fight erupted. In cross examination he added that not only did she fall onto the table, the pot or the wardrobe but she also banged herself on the wall and in all of this he was only slapping her and he somehow came out without any injuries.

The trial Judge found that the appellants defence that he was provoked by the presence of condoms in his wife's bag was an afterthought. The judge arrived at this conclusion because the Appellant stated that prior to the trial he made no mention of the condoms to anyone and not even to the police nor to his sister (PW3). The condoms were only discovered when the women were cleaning the house.

The learned trial Judge further found that the deceased's drunkenness and coming home late were not the source of the conflict and that the Appellant simply unleashed a vicious attack on his defenseless wife. The court accepted PW1 and PW2's evidence that the Appellant told them that he had beaten the deceased because she came home drunk and not that they were fighting. The fact that the Appellant attacked his wife was confirmed because the deceased suffered extensive injuries whilst the Appellant had none at all. The court referred to the case of **Daudi Phiri v the People** which sets out the elements that constitute a defence of provocation and the court found that in the case at hand, there was no provocative act and consequently found the Appellant guilty of murder and sentenced him to the mandatory death penalty.

The Appellant seeks to assail the lower Court's Judgment on a single ground of appeal stating that the lower Court erred in law and fact when it failed to accept the Appellant's failed defence of provocation as an extenuating circumstance. It was argued that the Court misdirected itself by dismissing, as an afterthought, the Appellants testimony that he was provoked by the presence of condoms in the deceased's bag. It was submitted that the court erred in arriving at that conclusion purely on the basis that the Appellant did not cross examine PW1 and PW2 on the issue of the condoms. He buttressed the argument by citing the case of **Joe Banda v The People** ⁽¹⁾ in which the Supreme Court held that *"An Accused's defence begins when he begins his defence and not at cross examination of the Prosecution's witness and that the mere fact that an accused did not cross examine on an issue*

does not necessarily mean it's an afterthought". We were, on that basis, urged to set aside the death penalty and, in its place, impose a sentence that will reflect the circumstances.

In response, the Respondent's Counsel argued that the trial Court was on firm ground in refusing to accept the Appellant's failed defence of provocation as an extenuating factor. The Respondent supported the trial courts finding that the defence with regard to the condoms was an afterthought and carried no weight and reliance was placed on the case of **Donald v The People**⁽²⁾. It was further submitted, *viva voce*, that the mere fact that there were condoms in the room or in the custody of his wife, was not a ground for provocation.

We have considered the Judgment as well as the Arguments by both Counsel. The Postmortem Report at page 138 of the Record of Appeal shows that the attack on the deceased was gruesome and resulted in lacerations and multiple stab wounds. There is nothing on record that indicates that she had any wounds before the encounter with her husband and despite his denial of having used any weapon, the said injuries were inflicted by no one but him. We agree with the trial courts finding that there was no fight between the Appellant and the deceased and that he just beat her up brutally.

The real issue that requires determination is whether or not the Appellant was provoked by the deceased within the meaning of the law. With regard to provocation, **Sections 205 and 206 of the Penal Code** provide as follows;

Section 205:

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

Section 206

(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. For the purposes of this section, "an ordinary person" shall mean an ordinary person of the community to which the accused belongs.

In the case of **Simutenda v The People** ⁽³⁾, the Supreme Court took the liberty to set out the elements that must be satisfied for a defence of provocation to succeed. They stated that there must exist, the act of provocation; the loss of self-control, both actual and reasonable, and; the retaliation must be proportionate to the provocation. This means that the evidence must show that the Accused suffered sudden provocation and acted in the heat of passion.

This Court recently dealt with the defence of Provocation in the case of **Precious Longwe v The People Appeal** ⁽⁴⁾ in which the Appellant alleged that she was provoked by text messages and phone calls made by her husband to her parents before she shot him 3 times in a struggle for a gun. We found, in that case that the evidence on record did not support the existence of a proactive act and we dismissed the defence for failure to satisfy the elements as stated above. We must be satisfied that there is a proactive act before the defence can be invoked.

A perusal of the Record of Appeal, in particular the Postmortem Report, shows that the attack on his wife could not possibly have occurred in the manner that Appellant claims it did because the injuries suffered by the deceased are at complete variance with his account of events. Added to this was the fact that he told PW1 and PW2 that he had beaten his wife because she came home late. We therefore cannot fault the trial courts conclusion in that regard.

With regard to the alleged presence of condoms in his wife's handbag, we note that the Appellant did not tell anybody that he beat the deceased because of the condoms. PW3, the Appellants sister, made mention of seeing some condoms wrapped in a plastic bag, in the matrimonial bedroom, when they were removing goods from the house. She did not state that the Appellant indicated that he was provoked by the presence of the condoms. We therefore agree with the trial court's reasoning that concluded that the issue of the condoms was raised as a mere afterthought.

Section 205 of the Penal Code, clearly states that the reaction to a provocative act is one that can be expected of an 'ordinary person' who is then defined as a person of a community to which an accused belongs. In order for a Court to arrive at a finding that the reaction was reasonable, the Judge ought to resolve whether or not an ordinary person in that situation would have been provoked to a degree of losing self-control and in the case of **Nyambe Mubukwanu Liyumbi v The People** ⁽⁵⁾ the Supreme Court addressed what it called "the reasonable relationship test" as it applies between the provocative act and the provoked persons reaction. The court said as follows;

"Moreover the cases of Phillips (2) and Makomela (3) to which we have already adverted bear testimony to the proposition that in considering the defence of provocation the court should not stop at the point at which it is satisfied that the person in the dock was provoked into losing his self-control. It should go further and determine whether the stimulus to which the accused reacted as he is proved to have done would have had the same effect on a reasonable man. The rationale behind the preference of the objective to the subjective test is that in the former case one standard is applied to all, while the latter would apply differently according to each person's temperamental peculiarities."

The Court also stated that the reasonable relationship test must be applied in line with **Section 205 of the Penal Code** and stated that the Section can only apply if the Court is satisfied that the act which caused the death bears a reasonable relationship to the provocation. In the cited case, the

Supreme Court referred to its holding in the **Makomela case** in which it adopted the dictum of Fenton Atkinson, L.J., in Walker v R. when he said that:


"It has never been the law that the man who completely loses his temper on some trivial provocation and reacts with gross and savage violence which kills his victim can hope for a jury verdict of manslaughter on grounds of provocation."

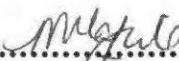
Reverting to the instant case, as we have already stated, we find that there was no provocative act to justify the vicious attack on the deceased. There being no provocative act at all, the defence of provocation did not even arise and cannot and could not have been considered in order for it to fall in the category of failed defenses leading to extenuation.

The Appeal lacks merit and is accordingly dismissed.

Dated this day of 2018


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


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M.M. KONDOLO SC
COURT OF APPEAL JUDGE


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B.M. MAJULA
COURT OF APPEAL JUDGE