IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 164/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

CLINT MWILA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
on the 2nd October, 2018 and 23rd October, 2018

For the Appellant: Mr. K. Katazo, Senior Legal Aid Counsel

For the Respondent: Mrs. M.P. Lungu, Acting Deputy Chief State Advocate

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

cases referred:

1. **Jack Chanda and Kennedy Chanda vs. The People SCZ judgment No. 29 of 2002**
2. **Francis Kamfwa vs. The People SCZ. Appeal No. 125/2017**
3. **Alubisho vs. The People (1976) Z.R. 11**
4. **Kalunga vs. The People (1975) Z.R. 72**
5. **Sichote vs. The People (1975) Z.R. 32**

This is an appeal against the judgment of the High Court which found the appellant guilty of murder with extenuating circumstances and imposed life imprisonment. The particulars alleged that on the 28th April 2013 at Kitwe in the Copperbelt Province of the Republic of Zambia, the appellant caused the death of one Pepino Mumbati (hereinafter called "the deceased").

The facts established in the court below are that the appellant, the deceased, the deceased's mother (PW3) and PW4 were neighbours. Apparently, PW4 was a friend to the appellant and the deceased. On the fateful day, the appellant who arrived between 19:00 hours and 20:00 hours found the deceased seated outside with his mother and PW4 while his wife and children were also outside his hut cooking. The appellant started insulting the deceased and in turn insulted the deceased's mother who had by this time retired into her hut. The deceased was angered by the insults and followed the appellant to his hut and the two started struggling with each other. PW3 and PW4 both heard the appellant's wife asking the appellant what he used to stab the deceased. As PW3 was rushing outside to see what had happened

to the deceased, she met him by the door holding his chest and noticed blood gushing out upon which he collapsed and he eventually passed on before he could be taken to the clinic. The appellant fled the scene. He later surrendered himself to the police.

During investigations the police visited the scene of crime where a blood-stained knife was recovered. The post-mortem examination report conducted on the body of the deceased revealed that the cause of death was injury to the right lung and heart.

The appellant was subsequently charged with the subject offence which he denied. His version of the events of that fateful night which totally contradicted that of the prosecution witnesses was rejected by the trial judge. In sum, he admitted finding the deceased, PW3 and PW4 his neighbours outside their hut as well as his own family. According to the appellant, it was the deceased who was the aggressor as he involved himself in his matrimonial affairs and followed him to his place and efforts to get him to go back to his home proved futile. He stated that the deceased started insulting him which led to a fight. As they fought and struggled, they fell to the ground and the deceased got up and ran home. The

appellant stated that he fled from the place because he heard people threatening to burn him. The appellant who fled to Ndola was informed the following morning that the deceased had passed away and he handed himself over to the police.

In her judgment, the learned judge accepted the evidence of PW3 and PW4 that while the appellant was quarreling with his wife, the deceased intervened and this angered the appellant who began to insult the deceased's mother. During the quarrel, the learned judge found that the deceased and the appellant were standing close to each other and that the appellant was the aggressor who threatened to beat the deceased. According to the learned judge, at the time the appellant and the deceased were quarreling, PW3 was inside her hut while PW4 was outside but that PW4 did not see the appellant stab the deceased. The learned judge was satisfied looking at the circumstances of the case that there was overwhelming evidence that the appellant stabbed the deceased with the knife during the scuffle especially that his wife was heard to question what he had used to stab the deceased. The appellant was found

guilty and convicted of extenuated murder and sentenced to life imprisonment which he is now appealing against.

Mr. Katazo learned Counsel for the appellant in his lone ground of appeal attacks the trial court for sentencing the appellant to life imprisonment which in his view is excessive and should induce a sense of shock. In his heads of argument Mr. Katazo reminded us of our decision in **Jack Chanda and Kennedy Chanda vs. The People**[1] in which we quashed the death sentence on appeal and instead sentenced the appellant to 20 years imprisonment with hard labour as there was evidence that the appellants had been drinking beer for about five hours. We held that:

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

It was submitted that there was evidence that the appellant was drinking 'kachasu' from 09:00hours to 20:00hours. The gist of learned Counsel's argument is that after finding extenuating circumstances, the trial court sentenced the appellant to life imprisonment without citing any aggravating circumstances to justify the sentence. Counsel reminded us of our holding in the case

of **Francis Kamfwa vs. The People**[2] where we held that there is need for consistency of sentences for similar offenders in cases of manslaughter. He argued that in the same vein there is need for consistency of sentences in cases of extenuated murders involving drunkenness. Counsel urged us to revisit the sentence so that it reflects the leniency accorded to a first offender convicted of murder with extenuating circumstances such as drunkenness.

In her response Mrs. Lungu supported the sentence imposed by the trial court. Learned Counsel supported her argument with the case of **Alubisho vs. The People**[3] where we held that:

> **With the exception of prescribed minimum or mandatory sentence, a trial court has a discretion to select a sentence which seems appropriate in the circumstances of each individual case. The Appellate court does not normally have such discretion.**

Mrs. Lungu's contention is that in as much as there is need for consistency of sentences for similar offences, the circumstances of each individual case should be considered. She argued that the trial court considered the circumstances of this case and took note of the fact that the appellant was aggressive and failed to heed advice, he had earlier mentioned that he would harm the deceased

and fulfilled his intentions; he was aggressive yet the deceased made it clear that he did not want to fight but the appellant continued insulting the deceased and finally stabbed him. Counsel further relied on the case of **Kalunga vs. The People**[4] where we held that:

> **...just as an Appellate court will not interfere with a sentence as being too high unless that sentence comes to the court with a sense of shock, equally it will not interfere with a sentence as being too low unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular case.**

Bearing in mind the cited cases, Mrs. Lungu urged us not to interfere with the sentence and dismiss the appeal and uphold the sentence imposed by the trial court.

We have considered the arguments by learned Counsel. This appeal being against sentence, we take the view that the cardinal issue here is whether there were extenuating circumstances in this case. In the court below, Counsel for the appellant in mitigation had this to say:

> **"There is evidence that the accused was drunk. And drunkenness is considered in the light to this case in particular constitutes an extenuating circumstance. This is not a case in which the convict**

can be held to have gotten drunk for the sole purpose of gaining courage. The case is different from other decided cases because in his drunken state, he quarreled with his very good friend resulting in his close friend's death. The case of Justine Mumbi vs. ThePeople (2004) Z.R. 106 held that drunken circumstances generally attending upon the occasion sufficiently reduced the amount of moral culpability so that there was extenuation.....the point am trying to make is that the drunkenness of the convict should be under the circumstances as amounting to extenuation so that a sentence rather than death should be passed."

The record shows that the learned trial judge simply agreed with Counsel that there were extenuating circumstances and proceeded to impose the life sentence without giving reasons. This is unacceptable. A court must reveal its mind as to the reasons for imposing any sentence. The accused has a right to know why he is receiving such a light or grave sentence.

Mr. Katazo submitted that there was evidence that the appellant had been drinking kachasu from 09:00hours to 20:00hours. We have not found evidence to support this assertion. Although in her judgment the learned trial judge accepted that the appellant was drunk when he arrived home that night, she did not accept that he had been drinking almost all day as alluded to by Mr. Katazo. In fact, the appellant's own defence did not bring out the defence of drunkenness or intoxication. Although he stated

that he was drunk when he started for home from his uncle's place, he explained how he quarreled with his wife over some money which she allegedly got from his pocket without his knowledge and the deceased intervened and ended up going to his hut and that despite pleas from the appellant and his wife asking the deceased to go back to his hut, he did not take heed. The appellant stated that the deceased followed him and his wife as they proceeded to his uncle's place (yet he had come from there) and seven metres away from his house he had a scuffle with the deceased. He claimed he 'had nothing' (no weapon') and they fell down and the deceased ran away. According to the appellant, after the deceased fled the scene, he heard people threatening to burn him and this is how he ran away to Ndola travelling the whole night. If he was drunk, would he have walked all night as he claimed. Clearly, his story was unbelievable hence the reason why the trial judge believed the evidence of the prosecution witnesses instead.

We have reviewed the evidence in the court below to show that there were no extenuating circumstances in this case. It is clear to us that the learned trial judge accepted the submission of

the existence of extenuating circumstances without question and due consideration. Our holding in **Jack Chanda**[1] and other cases where we have pronounced ourselves are not to be applied in any case where drunkenness is a factor. Each case must be dealt with on its own peculiar facts. We have stated time and again that simply because an accused claims he was drinking, this will not automatically earn him/her an extenuation. In this case, although the appellant had been drinking earlier, by the time the tragic incident happened, going by his own explanation and that of the prosecution witnesses, the defence of drunkenness or intoxication was not available to him. He stabbed the deceased right to the heart. We find that he was not intoxicated to such an extent as to be incapable of appreciating the consequences of his actions. In the case of **Sichote vs. The People,**[5] we held, *inter alia*, that:

> **(ii) For a person to be inflamed because of drink to a greater extent than he might otherwise have been does not mean that the person is drunk in the sense of being unable to form the particular intent.**
>
> **(iv) The question of intoxication is only one of the factors to be taken into account by the court in deciding whether an accused person has formed the necessary intention.**

(v) It is necessary for the accused person's capacities to have been affected to the extent that he may not have been able to form the necessary intent.

As we have observed herein, the trial judge was quick to agree with Counsel that there were extenuating circumstances when in fact not. If the appellant was so drunk he should not even have been able to remember to the minute detail the events of that tragic day when he took the life of the deceased who was unarmed at the time. The fact that he fled from the scene and walked all night is indicative of the fact that he was not drunk as to not know what he was doing. In his defence he claimed he fled because he heard people were threatening to burn him. Contrary to his story, the prosecution established that the incident happened at the appellant's house and he fled soon after stabbing the deceased. He was not an innocent man

After considering the evidence in the court below, we take the view that the learned trial judge misdirected herself when she found that there were extenuating circumstances in the form of drunkenness. In the circumstances, we set aside the sentence of

life imprisonment and instead we sentence the appellant to the mandatory death sentence.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE