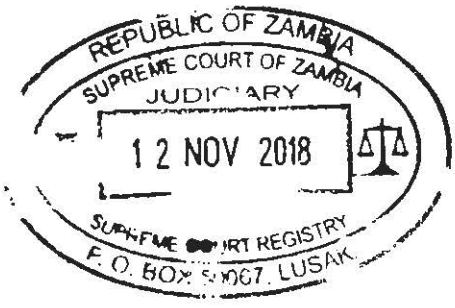
SCZ. Appeal No. 527/2013

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:



DONALD TAULO — **1ST APPELLANT**
WATSON MBOKO — **2ND APPELLANT**

VS

THE PEOPLE — **RESPONDENT**

Coram : **Chibesakunda, A/g CJ, Phiri, Wanki, Muyovwe, Hamaundu, Kaoma, JJS, and Lengalenga, Ag JS**
On 8th April, 2014 and 7th November, 2018

For the appellants: **Mr. H. Mweemba – Senior Legal Aid Counsel**

For the respondent: **Mrs. C. M. Hambayi – Deputy Chief State Advocate**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Noah Kambobe vs. The People (2002) Z.R. 57**
2. **Mbomena Moola vs. The People (2002) Z.R. 149**
3. **Jack Chanda and Kennedy Chanda vs. The People (2002) Z.R. 124**
4. **John Lubozha vs. The People SCZ Appeal No. 485/2013 (unreported)**
5. **Raphael Hachigabalala vs. The People (1999) Z.R. 7**
6. **Davis Kunda vs. The People SCZ Judgment No. 49 of 2014**
7. **Best Kanyakula vs. The People SCZ Selected Judgment No. 35 of 2017**

When we heard this appeal we sat with Honourable Lady Justice Chibesakunda and Honourable Mr. Justice Wanki who have since retired. We also sat with Madam Justice F. Lengalenga, acting Judge of this Court who has since reverted to her position. This judgment is therefore a majority judgment.

The appellants were convicted of **Murder contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia.** The particulars of offence are that on 18th April, 2012 in Kasempa in the Kasempa District of the North-Western Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did murder one Monica Kabondo.

The brief facts of the case are that during the morning of 18th April, 2012, the deceased was brutally attacked by a mob at her home and she died on the way to the hospital.

PW1's evidence was to the effect that on the morning of the mentioned date between 10.00 hours and 11.00 hours she was at home with her grandmother in the company of her young brothers, sisters and sisters-in-law, when a group of people carrying a coffin

approached their house. In the mob, she recognized Taulo, the 1st appellant herein and Mboko the 2nd appellant (who she knew as Mbanjo). She knew them by those names and they lived in the same area. As the mob approached the house, they attacked her grandmother who later fled into the house. The appellants followed her inside her house. It was PW1's further evidence that when she heard her grandmother crying for help, she forced herself into the two-roomed house and found her lying on the floor, with bloodstains on the head and face. Thereafter, the mob left with the coffin taking with them her grandmother's blanket, a chitenge wrapper, a sweater and a goat. The crime was initially reported to their uncle in Kitwe. The deceased died on the way to Mukinge Hospital.

PW2's evidence was similar to that of PW1. She equally saw the mob that carried the coffin to the deceased's house and recognized both appellants. She witnessed all the events that took place at the deceased's house and she stated that she was assaulted by the 1st appellant during the commotion.

In his defence, the 1st appellant informed the lower Court that his two year old son died on the 17th of April, 2012 and was to be buried the next day on the 18th of April. On the way to the cemetery, mourners took turns to carry the coffin. However, as they moved, the coffin turned and headed in the direction of the bush and later followed the road towards the deceased's house. According to the 1st appellant, he tried to stop the mob from moving with the coffin in the direction of the deceased's house but he was overpowered. He also told the trial Court that he was in the company of the 2nd appellant when they followed the mob to the deceased's house where he attempted to prevent the attack. The mob hurriedly dispersed after the deceased sustained serious injuries.

The 2nd appellant's evidence was similar to that of the first appellant. He equally followed the mob carrying the coffin to the deceased's house. According to the 2nd appellant, he advised the mob against committing a crime but his advice was not heeded.

The learned trial Judge evaluated the evidence on record and considered the appellants' denial and found that the appellants put

themselves on the spot at the deceased's house and believed PW1 and PW2's evidence as establishing that they both took part in assaulting the deceased in broad daylight. The learned trial Judge concluded that the appellants knew that what was taking place at the deceased's house was a serious offence and found both appellants guilty of murder. However, the learned trial Judge found that there was a belief in witchcraft on the part of the appellants which triggered the presence of extenuating circumstances. As a result of this finding the appellants were sentenced to life imprisonment. They appealed to this Court against the sentence which they consider to be excessive. They did not appeal against conviction.

The lone ground of appeal is that in the circumstances of this case, the sentence of life imprisonment imposed on the appellants was manifestly excessive considering that the appellants were first offenders. In support of this ground, it was submitted that the maximum sentence for the offence of murder committed under extenuating circumstances was life imprisonment, while any lesser custodial sentence would qualify for the minimum sentence. It was

argued that this Court set a precedent in the case of **Noah Kambobe vs. The People**[1] to the effect that a first offender ought to be accorded leniency which should be reflected in the sentence. It was argued therefore, that the upper limit of the sentence of life imprisonment in such circumstances should be reserved for the worst offenders who were not remorseful, while the lower limit should be reserved for first offenders. Counsel urged this Court to allow the appeal by setting aside the sentence and substituting it with a reduced one.

In response, Mrs. Hambayi, learned Chief State Advocate submitted that although the trial Court found that there were extenuating circumstances in form of the 'kikondo' practice among the communities in that part of the country where the offence took place, there was no evidence on record to indicate that there was any belief in witchcraft on the part of the appellants. It was submitted that none of the prosecution witnesses established that the deceased was accused of being a witch or that she was linked to the death of the 1st appellant's son.

The 1st appellant in cross-examination narrated to the trial Court that his son died on the 17th of April, 2012 after being treated for a fever at Mukinge Hospital. When specifically asked whether the 1st appellant instructed anyone to put medicine on his late son's coffin in order to initiate the 'kikondo' procession, the 1st appellant categorically denied giving such instruction.

It was therefore, the respondent's submission that the appellants proceeded with their actions at the deceased's house without any belief that the deceased practiced witchcraft which was responsible for the death of the 1st appellant's son. It was argued that there was no evidence upon which the trial Court could find that there were extenuating circumstances in the form of belief in witchcraft. We were urged to dismiss the appeal, quash the finding of extenuating circumstances, set aside the sentence of life imprisonment and substitute it with the mandatory death sentence.

We have considered the sole ground of appeal and the submissions made by both Counsel. At the centre of this appeal is the question of when does the belief in the practice of witchcraft amount to extenuating circumstances and the consequential first

offender's entitlement to leniency in sentencing. We have dealt with these issues on a number of occasions that have come before us. One such occasion is lucidly expressed in the case of **John Lubozha vs. The People**[4] which followed and expanded our view in the earlier cases of **Mbomena vs. The People**[2] **and Jack Chanda and Kennedy Chanda vs. The People**[3].

A summary of the position which we have taken is this: according to **Section 201(1) (b) of the Penal Code, Chapter 87 of the Laws of Zambia,** where a person is convicted of the offence of murder and there are extenuating circumstances, the trial Court is obliged to impose a sentence other than the mandatory death sentence. Our decisions in the cases of **Mbomena and Jack Chanda** instruct that the belief in witchcraft is an extenuating circumstance which must be taken into consideration when sentencing a murder convict for purposes of imposing a lesser sentence other than the mandatory death sentence.

With regard to the sentencing of first offenders, we have always guided that a first offender should not be denied leniency. The converse of this position is that a record of the offender's past

or previous convictions is a reason to deny leniency. We have also made it very clear in many cases that it is customary for the Court to give credit to a convict for the time spent in custody unless a good reason is satisfactorily advanced **(See Raphael Hachigabalala vs. The People[5]).** For these reasons we totally agree with Mrs. Hambayi that a first offender is entitled to leniency. This matter however, does not end at the question of leniency.

Regarding the issue of extenuation by the belief in witchcraft, we have acknowledged in a plethora of cases that belief in witchcraft by many communities in Zambia is very prevalent and is held to be an extenuating circumstance. We have gone further to clarify by stating that the existence or otherwise of a belief in witchcraft is a matter of fact to be decided on the merits of each case. **(see the cases of Mbomena vs. The People[2] and Davis Kunda vs. The People[6]).**

In the **John Lubozha case[4],** we pronounced that it is essential in every case where the appellant's belief in witchcraft is material, either for the purpose of his defence or for the purpose of establishing whether extenuating circumstances exist, that the

belief in witchcraft must be evidence based and must be established as a matter of fact. In a more recent case of **Best Kanyakula vs. The People**[7] we pronounced that evidence of belief in witchcraft must reach the threshold of provocation in order to attract the lesser penalty other than the sentence of death following a conviction for the offence of murder.

In the present case, nowhere in both appellants' defences in the Court below did the appellants indicate their belief in witchcraft. In addition, the record of proceedings does not show any evidence either from the prosecution or from the defence to establish facts or circumstances which tend to exhibit both appellants' belief in witchcraft. We have said before in the **John Lubozha case**[4] that we envisaged such evidence to include; a visit to a witchdoctor, a visit to a witch finder or advice from either of the two; a visit or advice from a traditional healer or consultation about witchcraft or some other reasonably suspicious event or admission believed to have been authored by the deceased in the murder case; or indeed, a demonstration of strong belief in a local ritual ordinarily associated with witchcraft.

There is evidence from PW1 and PW2 establishing that the appellants used to seek and do part time work of cultivating the field owned by the deceased; they were well known to the deceased and her grandchildren. The 1st appellant's child was taken to the hospital with a fever from which he died. There is no evidence of apparent connection between this death and the deceased old woman prior to the assault by the mob. None of the appellants visited any witchdoctor or witch finder concerning the sick child prior to his demise.

In addition, there is evidence from the appellants themselves to the effect that they tried to stop the mob from performing the 'kikondo' ritual. It is clear to us that the appellants knew or must have known that the 'kikondo' practice against the deceased old woman was an offence; and they would not have worked for her if they believed that she was a witch. Considering that the deceased old woman was attacked in broad daylight and that the question of the appellants' identity was effectively resolved in the prosecution's favour, we do not find any evidence based belief in witchcraft on the

part of the appellants to justify their assault of the deceased so as to avail them the relief of extenuating circumstances.

Our conclusion therefore, is that the finding by the lower Court that there were extenuating circumstances in favour of the appellants was a perverse finding of fact in the face of the evidence on record. We therefore, feel duty bound to interfere with this finding and we reverse it forthwith. The ground of appeal which is based on the need for leniency must fall away. The net result is that we quash the life sentence and we impose the mandatory death sentence in its place. This appeal is dismissed.

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE

E. M. Hamaundu
SUPREME COURT JUDGE

R. M. C. Kaoma
SUPREME COURT JUDGE