IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 81/2017**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

RODGERS KUNDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS,
on 10th April, 2018 and 6th June, 2018

For the Appellant: Mr. C. Siatwinda, Legal Aid Counsel

For the Respondent: Mrs. M. Kapambwe-Chitundu, Deputy Chief State Advocate

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JUDGMENT

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Edward Sinyama vs. The People (1993-1994) Z.R. 16**
2. **Esther Mwiimbe vs. The People (1986) Z.R. 15**
3. **James Kape vs. The People (1977) Z.R. 19**
4. **Soondo vs. The People (1981) Z.R. 302**
5. **Whiteson Simusokwe vs. The People (2002) Z.R. 63**
6. **Liyumbi vs. The People (1978) Z.R. 25**
7. **Fumbelo vs. The People SCZ Appeal No. 476 of 2013**

This appeal is against conviction and sentence. The appellant, a headman of Kachepeshi Village was convicted by the High Court

sitting at Mansa of the offence of murder contrary to Section 200 of the Penal Code. It was alleged that on the 3rd September, 2012 at Mansa the appellant murdered Peter Bwanga (hereinafter called "the deceased").

The facts established by the trial court were that on the 3rd September, 2012, the deceased left home after 1900 hours to look for relish. Not long thereafter, he was brought back in a vehicle driven by one Musenge Musonda in a bad state as he was bleeding profusely from head injuries. The deceased told his brother PW2 that the appellant hit him with a bamboo stick. Sadly, the deceased passed away on the 10th September, 2012.

It was established that shortly after the incident, the appellant left for Congo only to return in April, 2013. On the 25th April, 2013 he approached Chief Kasomalwela with a request to meet the deceased's family to discuss the killing of the deceased. The Chief declined as the matter was in the hands of the police and he handed over the appellant to the police. According to the arresting officer, the appellant told him that he had gone to Congo because he was afraid that the deceased's relatives would beat him.

The learned judge rejected the appellant's defence that the deceased went to his house around 03hours in a drunken state where he insulted him and threatened to burn his house. The learned Judge found that the appellant's evidence was inconsistent and classified him as an untruthful witness because of the contradictions in his evidence. The learned judge accepted that the statement made by the deceased to PW2 that the appellant assaulted him qualified as *res gestae* in terms of the case of **Edward Sinyama vs. The People.**[1] The learned judge found that malice aforethought had been established as the appellant ought to have known that hitting the deceased with a bamboo stick on the head was likely to cause grievous bodily harm. The appellant was found guilty and sentenced to death.

On behalf of the appellant, learned Counsel Mr. Siatwinda filed two grounds of appeal. In the first ground, Counsel attacked the learned trial judge for rejecting the appellant's defence of provocation. In the second ground, Counsel accused the trial court of failure to find a failed defence of provocation as an extenuating circumstance.

Relying on the case of **Esther Mwiimbe vs. The People**[2] Counsel's argument in ground one is that the defence of provocation was available to the appellant. It was contended that the appellant's evidence that the deceased went to his house around 03hours in a drunken state; that he insulted him and threatened to burn his house; when the appellant came out of his house the deceased attacked him forcing him to repel the attack by pushing him to the ground - all this amounted to provocation. It was submitted that the trial court convicted the appellant on the ground that his evidence was inconsistent and untruthful yet we have guided in **James Kape vs. The People**[3] and **Soondo vs. The People**[4] that in certain cases accused persons would lie to save themselves and that it is necessary to consider whether the explanation given to the police by the accused could reasonably be true. It was submitted that the story given by the appellant to the police was essentially the same as that given to the court. Counsel argued that since the appellant voluntarily gave an explanation to the police soon after apprehension, we should accept his version as being reasonably true and fault the lower court for failing to consider and accept his version. According to Counsel, the

appellant's version satisfied all the ingredients of the defence of provocation and he should, therefore, have been convicted of the offence of manslaughter instead of murder. We were urged to quash the conviction of murder.

In ground two, it was submitted, *inter alia*, that the defence of provocation having failed, the trial court should have found that this was an extenuating circumstance in line with the case of **Whiteson Simusokwe vs. The People.**[5] On the basis of this argument, we were urged in the alternative to find the appellant guilty of extenuated murder and quash the death sentence and impose an appropriate sentence.

Mrs. Chitundu the learned Deputy Chief State Advocate filed heads of argument in response which she relied on. In her written response, learned Counsel submitted, *inter alia*, that there was unchallenged evidence that the appellant voluntarily approached the Chief with the request to have a meeting with the deceased's family. Looking at the evidence in the court below, Counsel took the view that the issue for determination is whether the appellant was provoked by the deceased. Counsel cited numerous authorities

in which we laid down the guiding principles on the defence of provocation which included the case of **Liyumbi vs. The People.**[6] Counsel pointed out that the post mortem report reveals that the cause of death was cardiac arrest due to intracranial hemorrhage which confirms that the appellant used excessive force.

In ground two, it was submitted that there are no extenuating circumstances in this case. Counsel contended that the defence of provocation was not available to the appellant and, therefore, there are no circumstances affording extenuation to the appellant. It was submitted that the appellant had malice aforethought when he injured the deceased in that he ought to have known that hitting the deceased with a bamboo stick four times (according to his warn and caution statement) could cause grievous harm or death.

We will deal with both grounds together as they are interrelated.

From the outset, we agree with learned Counsel for the parties that the main issue for determination in this appeal is whether the defence of provocation was available to the appellant. If we agree with Mr. Siatwinda that the appellant was provoked, in line with the

case of **Simusokwe vs. The People**[5] then it follows that the failed defence of provocation will afford extenuation in favour of the appellant. On the other hand, if we agree with the learned trial judge that provocation as a defence was non-existent, then the question of a failed defence of provocation as an extenuating circumstance laid down in **Simusokwe**[5] case cannot arise.

Having considered the evidence in the court below, we take the view that the defence of provocation was not available to the appellant. This is in view of the fact that the learned trial judge accepted the evidence of PW2 that the deceased told him that it was the appellant who hit the deceased with a bamboo stick on the head. The statement made by the deceased to PW2 properly qualified as *res gestae* as the deceased was still in the throes of the event such that there was no opportunity for concoction or distortion of what had happened to him. The learned judge accepted the evidence of the Chief's retainer who revealed that the appellant approached the Chief to convene a meeting for him to discuss the killing of the deceased. In fact, a proper reading of the evidence points to the fact that the appellant admitted that he killed

the deceased and was requesting for a meeting to discuss the matter with the deceased's family. However, the matter was in police hands hence the report by the Chief to the police. In rejecting the appellant's defence of provocation the learned judge considered the appellant's warn and caution statement which was admitted in evidence at the instance of his own defence counsel in which he admitted hitting the deceased four times on the head with a bamboo stick. He claimed that this was after the deceased threatened to burn his house. He stated further that he ran away to Congo in fear of the deceased's family though he ended up seeking medical treatment. In fact before fleeing from the village, he claimed that he could not visit the deceased because he was not responsible for his plight. The appellant even claimed that the deceased was alright as he had information that the following day he had gone to FRA to sell maize. The learned judge took the view, and we agree with him, that if the deceased had attacked him and threatened him, he would have summoned him or reported the case to the chief and he would not have run away from the village. We do not believe that he was a victim as he claimed in his testimony.

The bottom line is that the appellant gave different versions of what happened. In his testimony he stated that he never laid a finger on the deceased and that he did not run away from the village in fear of the deceased's relatives. Clearly, the appellant chose to depart from the defence laid by his legal counsel who based his defence and cross-examination on the warn and caution statement voluntarily given by the appellant. As we have observed, and the record speaks for itself, that the appellant's counsel in the court below went to great lengths to ensure that the warn and caution statement was admitted into evidence. Surprisingly, the appellant disowned the warn and caution statement when he took the stand claiming the police recorded it in English, a language he did not understand. The learned trial judge rightly concluded that the appellant was an inconsistent and, therefore, an untruthful witness.

In **Donald Fumbelo vs. The People**[7] we stated that:

> **In trying to ascertain what weight should be attached to the testimony of a witness on a particular issue, an important factor that should be considered is the consistency of the testimony. Hence a lot of weight will be attached to the testimony if the witness starts showing at the earliest opportunity his version on**

the issue. In the case of a witness who is an accused person, it is indeed very important that he must cross examine witnesses whose testimony contradicts his version on a particular issue. When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that his version is an afterthought and, therefore, less weight will be attached to such a version. Therefore, in a contest of credibility against other witnesses, the accused is likely to be disbelieved.

The learned judge believed the testimony of PW2 and PW3 that the appellant had assaulted the deceased seriously and also that he approached the chief with a view to amicably resolve issues relating to the death of the deceased with the deceased's family. As a village headman, his actions left much to be desired. He had the authority to summon the deceased to answer charges the following day since he stated that the deceased went to his home and threatened to burn his house but instead he fled from the village which spoke volumes that he was not as innocent as he claimed. His own testimony before the trial court could not be believed and as an appellate court we have stated in a plethora of cases that we cannot fault a trial court which has had an opportunity to observe the demeanour of the witnesses before it.

As we stated earlier, we have examined the evidence and the learned trial judge cannot be faulted for reaching the inescapable conclusion, after taking into account the circumstances of this case, that the appellant could not benefit from the defence of provocation as there was no provocation to talk about. In the same vein, once provocation is non-existent the holding in the case of **Simusokwe vs. The People**[5] does not apply.

Before we end, Mr. Siatwinda also alluded to the cases of **Soondo vs. The People**[4] and **Kape vs. The People**[3] both on the principle that an accused person may tell lies to save himself and that the court should not always conclude that he/she committed the offence. In the case of **Kape vs. The People**[3] we held that:

> **The lie told by the accused, where it is reasonably possible that he is lying for a motive which is consistent with his innocence, does not lead inevitably to an inference of guilt, and does not remove the necessity to consider whether the explanation he gave to the police could reasonably be true.**

In this case, the learned trial judge considered the evidence holistically and rightly arrived at the only inference which is that the appellant was guilty as charged.

The net result is that both grounds of appeal must fail and the appeal is dismissed accordingly.

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G.S PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE