IN THE SUPREME COURT OF ZAMBIA Appeal No. 187/2017
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

LESLEY MUTALE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJS
on 4th December, 2018 and 10th December, 2018

For the Appellant: Ms. E.I. Banda, Senior Legal Aid Counsel - Legal Aid Board

For the Respondent: Mrs. C.M. Hambayi, Deputy Chief State Advocate, National Prosecutions Authority

---

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Zitandala Nyendwa and Samilani Ngoma vs. The People (1978) Z.R. 399**
2. **Makomela vs. The People (1974) Z.R. 254.**
3. **Phillips vs. R (1969) 53 Cr. App. R 132**
4. **Liyumbi vs. The People (1978) Z.R. 25**
5. **Lee Chun-Chuen vs. Regina (1963) 1 All E.R. 73**
6. **Tembo vs. The People (1972) Z.R. 220**

7. **Jack Chanda and Kennedy Chanda vs. The People SCZ Judgment No. 29 of 2002**
8. **Whiteson Simusokwe vs. The People (2002) Z.R. 63**
9. **Kanyanga vs. The People Appeal No. 145 of 2011**
10. **Kenious Sialuzi vs. The People (2006) Z.R. 87**

Legislation referred to:

1. **The Penal Code Cap 87 of the Laws of Zambia**

On the 23rd June, 2014 the appellant was found guilty and convicted of murdering his 13 year old sister-in-law Namweemba Kapwaya (hereinafter called "the deceased") and was sentenced to suffer the mandatory death penalty. His appeal before this court is against conviction and sentence.

At the outset, we wish to state that the facts of this case are a typical reflection of the ugly face of gender based violence that has affected our society and country at large. The chilling events of this case squarely fit the definition of gender based violence in the Gender Based Violence Act of 2011 as any physical, mental, social or economic abuse against a person because of that person's gender.

The facts established by the prosecution are that on the 10th September, 2013 the appellant's wife left her matrimonial home and returned to her parents home following matrimonial problems. She

alleged that the appellant used to assault her and force her to have sex as he wanted another child. The following day, the appellant in the company of two other men followed his wife at her parents' home where he pleaded with his father-in-law to allow him take his wife back home but to no avail. The appellant's father-in-law declared that the marriage was dissolved and assigned the deceased to go with the appellant and his entourage to collect his daughter's clothes as well as the appellant's child's clothing from the appellant's home. The deceased left with the appellant around 09:00 hours but was found dead in the appellant's house around 11:00 hours. The deceased's body was covered in blood and there was a car battery placed on the chest of the body and the deceased's head was smashed on the left and right side. There was blood splattered on the wall of the appellant's house. The post-mortem report revealed that the cause of death was head injury.

There was evidence that the appellant was shortly thereafter found at a dambo not far from his house sprawled on the ground while crying that he had killed someone's child and some people were forcing him to eat cow dung as they suspected that he had ingested

some poison. There was also evidence that the appellant owned a car battery which he utilised to play music in his house.

The appellant's defence was that he did not follow his wife to his in-law's house on the material day. According to the appellant he was working in his field when he heard loud music coming from his house. He rushed there only to find the deceased packing his wife and child's clothes stating she had been sent by her father who had declared his marriage with his wife dissolved. He tried to dissuade her and in fact slapped her but she did not heed his plea and he left her in the house and went back to his garden and continued working and on his return he did not find her. He denied that the deceased's body was found in his house.

The learned trial judge found that the deceased was assaulted by the appellant when he found her in his house. The question for determination, the trial judge contended, was the nature of the assault and whether the same resulted in the death of the deceased. Looking at the evidence in totality, the learned judge concluded that there was sufficient circumstantial evidence which pointed to the guilt of the appellant as the person who murdered the deceased: he

owned a car battery which he used to play music; he found the deceased in his house; he slapped her and she was found dead with a car battery on her chest. The trial judge opined that the appellant had the motive to kill following the dissolution of his marriage by his in-laws and the instruction to the deceased to go and collect the baby's clothes angered him which anger he vented on the deceased resulting in the fatal assault. The appellant was convicted and sentenced to death.

The appellant through his learned Counsel Ms. Banda has advanced two grounds of appeal. In the first ground, it is contended that the learned trial judge erred when he failed to consider the defence of provocation. In the second ground which is in the alternative, it is contended that the learned trial judge misdirected himself in law and fact when he failed to find extenuating circumstances to warrant a sentence other than death.

In her filed heads of argument which she augmented passionately, Ms. Banda in arguing ground one submitted, *inter alia,* that the learned judge erred in not considering whether malice aforethought was established. The thrust of Ms. Banda's argument

is that the learned trial judge failed to recognise that the appellant had a possible defence of provocation available to him. She cited Sections 205 and 206 of the Penal Code in support of her argument. Counsel also relied on the cases of **Zitandala Nyendwa and Samilani Ngoma vs. The People**[1] and **Makomela vs. The People**[2]. She also relied on the case of **Phillips vs. R**[3] where Lord Diplock stated, *inter alia,* that:

> **"...the average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon."**

She also relied on the case of **Liyumbi vs. The People**[4] in which this court pronounced itself on Sections 205 and 206 of the Penal Code. We will bring out later in this judgment the principles that Ms. Banda particularly referred us to.

Relying on these authorities, Ms. Banda argued that the trial court should have considered the possible defence of provocation even if the same was not raised by the defence because the burden to prove a case from start to finish rests on the prosecution. Counsel relied further on the case of **Lee Chun-Chuen vs. Regina**[5] which was

cited with approval in the **Liyumbi case.** In **Lee Chun-Chuen vs. Regina** it was stated, *inter alia*, that:

> **"...the facts can speak for themselves and if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied." ..."**

Further the court said:

> **"...what is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. ..."**

Ms. Banda insisted that it is immaterial that the appellant denied killing the deceased and failed to raise the defence of provocation. That it is incumbent upon the trial judge to decipher the defence from the evidence before him. According to Ms. Banda, the learned trial judge should have considered 'why' the appellant killed the deceased. Counsel went on to plead with us, in fact begging us, on behalf of the appellant who in her view was pushed to the very end and reacted to the collective circumstances that led him to kill the deceased. Counsel also referred us to the case of **Tembo vs. The People**[6] where the Court of appeal the forerunner of this

court, set aside a conviction for murder on the ground that the retaliation was not excessive in terms of Section 205(2) of the Penal Code. She also alluded to the fact that the pathologist was not called and therefore there is no evidence to show how many times the deceased was struck. She contended that malice aforethought was not established. In conclusion, she urged us to set aside the conviction for murder and substitute it with the offence of manslaughter and impose an appropriate sentence taking into account the aggravating and mitigating factors.

In the alternative ground, it was submitted that although the appellant in his defence gave a bare denial and did not raise the defence of provocation the fact that the lower court believed the evidence of PW1, PW3 and PW5 the learned judge should have seen that the appellant was 'gripped with remorse and attempted suicide by drinking a poisonous substance; that he told a lie to save himself and the fact that the trial court believed that the appellant was angered by the events of the previous day and vented his anger on the deceased - she believed this amounted to a failed defence of provocation which the trial judge should have found to be

extenuating in line with the principle established in the case of **Jack Chanda and Kennedy Chanda vs. The People**[7]. Counsel urged us to accept that evidence of failed defence of provocation was an extenuating circumstance and impose an appropriate sentence.

Mrs. Hambayi filed heads of argument in response. Responding to ground one, it was submitted that the trial court was on firm ground when it did not consider the defence of provocation as it was none existent. It was contended that if the appellant was truly provoked, he should have acted the moment the directive was made by PW1 that his daughter would not go back with the appellant and that the deceased accompanies the appellant to go and collect her sister's and baby's clothes from the appellant's house. However, the appellant did not react but walked all the way home during which time he had time to cool but he proceeded to kill the deceased, an innocent young girl in a heinous manner. It was argued that the appellant was not provoked at all but acted out of anger and indignation when he did not get what he wanted when he went to collect his wife. Counsel contended that the circumstances of the killing were not in the heat of the moment. Counsel referred us to

the case of **Whiteson Simusokwe vs. The People**[8] on the principle of failed defence of provocation. It was submitted that if the appellant did not want the deceased to collect the clothes, he could have locked the house to deny her entry into the house or drag the deceased out of the house. It was submitted that if anything, the appellant was supposed to be angry with PW1 who dissolved the marriage not the deceased. Counsel argued that the use of a car battery to inflict injuries on the deceased showed that the appellant intended to cause grievous harm or death to the deceased as envisaged by Section 204(a) of the Penal Code. In concluding, it was submitted that since the facts do not disclose any provocation, and as it was not raised as a defence, we should uphold the finding of murder.

In response to ground two, it was submitted that a perusal of the evidence on record reveals that there are no extenuating circumstances that would warrant this Court to reduce the sentence from death to a term of imprisonment. Counsel referred us to instances where we have found extenuating circumstances such as where there is evidence of drinking, witchcraft and a failed defence of provocation or self defence. Counsel cited the case of **Kanyanga vs.**

The People.[9] It was contended that remorse is not and does not amount to extenuation. It was argued that although there is evidence that the appellant was found lying down in a distressed state after having killed the deceased, this is not reflective of remorse. It was submitted that had the appellant taken the deceased to the hospital, reported himself to the police or to the deceased's family of what he had done, that would have shown that he was remorseful for his actions. Counsel prayed that this Court dismisses this ground for lack of merit and uphold the conviction of murder and sentence.

We have considered the arguments by Counsel for the parties.

The main issue for determination in this appeal is whether the learned trial judge should have considered whether the defence of provocation was available to the appellant. Below we produce an excerpt of the appellant's evidence in the court below:

> **"...I had no differences with my wife in the marriage but one day my wife's parents came and demanded to get their daughter because I had not paid the full amount of dowry. So on the date in issue, upon return from where I had gone, I found that my wife was not at home I however, saw shoe prints for Joseph Kapwaya and prints of his bicycle. I knew the shoe prints and the bicycle prints. This was on 11/09/13. I then went to the garden thinking my wife had just**

gone somewhere and she would return while at the garden, I heard the radio playing in the house. When I went to the house I found the deceased packing the child's clothes and my wife's clothes. I asked her where my wife was. She told me that her father had sent her to collect my wife's clothes after discussing that the marriage was dissolved. I prevented Namweemba from collecting the clothes and told her I would go to their home with elders to discuss the issue with her father. I slapped Namweemba because she insisted collecting the clothes for my wife. She proceeded to pack the clothes while I returned to the garden. When I returned to the house I did not find Namweemba as she had packed the clothes and left. ..."

From the above defence advanced by the appellant, he did not plead provocation but merely denied killing the deceased stating that he only slapped her. Ms. Banda attacked the learned trial judge for not considering provocation as a defence looking at the circumstances of this case. We must state that we were rather taken aback by Ms. Banda's arguments which bordered on giving evidence from the bar. In her arguments she talked about how tradition was broken in this case: Firstly, by the fact that the appellant's wife left the matrimonial home unceremoniously; secondly, that when the appellant followed with elders to his father in law to negotiate for the wife's return, his father in law demanded for the balance of the dowry on the spot and proceeded to dissolve the marriage 'just like that' and thirdly, by sending the deceased (the

sister-in-law) to go into the appellant's bedroom to get her sister's clothes which is a taboo in Zambian culture. According to Counsel, with all these cumulative events of provocation, there was no time for the appellant's passion to cool and urged us to overturn the verdict of murder and substitute it with manslaughter.

Further, we find it difficult to accept Ms. Banda's spirited arguments which in fact departed from the appellant's own defence that he never even had marital problems and he did not follow his wife to her parent's home. If anything, in his evidence he tried to show that he was surprised to find the deceased packing her sister and his child's clothes in his house. We are alive to the authorities cited by Ms. Banda but we find that they are unhelpful to the appellant's case. Ms. Banda quoted from the case of **Lee Chun-Chuen vs. Regina** and applying the principles to this case - it does not apply to the case in *casu* because the facts do not 'disclose material that suggests provocation at law'. In the case in *casu,* the deceased who was sent on an errand by her father to collect her sister's clothes became the victim of the appellant's anger: because

his wife left him and his father in law dissolved his marriage. The learned trial judge accepted this when he said in his judgment:

> **"...Equally, the events of the previous day and more especially those of the date in issue, provide sufficient motivation to the accused to have behaved in an aggressive manner. The dissolution of his marriage, and PW1's instruction to the deceased to go collect the baby's clothes angered the accused which anger he expressed through that fatal assault on the deceased. ..."**

Clearly, the learned judge accepted the prosecution evidence that the appellant was probably angered by the events of the day but all in all, he found that the appellant had no justification to vent his anger on a 13 year old girl whose mission was to collect clothes from his house in obedience to the instruction from her father. Reading the evidence of the appellant's father in law, we see a father who protected his daughter (the appellant's wife) from gender based violence but he was quite unprepared for the appellant's brutal attack on his young daughter. There was no mention that the appellant was aggressive at the time of the meeting at his father-in-law's house that morning around 09:00 hours. There's evidence that PW1 fainted twice upon hearing that the deceased had been killed by the appellant.

Most importantly, in considering Ms. Banda's passionate appeal on behalf of her client, we must state that the defence of provocation or the *possible* defence of provocation was not raised before the trial court. It is trite that an accused person must lay his defence from the commencement of trial up to his defence. It is not the duty of the court to establish the defence raised by an accused person. The duty of the court is to consider the prosecution evidence and the appellant's defence and make its findings and render its judgment accordingly. Having so stated, we take cognizance of the case of **Kenious Sialuzi vs. The People**[10] in which we held, *inter alia*, that:

> **A Court is not required to deal with every possible defence that may be open to an accused person unless there is some evidence to support the defence in question.** (emphasis ours)

As we have already stated, there was no evidence to support the defence of provocation in this case. The appellant was angry at his father-in-law and his wife and, therefore, the learned judge was on terra firma when he convicted the appellant without considering the defence of provocation on the facts which was not available to the appellant. Agreeing with Ms. Banda's argument that the appellant was provoked on the facts of this case would be tantamount to

encouraging people to vent their anger on persons who are not involved in a dispute and claim that they were provoked.

Even assuming that the appellant was provoked as suggested by Ms. Banda, he would not be entitled to a finding of manslaughter owing to the gruesome manner in which he reacted and attacked the victim who did not provoke him at all. In the case of **Makomela vs. The People** we held, *inter alia*, that:

> **A man who completely loses his temper on some trivial provocation and reacts with gross and savage violence cannot hope for a verdict of manslaughter on grounds of provocation.**

We have noted that Ms. Banda relied heavily on the case of **Liyumbi vs The People** and particularly, she pointed us to Page 28 where as we considered Section 205 and 206 of the Penal Code we stated as follows:

The following main principles emerge from these sections:

(1) If a man kills another in consequence of reacting to sudden provocation and he so kills in the heat of passion and before there is time for his passion to cool, he is guilty of manslaughter only.

(2) His mode of resentment must bear reasonable relationship to the provocation. If the mode is out of proportion to the provocation then the principle in (1) above is not available to him.

(3) **A wrongful act or insult is not provocation unless it is such as would deprive an ordinary person (of the community to which the man who kills belongs) of the power of self-control and induce him to assault the person who does the wrongful act or utters the insult.**

Applying the above principles to the case in *casu;* there was no sudden provocation or any provocation and the question of reasonable relationship to the provocation cannot arise. In fact, if we have to refer to any provocation, it should be provocation from the deceased who is the victim in this case. She was sent to collect clothes from the appellant's house and as Mrs. Hambayi has argued the appellant could have merely locked his house to prevent the deceased access. The facts presented by the prosecution reveal no justification whatsoever for the appellant's conduct.

Having addressed the issue of provocation, we now turn to examine the issue of whether the appellant killed the deceased with malice aforethought.

We must begin by agreeing with Ms. Banda that the record shows that the learned trial judge did not pronounce himself on the issue of malice aforethought which is the main ingredient in the offence of murder. The Penal Code provides as follows:

204. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

We must state that it is always desirable that a trial judge makes a finding as to whether manslaughter has been established or not. However, we hasten to add that this omission will not affect the prosecution's case depending on the evidence on record, as in this case where malice aforethought was established. Ms. Banda in her heads of argument and in her augmentation before us during the hearing of the appeal conceded that the appellant killed the deceased albeit under extreme provocation. It is not in dispute that the

murder weapon was the car battery which was found on the chest of the deceased and there is no doubt in our minds that the intention of the perpetrator of this crime who is the appellant, was to cause death or grievous harm to the deceased. Ms. Banda's spirited arguments cannot persuade us to find fault in the learned trial judge's verdict on the ground that he did not state that malice aforethought was established.

Ground one therefore fails.

Turning to ground two, which was an alternative ground we must state immediately that it has no merit as it depended on the success of ground one.

We uphold the conviction and sentence by the lower court and we dismiss the appeal for lack of merit.

.....

G.S. PHIRI
SUPREME COURT JUDGE

.....

E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....

J. CHINYAMA
SUPREME COURT JUDGE