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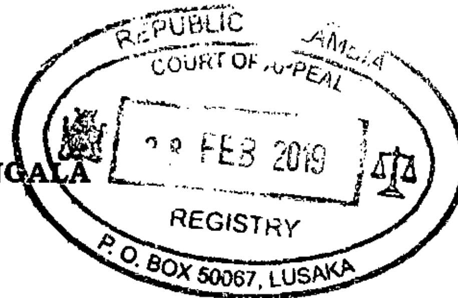
IN THE COURT OF APPEAL APPEAL NO. 187,188,189/2017

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:




**HENRY SIMUNGALA** **1ST APPELLANT**

**MIKE BANGO** **2ND APPELLANT**

AND

**THE PEOPLE** **RESPONDENT**

**CORAM: CHISANGA JP, MAKUNGU, KONDOLO SC, JJA**
**On 27th March, 2018 and on February, 2019**

*For the Appellants : Mr. O. Mudenda, Legal Aid Counsel – Legal Aid Board*
*For the Respondents : Mr. K. Waluzimba, Deputy Chief State Advocate, National Prosecution Authority*

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# J U D G M E N T

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**KONDOLO SC, JA delivered the Judgment of the Court**

CASES REFERRED TO:

1. **Haonga & Others v The People (1976) Z.R. 200.**
2. **Boniface Chanda Chola and Others v The People (1988/1989) ZR 163**
3. **Modestar Mulala v The People – SCZ/51/2013**
4. **Febias Habayumbe and Obvious Habayumbe v The People SCZ/129-130/2013**
5. **Saluwema v The People (1965) ZR 5 (CA)**
6. **Guardic Kameya Kawanda SCZ/84/2015**
7. **Mwenya v The People SCZ/640/2014**
8. **Yokoniya Mwale v The People SCZ/285/2014**

9. **Charles Phiri v The People (SCZ/53/2014)**
10. **Whiteson Simusokwe v The People (220) ZR 63**
11. **Bright Katontoka Mambwe v The People SCZ/8/2014**
12. **Mwape v The People (1976) Z.R. 160 (S.C.)**
13. **Benson Phiri v The People (2002) ZR 107**

**LEGISLATION REFERRED TO:**

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

The High Court convicted the two Appellants, Henry Simungala and Mike Bango of Murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia** and they were both sentenced to death. They were alleged to have assaulted John Chisale who later died of injuries. In the High Court, Henry Simungala was the 1st Accused (A1) and Mike Bango the 2nd Accused (A2). We shall refer to them in this Judgment as the 1st Appellant and 2nd Appellant, respectively.

The Prosecution called 6 witnesses. Their star witness was PW5, the deceased's young brother Borniva Kamba and the Court convicted the Appellants on the basis of his evidence. When the case commenced, there was a third accused person, Grace Chilengwe but the State entered a *nolle prosequi in her favour* and she was discharged. She was called by the Appellants as DW3.

PW5 testified that the 2nd Appellant and Grace Chilengwe were their neighbours and he and his brother went to their house to see what was happening after they heard Grace screaming. Grace and the 2nd Appellant were fighting and the deceased intervened and stopped the fight but then the 2nd Appellant, in the company of the 1st Appellant, reacted by taking him into the house and they started beating him. The deceased suffered a blow to the

eye and he fell to the ground. The 1st Appellant then got an iron bar and hit the deceased on his head and on his back.

They pulled the deceased out of the house and into the yard. In the meantime, Grace left the scene and PW5 organised transport and took the deceased to the hospital where his wound was stitched. According to PW5, blood continued seeping through the stitches and the following morning, the deceased started vomiting blood and later died. PW5 identified an iron bar in Court and he stated it was the one that the 1st Appellant hit the deceased with.

Under cross examination PW5 agreed that the 2nd Appellant and Grace had fought earlier in the day. He also agreed that she had injured the 2ndAppellant but stated that the incident he had testified about, occurred much later in the day around 18:00 hrs. It was put to PW5 that the deceased threw a bottle at the 2nd Appellant and attempted to stab him with a broken bottle but PW5 denied the assertion and replied by saying that it was actually the 2nd Appellant who hit the deceased on the head with a bottle and the bottle broke. He said he didn't take the bottle to the police because it was broken but he told them about it.

He repeated that it was the 1st Appellant who hit the deceased with an iron bar. It was put to PW5 that the iron bar the 1st Appellant used was smaller than the one produced in Court and that he only hit the deceased with it once. PW5 confirmed that he gave the police the iron bar produced in Court and that it was the one the 1st Appellant used.

Before the Appellants gave their testimonies, their Counsel, Mr. Michelo, gave some opening remarks in which he said as follows;

***"Our defence is premised on Section 17 of the Penal Code which is amendment No. 3 of 1990 .... Our gist of defence is that the killing can be justified if it is done in self-defence. If without that attack, was the person who was attacked giving himself to be killed or greviously harmed. This is the way our defence will proceed"***

In their Defence, the 2nd Appellant gave his name as Mike Kafula and testified that Grace was his girlfriend and landlady. He told the Court that on 15th January, 2015 he was at home with the 1st Appellant and later that day, around 17:00 hours, he had an altercation with Grace during which she stabbed and injured him with a knife. He started off for the police station to report the matter but the 1st Appellant convinced him not to do so and they turned back for the 2nd Appellant 's house.

When they got there, they found Grace telling the deceased and others that he had beaten her and upon seeing him, the deceased tried to start a fight with him but they were separated. He went into his house to sleep and later that evening, he heard people screaming and the sound of breaking glass. He went to the sitting-room and found the deceased standing there whilst the 1st Appellant was on the floor, holding his chest in pain and PW5 was by the door holding a plank.

The 1st Appellant's account of what transpired was that, on 15th January 2015, he was at the 2nd Appellant's house when the 2nd Appellant started fighting with his girlfriend Grace, who stabbed the 2nd Appellant with a knife causing him injury. The 2nd Appellant decided to go and report the incident to the police but when he got outside, he found the deceased by the

gate who started insulting the 2nd Appellant and asking why he had become troublesome. The deceased was being encouraged by his brother, PW5, to beat up the 2nd Appellant.

Later that evening, whilst he was preparing supper, he heard people approaching the house with insults and then the deceased walked through the open door. He was holding two bottles and said *"we have come to beat you now you fuckers"*. He saw PW5 and those who were outside broke a window pane. The deceased entered the house and threw a bottle at him but missed. He then threw the second one which hit him on the left side of his chest and he sat on the floor thinking that by so doing, the deceased would leave but he didn't.

At that point, the 2nd Appellant came from the bedroom and PW5 was standing at the entrance with a plank. The deceased then took two bottles from his pockets, smashed them together and with the jagged ends charged at the 2nd Appellant who held his hands by the wrists. He noticed that the 2nd Appellant was being overpowered and there was nowhere to run to as PW5 was standing in the doorway with a plank. In a bid to rescue himself and the 2nd Appellant he got an iron rod and hit the deceased with it and was unable to choose which part to hit so he just hit because his objective was to get the deceased off the top of the 2nd Appellant. He stated that he hit the deceased on the head and the (the deceased) fainted. The 1st Appellant stated that PW5 left after he hit the deceased.

Then he and the 2nd Appellant decided to take the deceased to the police station but when they exited the house, they found people in the yard who

threatened to beat them if they did not leave the deceased alone. Therefore he ran away and the 2nd Appellant went back in the yard.

Grace Chilengwe, the 2nd Appellant's girlfriend and tenant was called as DW3. She testified that after her altercation with the 2nd Appellant she went outside and she saw the deceased and his brother PW5, enter the yard. The deceased started shouting at the 2nd Appellant asking him why they were making noise and why he was beating her. The deceased wanted to hit the 2nd Appellant with a plank but he was stopped by the 1st Appellant and the 2nd Appellant's cousin. She told the Court that she went into her house, a separate building within the same yard, and she saw the deceased return with a group of about 5 to 6 people and he entered the 2nd Appellant's house. She heard the 2nd Appellant ask Joe what he was doing in his house and she heard Joe insulting the 2nd Appellant. She then heard the sound of breaking bottles and people fighting. She didn't know who was fighting but after some time, she saw Joe's friends get out and run. They were all armed with planks which they had pulled from the fence.

Under Cross examination, DW3 stated that the 2nd Appellant was still her boyfriend and she loved him very much. She said she stabbed him by mistake, when she was trying to scare him and that the wound he sustained was not alarming.

The trial Judge analysed the evidence and submissions of the Parties and referred to the Postmortem Report. The mortem report indicated the cause of death as intracranial haemorrhage with brain damage. Other findings were listed other findings as follows; *"a big haemorrhage into soft*

*tissue of the head occupying the tible surface. Right side from the temporal to occipital area sutured cut wound 10cm. No other injuries found."*

The learned trial Judge noted that the whole incident arose from the altercation between the 2nd Appellant and his girlfriend. Their neighbour, Joe Chisale the deceased, and his young brother PW5, went to DW3's yard after they heard her screaming. Whilst there, a fight ensued and the 1st Appellant hit the deceased on the head with an iron bar. These facts were not in dispute.

According to the trial Judge, the contention was about the circumstances under which the 1st Appellant hit the deceased with an iron bar on the head. After weighing the evidence of the Parties, she believed the evidence of PW5 and dismissed that of DW3 and the 2 Appellant as concoctions. The Court found that there was no attack on the 1st and 2nd Appellants, but it was they who attacked the deceased after they dragged him into their house and she consequently dismissed the defence of self-defence. The trial Judge went further and found that, *per adventure*, had she accepted the Appellants' version of events, the defence of self-defence would not have succeeded because, the 1st Appellant was not under attack and had every opportunity to choose a less excessive and less disproportionate method of stopping the alleged attack on the 2nd Appellant.

The trial Judge further found that the two Appellants jointly assaulted the deceased and they ought to have known or must have known that beating up the deceased, in the manner they did, would cause death or grievous bodily harm. She cited the case of **Haonga & Others v The People** (1) in which the Supreme Court held, inter alia;

***"If a death results from the kind of act which was part of the common design, then if the offence is murder in one, then it is murder in all."***

On the basis of the evidence before her and on the principle of common purpose, the learned trial Judge held that both accused persons had the requisite malice aforethought and caused the death of the deceased through the unlawful act of assault. She convicted them accordingly and there being no extenuating circumstances, she sentenced both Appellants to death.

Aggrieved with the Judgment, the Appellants appealed and filed three grounds of appeal as follows;

***The learned trial Judge erred in law and fact when she convicted the 2nd Appellant for murder and sentenced him to death when there is no evidence on record that the 2nd Appellant committed the subject offence.***

1. ***The learned trial Judge erred in law and fact when she held that self- defence was not available to the 1st Appellant herein relying entirely on the evidence of PW5 who was a witness with a motive to falsely implicate the Appellants.***
2. ***In the alternative the trial Judge erred in law and fact when she did not find extenuation circumstances on the 1st Appellant thereby imposing a sentence of death.***

We have considered the evidence on record as well as the submissions of the Parties and we shall begin by addressing ground 2 and thereafter grounds 1 and 3, in that order.

With regard to ground 2, Counsel for the Appellants laid the Appellants' cards on the table by essentially accepting that his Client, the 1st Appellant, hit the deceased with an iron bar but that this was done in defence of himself and the 2nd Appellant.

The gist of the Appellants submissions was that the trial judge erred by not warning itself before disregarding the Appellants evidence and accepting the evidence of PW5 who was a single witness and whose evidence required to be treated with caution because he was the deceased's young brother. In aid of this, they cited the cases of **Boniface Chanda Chola and Others v The People**(2); **Modestar Mulala v The People**(3) and **Febias Habayumbe and Obvious Habayumbe v The People**(4) which all highlight the position that a court must warn itself before accepting the evidence of a witness whose testimony requires to be considered with caution.

According to counsel for the Appellants, the evidence of PW5 was contradictory and the trial court should not have accepted it without warning itself of the danger of false implication. It was further argued that the danger of false implication meant that the court should have considered the fact that the Appellants testimony might reasonably be true and should have on that basis, found that the prosecution had not discharged its burden of proof. The case of **Saluwema v The People**(5) was cited in support of this.

The State responded by citing the case of **Guardic Kameya Kawanda**(6) **wherein** it was held that there is no law which prevents a blood relation of a

deceased from testifying so long as the evidence is cogent. Other cases cited were **Mwenya v The People**(7) and **Yokoniya Mwale v The People**(8) which state that a mere relationship does not automatically create an interest. It was submitted that the trial courts failure to warn itself of the danger of false implication was not fatal because the evidence did not disclose that PW5 had any motive to falsely implicate the Appellants. It was further submitted that the trial court correctly rejected the defence of self-defence because over and above rejecting the Appellants' narration of events, the court also found that the act of hitting the deceased on the head was not instantaneous and not proportionate to what was happening.

The Appellants only response was to insist that PW5's evidence was contradictory and should not have been accepted by the trial judge.

The Appellants' and Prosecution's versions of how events unfolded that fateful day, ending with the unfortunate demise of the deceased the following morning, are on record. We shall not repeat the two opposing versions save to highlight certain parts.

We note that the trial Judge honed in on the evidence of the deceased's young brother, PW5, and accepted it as the true version of what occurred that fateful day. In so doing the trial Court noted at Page J21 that it did not make sense that the deceased with five others would have advanced to the 2nd Appellant's house in such an aggressive manner as described by both Appellants with a view to beat up the 2nd Appellant, only for the five others to remain outside and not intervene to help the deceased when the alleged fight erupted. The trial Judge threw out the evidence of DW3 as a concoction,

especially as it related to the five to six men she allegedly saw arrive in the company of the deceased.

In addition to the trial Judges' observations, we note that both Appellants testified that, during the entire episode, PW5 was standing in the doorway armed with a plank. If that be the case, it is odd that he did not try and help the deceased, by stopping the 1st Appellant from grabbing the iron bar which he used to hit the deceased. More especially, that according to both Appellants, the 1st Appellant was on the ground and in pain before he rose and got the iron bar.

We have no reason to assail the trial Judge's finding that it was in fact the two Appellants who were the aggressors and she was therefore on firm ground when she dismissed the Appellants' defence of self-defence.

With regard to the Appellants argument that PW5 was a suspect witness or a witness with a possible interest of his own to serve we would refer to the holding in the case of **Yokoniya Mwale (supra)** where it was held as follows;

> ***"The point in all these authorities is that these categories of witnesses may, in particular circumstances, ascertainable on the evidence, have a bias or an interest of their own to serve, or a motive to falsely implicate the accused the accused. Once this is discernable, and only in these circumstances, should the court treat those witnesses in the manner we suggested in the Kambarage case .... A conviction will thus be safe if based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim, provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is key in our view,***

***is for the court to satisfy itself that the is no danger in the implication."***

It is clear from the above that the court is required to consider the evidence and on that basis satisfy itself as to whether or not there is an indication of possible bias. In casu, the court reviewed the evidence of PW5 and having considered the facts of the case we perceive no bias on PW5's part and would not fault the trial judge for relying on his evidence which was clear and concise. On the other hand the evidence of the Appellants and their witness DW3 was contradictory and correctly rejected by the trial judge. Ground 2 consequently fails.

We now turn to Ground 1 and the argument that the trial court erred by convicting the 2nd Appellant on the basis of the principle of common purpose. **Sections 21 and 22** of the penal code reads as follows;

***21. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:***

***(a) every person who actually does the act or makes the omission which constitutes the offence;***

***(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***

***(c) every person who aids or abets another person in committing the offence;...***

> ***(d) any person who counsels or procures any other person to commit the offence.***
>
> ***22. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.***

Learned Counsel for the Appellants cited the case of **Charles Phiri v The People[9]** and submitted that the evidence showed that the 2nd Appellant did not inflict the injury that caused the death. He also pointed out that there is no evidence that he encouraged the 1st Appellant to use the iron bar meaning that there was no common design in that regard. Counsel added that, according to the Post-mortem Report, the only injuries on the deceased's body were those consistent with being hit with an iron bar.

The Respondents submitted that with regard to ground 1, the court was on *terra firma* because it convicted the 2nd Appellant under the doctrine of common purpose after analysing and accepting the evidence of PW5 who stated that he was standing in the doorway and observed what had transpired. The learned state advocate pointed out that the court rejected the Appellants evidence and that of their witness DW3. It was submitted that despite the fact that it was A1 who hit the deceased with the iron bar the facts placed A2 within the ambit of section 22 of the Penal Code which deals with the doctrine of common design. It was submitted that the evidence accepted

by the trial judge showed that the deceased was dragged into the house by both Appellants where he was assaulted. It was argued on that basis that the 2nd Appellant actively took part in the whole process leading to the deceased being hit with the iron bar and cannot be exonerated.

The task at hand is to determine whether the trial Court erred in finding that the two Appellants operated under a common design which resulted in the deceased losing his life. In the cited case of **Charles Phiri v The People (supra)** the Supreme Court stated as follows;

> ***"It is clear from the above cited provision that parties to a common design who intended to prosecute an unlawful purpose can be convicted as principal offenders. Each party is deemed to have committed the offence(s) committed in the process of prosecuting the unlawful purpose. The common design need not be expressed or premeditated. The act of joining in the prosecution of an unlawful purpose is sufficient. We have had occasion to determine upon the criminal liability of participants in a common design. We refer to some of our decisions on this subject hereunder.***
>
> ***In* Mwape v The People*(10) when applying our mind to the question of common design we held that: -***
>
> > ***"In law a participation which is the result of a concerted design to commit a specific offence is sufficient to render the participant a principal."***

*Similarly, in the case of* **Haonga And Others v The People** [(1)] *we said that: -*

> ***"If a death results from the kind of act which was part of the common design then if the offence be murder in one then it is murder in all."***

*On the same subject and in respect of Section 22 of the Penal Code, in* **Sakala v The People** *we had this to say:-*

> ***"Section 22 of the Penal Code clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design."***

In casu, on the issue of common design, the trial Judge said as follows, at page J24;

> ***"The accused persons as already noted jointly assaulted the deceased. The 1st accused hit the deceased with an iron rod after the 2nd accused kicked him on the eye and he fell down. The two accused persons had a common design to cause grievous harm to the deceased when they pulled him in the house and started beating him. The accused persons ought to have known or must have known that their actions of beating up the deceased in the manner that they did would cause death or grievous bodily harm to the deceased."***

It is evident that the trial Court concluded that the reason the Appellants pulled the deceased into the house was to enable them to grievously harm him. The second conclusion arrived at by the Judge is that each Appellant was equally responsible for whatever injury or harm either of them inflicted on the deceased.

In the case of **Bright Katontoka Mambwe v The People[12]** the Supreme Court elucidated as follows;

> ***"In criminal law, the doctrine of common purpose, common design or joint enterprise refers to the situation where two or more people embark on a project with a common purpose which results in the commission of a crime. In this situation the participants are jointly liable for all that results from the acts occurring within the scope of their agreement. Each of the parties to an arrangement or understanding is guilty of any crime falling within the scope of the common purpose which is committed in carrying out that purpose."***

Two cases in which the principle of *"common purpose"* was addressed by the Supreme Court are the cases **Mwape v The People (supra)** and **Benson Phiri v The People[13]**.

In the earlier case of **Mwape v The People (supra)** a group of burglars raided a ZCBC store and stole various merchandise from the store. During the course of the robbery, explosives were used and the night watchman was stabbed with a knife. The Appellant was tried for the offence and convicted of aggravated robbery. The only evidence against the Appellant was his own confession (which was held to have been properly admitted). That confession

was to the effect that he was part of the group that went to break into the store but that he was asked to remain by the car and only join them after he heard an explosion. He heard the explosion and went to the store where he was given boxes to carry to the car.

The Supreme Court quashed the conviction of aggravated robbery after saying as follows;

> ***"As can be seen from the appellant's confession it is quite clear that the expedition was to break into the ZCBC shop and to steal property therefrom. That was obviously the common purpose to which the appellant was a party. The offence of violence against the night-watchman which was committed by the appellant's confederates was not a probable consequence of the prosecution of the common purpose. because there was no evidence that the Appellant knew that his confederates would attack and stab the night watchman."***

The Appellants conviction for aggravated robbery was quashed and replaced with a conviction for store-breaking and theft.

In the later case of **Benson Phiri v The People (supra)**, the facts were that a choir Master (the deceased) and a member of his church (PW2) were walking along a road and they met three men (the Appellant & Co-Accused) who PW2 knew as neighbours. One of them asked the deceased whether he knew the person they had apprehended and when he said he did, a fight erupted. According to her evidence the Appellants started beating the choir master and in the course of the fight, the first appellant pulled out a knife and stabbed the deceased. The next day the deceased was found dead.

The matter was reported to the Police. PW2 led the police to the arrest of the Appellants and the co-accused. The learned trial Judge accepted that PW2 saw the first appellant pull out a knife; and stab the deceased. The Court found that the second appellant participated in beating the deceased, while the co-accused did not participate in the fight. The two Appellants were convicted and sentenced to death.

On appeal, Counsel for the 2nd Appellant submitted before the Supreme Court that the production of a knife by the first appellant went beyond a common purpose of assaulting the deceased as there was no common purpose to stab. He submitted that the 2nd appellant never knew that the first appellant had and would use a knife and for that reason should not have been found guilty of murder on the ground of common purpose. The Court stated as follows;

> ***"The issue of common purpose in the commission of a crime as raised by Mr. Mupeta in relation to the second appellant was well taken and has merit. The evidence of PW2 is that she saw the first appellant pull out a knife and stab the deceased. Although we accept that the second appellant took a part in assaulting the deceased, we cannot say that he knew that the first appellant would use a knife. In the circumstances, we find it unsafe to uphold the conviction of murder as against the second appellant. We quash the conviction of murder and set aside the death sentence. On the evidence, we find the second appellant guilty of common assault contrary to section 247 of the Penal Code."***

We have carefully considered the facts in the two cited cases where a knife was used and compared them to the case before us. Of particular note is that in the latter case the knive were concealed and there was no evidence that the perpetrator's confederate had any knowledge of the concealed weapon. In the former case the common purpose was to break into and steal from the ZCBC store and not to harm anybody who would be found there.

In casu, the Post-mortem Report presented to the Judge detailed the cause of death as follows;

***"SUMMARY OF SIGNIFICANT, ABNORMAL FINDINGS AT EXAMINATION***
***Death due to intracranial haemorrhage with brain damage without fracture of the skull bones. Big haemorrhage into soft tissue of the head (occupying tible surface. Right side from temporal to occipital area sutured cut wound 10cm. No other injuries found."***

The Post-mortem Report does not suggest what might have caused the intracranial haemorrhage which resulted in death. The evidence before the trial Court was that the deceased was not only hit with an iron bar but was also kicked after which he fell down. The evidence of PW5 was as follows;

"***That's how Mike and Henry got Joe and took him inside the house. I also followed and stood by the door and I saw them start beating Joe. Mike Bangu started kicking Joe on his eye and he fell down. Henry Simungala got an iron bar and started hitting Joe on the head and back***"

It is our considered view that the actions of the 1st Appellant kicking the deceased and the 2nd Appellant hitting the deceased with an iron bar, which he picked at the scene of crime, cannot be seen in any other light but as a consequence of the Appellants' joint decision to assault the deceased. The trial Court rightly found that the two Appellants dragged the deceased into the house from outside for the purpose of assaulting him.

In the premises, this case can be distinguished from the case involving the stabbing of a deceased with a knife because the iron bar was not concealed. There is no indication that rules out the fact that the intracranial haemorrhage could have been caused by the kicking and falling.

This case falls within the ambit of the reasoning in the already cited case of **Bright Katontoka Mambwe v The People (supra)** where the Supreme Court said that *"the doctrine of common purpose, common design or joint enterprise refers to the situation where two or more people embark on a project with a common purpose which results in the commission of a crime."* That is exactly what happened in *casu*, the two Appellants embarked on a project with the common purpose of assaulting the deceased during the course of which the crime of murder was committed. People get injured when they are being assaulted and the injuries suffered by the deceased are a natural consequence of being assaulted. Blame for the death of the deceased cannot, in this instance, be apportioned between the Appellants and Ground 1 therefore fails.

Ground 3 was argued in the alternative and to the effect that the trial Judge erred when she failed to find extenuating circumstances in this case. Defence counsel submitted that where self-defence fails, there is extenuation

and the guilty party should receive a custodial sentence and not the death penalty. This defence submitted that the evidence of PW5 at lines 4 to 6 on page 22 of the Record of Appeal was that, *"Grace left after she saw that Joe had come and he was fighting with these two men."* According to Counsel for the Appellants, those words meant that the deceased was the one who had gone to fight with the Appellants and he was therefore the aggressor or in other words, he provoked the Appellants. The case of **Whiteson Simusokwe v The People**(6) was cited in which the court held that *"a failed defence of provocation affords extenuation for a charge of murder ……"*.

PW5's words quoted by the Appellants' Counsel are misleading if not read in context. Line 2 to line 6 on page 22 of the record of appeal reads as follows; *"When the two men were beating Joe, Grace had gone out. Grace left after she saw that Joe had come and he was fighting with these two men." (emphasis ours)*

The learned trial Judge considered the defence of self-defence when she stated at pages J22 and J23 of her Judgement that:

> ***"…on the facts of this case as found, there was no attack on both accused persons to justify the defence of self-defence. It is further my considered view that even if the accused's version of events was to be accepted as the truth of what had transpired; the defence of self-defence would not succeed. This is on account that the 1st Accused was not under attack by the deceased in any way at the time he purportedly got an iron rod and hit the deceased on the head. The 1st Accused cannot therefore claim that he had no chance to choose the mode of retaliation. The retaliation***

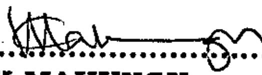
***would have been found to be excessive, disproportionate and unreasonable ......."***

**Section 201 (1) (b)** of the **Penal Code** provides for a conviction for murder with extenuating circumstances which clothes the Court with the Jurisdiction to mete out a sentence other than the death penalty.

As correctly stated by learned Counsel for the Appellants, it is trite law that a failed defence of provocation is an extenuating circumstance and should result in the death penalty being replaced with a lesser sentence. However, we agree with the trial Judge's analysis of the evidence and her conclusion that it was in fact the Appellants who were the aggressors and not vice-versa. That being the case, there was neither provocation nor self-defence and therefore no failed defence for the trial Court to consider vis-à-vis extenuating circumstances. We agree with the trial Court's findings and uphold the conviction and sentence.

The Appeal is accordingly dismissed.

**F.M. CHISANGA**
**JUDGE PRESIDENT**



**C.K MAKUNGU**
**COURT OF APPEAL JUDGE**

**M.M. KONDOLO SC**
**COURT OF APPEAL JUDGE**