IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. NO. 114/2020**
HOLDEN AT LUSAKA
(Criminal Jurisdiction**)**

BETWEEN:

JACOB MIYANDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: KONDOLO SC, MAKUNGU AND MAJULA, JJA
On 26th March, 2021 and on 26th August, 2021

For the Appellant :*Ms. M. Kapukutula, Senior Legal Aid Counsel- Legal Aid Board*

For the Respondent : *Mrs. C. Mwila, State Advocate-National Prosecution Authority*

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Saidi Banda v The People SCZ/30/2015.**
2. **Raban Mweni Kopa v The People SCZ Appeal No. 79/2017**
3. **Mwiya and Ikweti v The People (1968) Z.R. 53**
4. **Precious Longwe v The People CAZ Appeal No. 82/2017**

LEGISLATION REFERRED TO:

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

1. INTRODUCTION

1.1. The Appellant was convicted of murder, contrary to Section 200 of the Penal Code, on the basis of a confession made to a fellow inmate. Our decision will address the admissibility of confessions made to inmates.

1.2. Secondly we have been called upon to find the failed defence of provocation, as an extenuating circumstance to warrant a punishment other than the death sentence.

2. BACKGROUND

2.1. The Appellant was convicted on the basis of a confession made to a fellow prisoner. Nicholas Hambalo (PW2) was a Cell Captain at Choma Central Police Station. He met the Appellant, for the first time, in the cells and asked him why he had been detained. The appellant initially declined to divulge any information but the following day, he relented and recounted to PW2 how he had ended up in police custody.

2.2. He told PW2 that he and the deceased had a bad relationship because he had slept with the deceased's wife and that she was at the centre of him killing the deceased. On one occasion, the deceased warned the Appellant that he would kill him and he nearly executed his threats at a market place when he tried to run over the Appellant with a car. As a result, the Appellant decided to take pre-emptive action by killing the deceased.

2.3. The Appellant waylaid the deceased as he was about to enter his car and killed him by hitting him with a stick on the back of his head. He then placed him in the car and made a run for it.

2.4. In his defence, he denied playing any part in the death of the deceased and said that he was at home with his wife during the material period.

3. **HIGH COURT DECISION**

3.1. The trial Judge held that a confession made to a fellow prisoner is admissible because a fellow prisoner is not a person in authority. He further found that PW2's account

of what the Appellant told him correlated quite accurately with the evidence of the other witnesses with regard to the fact that the Appellant and deceased's' relationship deteriorated because of the adultery between the Appellant and the deceased's wife.

4. **APPEAL**

4.1. The Appellant launched his appeal in this Court on two grounds, namely;

4.1.1. The learned Trial Court erred in law and fact when it relied on the evidence of Nicholas Hambala in convicting the appellant without caution.

4.1.2. The learned Judge in the Court below erred both in law and fact when it sentenced the Appellant to death when the evidence revealed extenuating circumstances.

5. **ARGUMENTS**

5.1. In the filed arguments, the Appellant's learned Counsel submitted that the primary evidence that the lower Court

relied on was that of PW2 Nicholas Hambala who was the Cell Captain and therefore in a state of an advantage relative to the Appellant, and as such, the circumstances under which the confession was made cannot be said to be fair. Further, the witness was one with an interest to serve because he may have wanted to impress the police officers to his own advantage and his evidence must therefore be treated with caution.

5.2. In relation to ground 2, Counsel argued that as can be gleaned from the testimony of PW2, the deceased acted in circumstances that were provocative. That there was an adulterous relationship between the deceased and the Appellant's wife and he harboured an intention to kill the Appellant. He submitted that even though the defence had failed, the death sentence should not have followed.

5.3. At the hearing Mr. Kapukutula reiterated the argument that the conviction was premised on the evidence of PW2 whose evidence suggested the Accused confessed to him. He advanced the argument that being a cell-captain meant that PW2 was in an advantageous position and actually a

person in authority when he obtained self-incriminating information from the Appellant who was a mere remandee. Further that the purported confession was improperly obtained against the background of harsh prison realities which had a bearing on the Appellant's mind.

5.4. Additionally, since the trial Court relied on this evidence, it ought to have considered the extenuating argument as argued. Counsel did not dispute that the statement was made but took issue only with its admissibility.

5.5. In rejoinder, the State agreed with the trial Court's reliance on Nicholas Hambala's evidence. According to them, PW2 was not a person in authority and his evidence was properly admitted. That he was not a witness with an interest to serve and was facing a different charge from the Appellant and was in fact appointed as cell-captain by the previous cell captain.

5.6. Controverting ground 2, the State submitted that the lower Court rightly sentenced the Appellant to death because the evidence did not reveal any extenuating circumstance. A look at the evidence showed that the Appellant denied ever

having any differences with the deceased after the reconciliation. Moreover, the defence of provocation was not raised by the Appellant in his testimony.

5.7. In her *viva voce* submissions, Mrs. Mwila the State Advocate pointed out that no one saw the Appellant commit the murder but the circumstantial evidence was compelling. Reference was made to **Saidi Banda v The People**[1]**.** It was also submitted that PW2 was not a witness with an interest to serve and interviewing new inmates was one of the normal things that the Cell Captain PW2 used to. We were urged to uphold the conviction and sentence.

5.8. Replying briefly, Mr. Kapukutula emphasised that there is no guarantee that the confession statement was obtained fairly given that it was made in police custody. We were urged to expunge PW2's evidence as well as find extenuating circumstances in the case.

6. **OUR DECISION**

6.1. We will address the grounds of appeal as they have been set out.

6.2. Counsel for the Appellant has argued that the circumstances in which the confession was made were unfair and that PW2 had an interest to serve i.e. to impress the police.

6.3. Counsel's submission conflicts with the Appellant's evidence in cross examination as he consistently denied ever confessing to PW2 and stated that upon being asked what he was doing in the cells, he had merely stated that he was accused of murdering the deceased. It therefore follows that an argument that the confession was made in unfair circumstances is flawed.

6.4. In the case of **Kopa v The People** [2], the Supreme Court had occasion to deal with a matter in which the Appellant made a confession in the cells. The prosecution witness did not see the Appellant's face but heard his narration. In the cited case, the lower Court analysed the evidence before it and found that there was no motive for the

witness to concoct a story merely to implicate the Appellant with whom he had not differed. The Court further quoted Doyle J's, *obiter,* in **Mwiya and Ikweti v The People** [3] in which he remarked that the issue of whether or not the appellant made a 'confession' in the police cells was a question of fact.

6.5. In agreement with that reasoning, the Supreme Court held that it was up to the appellant in the **Kopa case** to deny that the statement was made, but he did not. On that basis it accepted that the lower court was justified in believing the prosecution witness's evidence.

6.6. In view of the forgoing, we have no difficulty in finding that PW2 was not a person in authority and the confession, having been freely and voluntarily made, in the absence of any evidence to the contrary, formed part of the evidence that tied the case together.

6.7. Reverting to the facts at hand, the lower Court found the evidence of PW2 as trustworthy, reliable and credible. The two were strangers to each other and only met for the first time in police cells. The trial Court found that the evidence

materially corroborated PW4's evidence that he found the deceased seated in the car. Further, PW2 had information on the animosity between the deceased and the appellant, including the family dialogue over the affair between the Appellant and the deceased's wife.

6.8. We agree with the trial Judge that there was indeed no motive for PW2 to falsely implicate the Appellant and, in any event, the Appellant denied having made the statement to PW2. This witness, we find, did not fall into a category of witnesses with an interest to serve. Ground 1 therefore fails.

6.9. Ground 2 is that the defence of provocation having failed, should have afforded the Appellant a sentence other than death. We note from the record that the defence was not set up at trial. In cross examination, the Appellant admitted that no other disputes existed between the deceased and himself. The only pending issue was the payment that he was required to make after the family dialogue in which he admitted to the adultery.

6.10. Further, the Appellant denied having been at the scene and said that on the material day he was at home with his wife. He cannot, in the circumstance's plead provocation.

6.11. We refer to our holding in the case of **Precious Longwe v The People** [4] in which we stated that in order for a failed defence of provocation to qualify as extenuation, the accused must prove that there was a provocative act and that there was loss of self-control but the retaliation was not proportionate to the provocation.

6.12. In this case, the Appellant denied being at the scene where the deceased met his demise and he has not pointed to any provocative act which sent him into a sudden rage.

6.13. This being the case, the defence of provocation could not be invoked, meaning that the notion of a failed defence of provocation, which would be considered as an extenuating circumstance does not and did not even arise. This ground of appeal also fails.

7. **CONCLUSION**

7.1. We find that the lower Court correctly admitted into evidence, the confession made by the Appellant to PW2. There being no extenuating circumstances, the lower Court was on firm ground to impose the death penalty.

7.2. We therefore uphold the Judgment of the Lower Court and dismiss the Appeal.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE