

**HOLDEN AT LUSAKA**

**(Criminal Jurisdiction)**

**BETWEEN:**

**LIVAY MWEENE**

**APPELLANT**

**AND**



**THE PEOPLE**

**RESPONDENT**

**CORAM: KONDOLO SC, CHISHIMBA AND SICHINGA SC, JJA**

**On 20<sup>th</sup> January, 2021 and on 26<sup>th</sup> August, 2021.**

*For the Appellant : Mr. I. Yangwa, Senior Legal Aid Counsel- Legal Aid Board*

*For the Respondent : Ms. C. Soko, 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. Jack Chanda and Others v The People (2002) Z.R. 124**
- 2. Malangisha Kapwepwe v The People CAZ Appeal No. 59/2018**
- 3. Simutenda v The People (1975) Z.R. 294**
- 4. Precious Longwe v The People CAZ Appeal No. 82/2017**
- 5. Rodgers Kunda v The People SCZ Appeal No. 81/2017**
- 6. Whiteson Simusokwe v The People (2002) Z.R. 63**

## **1. INTRODUCTION**

1.1. The Appellant was sentenced to death by Maka-Phiri J following a conviction of murder in the High Court. He has appealed against sentencing on the basis that his failed defence of provocation provided the necessary extenuating circumstances to warrant a sentence other than death.

## **2. BACKGROUND**

2.1. The Appeal being against a failed defence of provocation mitigating the death penalty, we shall confine ourselves to the facts surrounding the defence.

2.2. On the fateful day, Meetwell Cheelo (the deceased) went to tend the family garden near a stream. According to his mother (Mervis Koonde-PW1), a friend of his, Victor Mweene came asking after him and she escorted him to the garden. Moments later, Victor returned, on instruction from the deceased, to meet a friend who was supposed to help him wash some jerseys.

2.3. The friend, Kelvin, turned up looking for the deceased and once again, his mother directed Kelvin to the garden. Unfortunately, Kelvin did not find the deceased and returned to the deceased's mother to inquire on his whereabouts. PW1 then went back to the garden and found Meetwell lying in the water with injuries. When asked what had happened to him, the Deceased retorted that the Appellant beat him up. He died a few minutes later.

2.4. The deceased brother, Hardley Namalumba testified as PW3 and his testimony revolved around an alleged extra-marital affair between himself and the Appellant's wife. He stated that the Appellant had, on more than one occasion, accused PW3 of dating his wife and had threatened to kill PW3 or his parents, or siblings. For this reason, when PW3 heard that Meetwell had been murdered and that the Appellant was in the village, the Appellant was his primary suspect because the last threat issued by the Appellant was only about a week earlier.

2.5. In his defence, the Appellant stated that whilst on his way from seeing his brother-in-law, the deceased called out to him and told him that he would never get his wife back home because he was not man enough. The Appellant, while pointing his finger at the Deceased, told him he did not want to have any differences with him and he turned to walk away. Ignoring the Appellant's request, the Deceased punched him so much so that his tooth started shaking.

2.6. Following the blow, the deceased tried to run away but tripped and fell to the ground and injured his face. When he got up, he fell again but this time onto a log that was in the stream. The Appellant observed that the deceased was injured but he proceeded on his journey to visit his grandmother. In all this, the Appellant did not touch the deceased.

### **3. HIGH COURT DECISION**

- 3.1. The trial Court accepted, as a dying declaration, the deceased's statement to PW1 and PW2 (DyNESS Ngandu) that it was the Appellant who had assaulted him. Further, the learned Judge accepted that the Appellant had threatened PW3 because he was dating his wife.
- 3.2. Maka-Phiri J also found it an odd coincidence that deceased was found dead about a week after the last threat made by the Appellant. To reinforce the conviction, the lower Court noted that the Appellant had placed himself at the scene and the injuries described on the postmortem report did not support the Appellant's story but were more consistent with an assault. With these findings, he was convicted of murder and sentenced to death.

### **4. APPEAL**

- 4.1. Disgruntled with the holding of the lower Court, the Appellant launched his Appeal on the sole ground that the

learned trial Court erred in law and fact when it sentenced him to death in view of extenuating circumstances.

## 5. SUBMISSIONS

- 5.1. In support of the appeal, Counsel urged this Court to find extenuating circumstances. It was pointed out that there was an element of provocation and that the learned Judge in the Court below alluded to the fact that the deceased punched him on the chin for no apparent reasons but added that there was no medical report to that effect.
- 5.2. We were referred to page J15 - J17 of the Judgment and Counsel submitted that the learned trial Court had taken time to consider the defence of provocation and found that it could not stand. This being the case, it was argued that it is trite law that a failed defence of provocation can be an extenuating circumstance. The case of **Jack Chanda and Others v The People** <sup>(1)</sup> was relied on.
- 5.3. The Respondent made oral submissions at the hearing of the Appeal. The kernel of the arguments was that there

was no indication of any incident of provocation and the lower Court, in exercising its authority, took time to consider all available defences and arrived at the conclusion that there was no provocation save for the misguided cross-examination and the unreasonable explanation rendered by the Appellant in his defence.

- 5.4. We were directed to page J16 of the Judgement, where the Court found that the Appellant himself had stated that he was not provoked by any of the alleged actions by the deceased.
- 5.5. On this backdrop, we were urged to uphold the sentence.

## **6. COURT OF APPEAL DECISION**

- 6.1. We have considered the Record, the sole ground of appeal and the arguments of both Counsel.
- 6.2. The law on the defence of provocation is well settled. In **Precious Longwe v the People** <sup>(4)</sup> we stated that the evidence must show that there was a provocative act. In Malangisha **Kapwepwe v The People** <sup>(2)</sup> we stated that it

is the existence of the provocative act which invokes the defence, and we referred to the case of **Simutenda v The People** <sup>(3)</sup> where it set out what constitutes the defence of provocation. There must be an act of provocation; followed by loss of self-control, actual or reasonable; and finally, retaliation that is proportionate to the provocation.

6.3. The gist of the Appellant's argument is that even though his defence of provocation had failed, he had established the act of provocation and as such, his circumstances fell into the province of extenuating circumstances. We refer to the case of **Precious Longwe v The People** <sup>(4)</sup> 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.

6.4. Further, the Supreme Court in **Rodgers Kunda v The People** <sup>(5)</sup> stated that once provocation is non-existent, the principal espoused in **Whiteson Simuskowe v The People**



<sup>(6)</sup> that a failed defence of provocation affords extenuation for a murder charge will not apply.

6.5. Reverting to the facts before us, the Appellant in his evidence, stated that he did not touch the deceased who, in an attempt to run away after throwing his punch, tripped, on his own, and injured himself. The Appellant stated at page 55 of the Record that he did not touch the deceased but is beseeching this Court to find that there was a failed defence of provocation.

6.6. We note that the lower Court at J16 struggled with the contention that the Appellant and the Deceased were fighting when the Appellant's own testimony revealed that he never touched the deceased. She resolved that the contention was misleading. We agree and we cannot fault her finding.

6.7. There was no credible evidence on record to support the Appellant's argument that he was provoked. The only evidence that seemingly suggests there was some semblance of provocation is from the cross examination of

PW2. The Appellant's Counsel endeavored to ask this witness if the deceased, before his demise, told her that he was in a fight. She denied the assertion. Counsel for the Appellant, from the line of interrogation of PW3 with regard to the alleged affair between him and the Appellant's wife also seemed to suggest that the Appellant could have been provoked. Unfortunately, Counsel's efforts were negated by the Appellant's own testimony when he denied having touched the Deceased.

6.8. We find ourselves in a similar predicament as the lower Court where the Appellant insists that he did not touch the Deceased and yet relies on the defence of provocation which pre-supposes contact resulting in death.


## **7. CONCLUSION**


7.1 In the circumstances, we would agree with the trial judge that the question of a failed defence of provocation does not arise and we find that there was no provocation at all.

7.2 The trial Court was therefore on firm ground when it found that the Appellant assaulted the Deceased and was possessed of the requisite malice aforethought thus committing the offence of murder. We accordingly uphold the sentence meted by the lower Court.

The Appeal is dismissed.

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

  
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**F.M. CHISHIMBA**  
**COURT OF APPEAL JUDGE**

  
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**D.L.Y. SICHINGA**  
**COURT OF APPEAL JUDGE**