IN THE SUPREME COURT OF ZAMBIA APPEAL NO: 96/2017

HOLDEN AT KABWE

(Appellate Jurisdiction)

B E T W E E N:

BENSON KALIMA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Musonda, Kabuka and Chinyama, JJS,
On 10th April, 2018 and 11th July, 2018.

FOR THE APPELLANT: Mr. M. Makinka, Legal Aid Counsel, Legal Aid Board.

FOR THE RESPONDENT: Ms. M. K. Chitundu, Deputy Chief State Advocate, National Prosecutions Authority.

J U D G M E N T

KABUKA, JS, delivered the Judgment of the Court.

Cases referred to:

1. The People v John Nguni (1977) ZR 376.
2. Edward Sinyama v The People (1993 - 1994) ZR 16 (SC).

3. Sharmpal Singh v The Queen (1962) E.A. 13 (PC).
4. Katundu v The People (1967) ZR 18 (CA).
5. Whiteson Simusokwe v The People (2002) ZR 63 (SC).
6. Lemmy Bwalya Shula v The People (1996) ZR (SC).
7. Lubendae v The People (1983) ZR 54 (SC).
8. Mbomena v The people (1967) ZR 89 (CA).
9. Kanyanga v The People, SCZ Appeal No. 237 of 2011.
10. Jutronich, Shutte and Lukin v The People (1965) ZR 9 (CA).
11. Gideon Hammond Millard v The People (1998) S.J. 34 (SC).
12. The State v Godfrey Baloi & Others CCT 29/99.
13. Mudau v State (547/13) [2014] ZASCA 43 (31 March 2014).
14. Kenneth Mtonga and Victor Kaonga v The People (2000) ZR.

Legislation referred to:

The Penal Code Cap. 87 SS. 206, 206 (1).

The appellant was convicted for the murder of his wife and was sentenced to death. He now appeals against the sentence only.

The background to the matter is that on 21st November, 2015 the appellant who was then a resident of Fisenge in Luanshya District, had been out drinking and got back home around 20:00 hours in the evening where he found his wife and three children already asleep. According to a neighbour who testified as PW2 at

the trial, the appellant came knocking on her door between 20:00 – 21:00 hours that night and asked her to go with him to his house to check on his wife, the deceased, whom he said was sick and bleeding. The appellant also intimated that she could be pregnant as he had seen her washing a blood-stained underwear the previous day.

PW2 went to the appellant's house and found the deceased who was only wearing a blouse lying down. Her observations were that the deceased looked lifeless, she was bleeding from her private parts and was not responding. PW2 decided to call her grandmother, Espina Mutobola to help her deal with the delicate situation of a bleeding pregnant woman.

When PW2's grandmother came to the scene, her observation was that a pregnant woman does not bleed in the manner the deceased was bleeding. The grandmother advised PW2 to use a chitenge to help control the bleeding as she herself went out to call for another elderly neighbour, mother to Mwansa.

Upon coming to the appellant's house, Alice Mwansa, who testified as PW3 at the trial, expressed surprise to see the deceased

in that state. She explained that, they had earlier in the day around 17:00 – 18:00 hours, met with the deceased on the road when the deceased was walking back home from church. It was barely an hour later and the deceased was now bleeding heavily and unable to sit or stand. PW3 asked what had happened to her in the meantime and the deceased herself in response, alerted them all not to listen to the appellant's explanation on what had happened to her, for he was the one who inserted something like a stick in her vagina which had injured her. She told them that she was dying and asked to see her children.

The deceased also requested PW3 to check her thoroughly, but all PW3 could see was blood gushing out from the vagina. PW3 attempted to control this bleeding by using several chitenge wrappers. When that did not work, a blanket was used, after which the deceased was transported to the nearby Fisenge Clinic in a wheelbarrow. PW3 did not go with them but noted that the appellant appeared to have been drunk.

PW2, who accompanied the deceased to the clinic said that, when they got there, a nurse asked what the problem was and the deceased said it was the appellant who had placed an object that

was like a stick into her vagina. The deceased was then taken into a screening room to be examined but due to excessive bleeding, she was referred to Luanshya Thompson Hospital.

PW2 further testified that, each time the nurse tried to examine the deceased by inserting a finger into her vagina, the deceased screamed out in pain and she died the following day, the 22nd of November, 2015. PW2 also confirmed that the marriage between the deceased and appellant was characterised by frequent fights, although she did not know what they fought about. When asked whether the appellant was intoxicated on the day in question, she said that she would not know, but observed that he was certainly concerned and looked afraid.

The arresting officer who was PW4 at the trial, confirmed having received a call from the Councillor for Fisenge, informing him that the residents of his area were planning to lynch the appellant whom they suspected to have killed his wife. He also testified that during investigations, the appellant told him the only thing he had inserted into the deceased's vagina was his finger. After attending the post-mortem of the deceased and concluding

the investigations, PW4 proceeded to formally charge the appellant with the offence of murder.

PW5, the pathologist who conducted the post-mortem examination, in his evidence, said that the deceased had a 5 cm tear on the floor of her vagina which had opened into the rectum, causing the sphincters of the anus to tear. The cause of death was determined as haemorrhage, due to the vaginal wound.

In his own defence to the charge, the appellant testified that, he had gone out drinking on the material day. When he returned home in the evening, he found his wife lying down and he inserted his middle finger 'which had a nail', into her vagina because he wanted to have sex with her but that she then started bleeding and he could not proceed. He left to inform his neighbours and they took her to hospital. The appellant did not deny the substance of the prosecution evidence as narrated to the trial court by PW2 and PW3. His only complaint was that, at the hospital he was not allowed to give his own account of what really happened.

In his further testimony, the appellant admitted that the deceased had said she felt like he had inserted something into her vagina. He then variously contradicted himself by saying that the deceased had not stopped bleeding since her last menstrual cycle. He changed his story and attributed the bleeding to contraceptive injections. He also said the reason he inserted his finger into her vagina was because he was suspecting her to be sleeping with other men. The appellant claimed the conduct of the deceased generally, was not good and on the material day he had actually found her chatting with a man who, upon seeing the appellant, had ran away.

After thoroughly evaluating this evidence which was before her, the learned trial judge found the appellant was a very poor witness due to the different versions he gave on how he injured the deceased. She noted that, even if the prosecution evidence was largely circumstantial, PW2 and PW3 had still testified that the deceased herself had told them that it was the appellant who inserted something like a stick into her vagina. That this evidence was corroborated by the pathologist, PW5, who also testified that the injury could have been caused by a sharp instrument.

The learned judge noted that the statement by the deceased was made within minutes of her injury which excluded the possibility of concoction and allowed it to be admitted, as *res gestae* evidence. The cases of **The People v John Nguni**[1] and **Edward Sinyama v The People**[2] were cited as authority for that approach.

The trial judge ultimately found the appellant had a motive to hurt his wife, the deceased, as he had suspected her of being unfaithful and clearly wanted to punish her. After considering the gravity of the injuries, she further found, malice aforethought established by the very high degree of force used in inserting the object which resulted in the injury inflicted, to protrude from the vagina into the rectum and ultimately, also tore the sphincter muscles of the anus.

The judge relied on the case of **Sharmpal Singh v The Queen**[3] for the conclusion on the force used which held that, where no direct evidence is led on the degree of force used, the court can draw an inference as to whether the degree of force was so extreme that the accused person ought to have contemplated that grievous bodily harm could result from the assault.

The judge further rejected what she termed as the 'half-hearted submission' by the defence, that the appellant had diminished capacity on the material day due to intoxication. She pointed to the holding in **Katundu v The People**[4] which states to the effect that, the burden of proof lies on an accused who raises a defence of insanity or intoxication to show on a balance of probabilities, that as a result of suffering from either condition at the time of the offence, he was rendered incapable of understanding what he was doing. The learned judge found, evidence led had disclosed that the appellant in the present appeal understood what he was doing. And, on that premise, she came to the conclusion that the prosecution evidence had established, to the required standard of proof beyond reasonable doubt, that the appellant had murdered the deceased and accordingly sentenced him to death. The appellant has advanced a single ground of appeal against the judgment which is directed against the sentence only:

1. **That the trial judge misdirected herself on the facts, in her failure to find extenuating circumstances so as to impose any other sentence other than the mandatory death penalty.**

Two arguments were advanced by counsel for the appellant in support of the contention that, on the basis of the failed defences of provocation and intoxication, the court ought to have found that the evidence disclosed extenuating circumstances. That these extenuating circumstances ought to have led the trial court to impose on the appellant any other sentence but not the death penalty.

While counsel acknowledged that the appellant did not raise provocation in his evidence-in-chief, he still contended that there was such evidence introduced in cross-examination of prosecution witnesses. This was in form of evidence of infidelity on the part of the deceased which made the appellant upset. According to counsel, the overwhelming balance of this evidence suggests that the appellant was provoked when he found his wife standing with a man at night, who fled the scene upon seeing him. This raised more suspicion in the mind of the appellant, which could have made the appellant to act in the manner that he did.

The submission was to the effect that, the trial court's judgment and indeed the record, show that there existed evidence of a failed defence of provocation due to infidelity which is an

extenuating factor warranting a court to consider an alternative sentence other than the death sentence. The case of **Whiteson Simusokwe v The People**[5] was relied on where this Court said:

> **"We accept that a failed defence of provocation nonetheless affords the extenuation for the murder charge. The intimate relationship and the alleged infidelity which led to the assault were therefore an extenuating circumstance. This justifies the non-imposition of a mandatory capital sentence."**

The second extenuation factor, according to counsel, is that of evidence of beer drinking which came from PW3 who told the trial court that the appellant appeared intoxicated at the time he went to call her. That this piece of evidence was corroborated by the appellant himself who testified that, prior to the commission of the offence he had been drinking beer. Counsel cited, amongst others, as authority for the submission on intoxication, the decision of this Court in **Lemmy Bwalya Shula v The People**[6] where we said:

> **"we consider that the drunken circumstances generally attending upon the occasion sufficiently reduced the amount of moral culpability so that there was extenuation."**

In response to the appellant's submissions on the two arguments, the learned State advocate contended that, the trial judge was on firm ground when she held that there was insufficient evidence in relation to the failed defences of provocation or drunkenness which could support a finding of extenuating circumstances. She submitted that, without any extenuating circumstances disclosed by the facts, a sentence less than the mandatory death penalty cannot be justified. **Section 201 (2) (a) of the Penal Code** was referred to as defines extenuating circumstances to mean:

> **"(a) .....any fact associated with the offence which would diminish morally, the degree of the convicted person's guilt;"**

The State advocate argued that, in terms of the law, there was no provocation offered to the appellant in this case and referred to **section 206 of the Penal Code** which gives the following definition of provocation:

> **206(1) " the term "provocation" means and includes, as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation or in relation to a master or servant, to deprive**

> **him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. For the purpose of this section, "an ordinary person" shall mean an ordinary person of the community to which the accused belongs".**

It was further argued that, the appellant merely alleged that he found the deceased standing with a man who ran away after he saw the appellant. That in terms of **section 206 (1)** as quoted above, the question that begs to be answered is whether an ordinary person of the community to which the accused person belongs would insert a sharp instrument into the vagina of his wife if he found her standing with another man?

The submission was that, there is nothing in the appellant's evidence nor the record of proceedings, which suggests that, the appellant found his wife in *flagrante delicto* with the supposed man who ran away, to constitute grave provocation which was the rationale for the holding of this Court in the case of **Simusokwe[5].** That there was also no evidence adduced that the appellant knew this man or that he suspected him of having an adulterous affair with his wife. Neither, was there evidence of any communication between the appellant and this supposed man whom he allegedly,

found standing with the deceased. In conclusion on this point, the submission was to the effect that, there was no evidence led by the appellant to support the defence of provocation, whose failure can then be considered as an extenuation of the death sentence.

On the second argument relating to the appellant having taken some intoxicating beverages as an extenuating circumstance, it was observed firstly, that there was no evidence of heavy drinking that was adduced by the appellant during trial. Secondly, that the appellant testified that after his alleged bout of drinking on that particular night, he was able to walk about 40 minutes to his house without getting lost. Further that his conduct after the incident when he went to seek help from the neighbour and explained why he was doing so, shows he was still reasoning. Counsel stressed the point, by referring to the decision of this Court in **Lubendae v The People[7],** where we said that:

> **"Evidence of heavy drinking even to the extent of affecting co-ordination of reflexes is insufficient in itself to raise the question of intent unless the accused person's capacities were affected to the extent that he may not have been able to form the necessary intent."**

The submission here, was that the appellant was not drunk to the extent that he could rely on intoxication as a defence. We were in this respect called upon to distinguish, on the facts, the case of **Mbomena v The People**[8] relied on by the appellant in his submissions, as decided that the court must deal with a potential defence arising from the evidence led. The State advocate instead urged us to consider the holding in the case of **Kanyanga v The People,**[9] that if an accused had been drinking, it does not necessarily follow that the fact of drinking by itself, amounts to an extenuating circumstance, as each case must be decided on its own merits. She pointed to evidence in his cross-examination as appears at page 60, of the record lines 11 and 12, where the appellant actually admitted that he was not *'so drunk as not to know what he was doing.'* The submission was that, the appellant knew that forcefully placing an object in his wife's vagina which is a very delicate part of a woman, would result into a form of punishment to her and cause her grievous harm. That this evidence only goes to show that by so doing, the appellant intended to cause her grievous harm, which he infact did.

In ending her submissions, the State advocate urged us to hold, as we did in the case of **Katundu**[4], that the trial court was on firm ground, when it directed that the burden of proving diminished mental capacity due to intoxication, was on the appellant.

We have considered the arguments and submissions by counsel on behalf of the parties as well as the case law to which we were referred.

It is accepted that an appellate court will not lightly interfere with the discretion of the trial court on the question of sentence. That in dealing with appeals against sentence the appellate court should only consider whether, the sentence is wrong in principle; so manifestly excessive as to induce a sense of shock; or there are exceptional circumstances which would render it an injustice if the sentence was not reduced. The Court of Appeal case of **Jutronich, Shutte and Lukin v The People** [10], the predecessor to this Court, refers. This is what we also held in the case of **Gideon Hammond Millard v The People**[11], amongst many others.

The evidence in the present case, discloses that the appellant inflicted a fatal wound on the deceased in one of the most degrading manner on the person of a woman, as he was trying to inspect her vagina to confirm whether she had been with other men. In his defence the appellant did not attribute his actions to drunkenness but tried to argue that he was provoked. That argument was, however, discredited by the prosecution when they pointed out that the appellant had said he found the deceased asleep. It was only later in the evidence, which was treated as discredited, that the appellant claimed she had been with another man when he found her.

This case is but one of the many gender based domestic violence cases which are now becoming common place in our communities, where the man feels justified in inflicting harm on his spouse on trivialities such as mere suspicion, claiming that he had been provoked. One of the explanations given by the appellant in the present appeal, was that he wanted to check the vagina to confirm whether his wife had been with another man! We are constrained to comment on such conduct, save to re-iterate the observation that, this is one of the most demeaning exercise on the

person of a woman and her 'bodily integrity.' Evidence on the record shows this was not the first time that the couple were having a physical confrontation as testified by PW2 and PW3, but the evidence is also clear that this time proved to be one too many and fatal. It was something which the appellant obviously did not anticipate, if his evidence in defence as set out earlier in the judgment, is anything to go by, where he kept changing his story on what caused the bleeding.

In the South African case of **The State v Godfrey Baloi & Others**[12], Sachs J, as he then was, stated as follows regarding domestic violence:

> **"All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished".**

We could not agree more with that observation the substance of which was echoed in yet another South African case, **Mudau v The State**[13] where the Supreme Court of Appeal said that:

> **"Domestic violence has become a scourge in our society and should**

not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. <u>This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity"</u>. (Underlining for emphasis supplied)

There is no doubt that the 'ripple effect' of domestic violence is indeed far reaching in that, where it results in death, children of the couple, if any, are left without parents as one is dead while the other is incarcerated. As courts, our role is not only to deal with the perpetrators of such violence, whether male or female but to also discourage those who are inclined to so act, by sounding to them an advance warning of our indignation to this scourge, expressed through befitting punishments. To this end, when considering an appeal against sentence, in **Kenneth Mtonga and Victor Kaonga v The People**[14] we made the following observation:

> **".....we note that the learned trial judge ... considered that it was important to impose a sentence .... which would deter persons who may be tempted like the accused person to commit such offences."**

Those observations stand true in the present appeal. There is need here, to alert would be offenders that domestic violence in

all its forms will not be tolerated and the courts will not spare persons who will involve themselves in committing such offences with light sentences. Having considered the gruesome and degrading manner in which the appellant killed his wife, the deceased, we have also taken into account that the evidence on record does not disclose any extenuating circumstances. In the event, the sentence of death which our law provides as the penalty for murder, does not come to us with a sense of shock and we uphold it.

The appeal against sentence is hereby dismissed for being one totally devoid of any merit.

Appeal dismissed.

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M. MUSONDA
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE