

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL NO. 38/2018**

**HOLDEN AT LUSAKA**

(Criminal Jurisdiction)

BETWEEN:

**AMADI PHIRI**

AND

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: CHISANGA JP, MAKUNGU, KONDOLO SC, JJA**

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

*For the Respondent : Mr. P. Mutale, Deputy Chief State Advocate- National  
Prosecution Authority*

*On 26<sup>th</sup> June, 2018 and ..... November, 2018*

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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. Solomon Chilimba v The People (1971) Z.R. 36**
- 2. Benai Silungwe v the People (2008) 1 Z.R. 123**
- 3. John Musonda Mwanamwenge v the People (2012) Z.R. 1**
- 4. Whiteson Simusokwe v The People (2002) Z.R. 63**
- 5. Beatrice Mwala Hagwende and 3 others v the People Selected  
Judgment No. 13 of 2016**

**6. Alubisho v The People (1976) Z.R. 11**

**7. Jack Chanda and Kennedy Chanda v The People SCZ 29 of 2002**

LEGISLATION REFERRED TO:

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

The Appellant was charged and convicted of Murder contrary to **Section 200 of the Penal Code.**

On the fateful morning of 19<sup>th</sup> March, 2016, the deceased, Justina Banda, was gruesomely stabbed by her husband, the Appellant herein. Her neighbour, PW1 witnessed the horrific attack in which the Appellant stabbed his defenseless wife, with a knife, over and over again and she fell on her baby who was covered in blood. After the attack, the Appellant put the knife in his pocket and entered his house. PW1 then took the child from underneath the mother and ran to call for help whereupon the deceased was taken to hospital where she was admitted for about a month.

After being discharged, the deceased couldn't walk and was bedridden and developed bedsores which became septic. She was taken back to the hospital where she was diagnosed with septicemia due to the infected bedsores and she later died.

The Accused's evidence was inclined to the defence of provocation. According to him, his wife was a habitual adulterer and, on that morning, he found her in the act in some fields and she ran away. He went home and when the deceased came he confronted her about the adultery, she retorted that she was at liberty to use her body as she pleased. In that fleeting moment, the Accused lapsed into an uncontrollable rage and took a knife from his pocket and stabbed her with it. Realising what had transpired and out of fear, he bolted.

The lower Court found the Appellant guilty of murder because the chain of causation was not broken as the bedsores were the result of the deceased being bedridden due to the stab wounds sustained which resulted in injuries that confined her to her bed. In his Ruling<sup>1</sup> on sentence, the trial court accepted that the Appellant had been provoked and applied the principle that a failed defence of provocation is an extenuating factor which excuses a convicted murderer from the death penalty. However, after considering the brutal manner in which the deceased was killed, the Court sentenced the Appellant to life imprisonment with hard labour.

The Appellant, displeased with the Judgment of the lower Court, put forward only one ground of appeal, that the lower Court erred in law and fact because

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<sup>1</sup> Record of Appeal, page 88

despite finding the existence of extenuating circumstances and considering he was a first offender, the Court imposed the maximum sentence of life imprisonment.

When the appeal was heard, both Counsel relied on their written submissions. Counsel for the Appellant accepted that the Appellant contributed to the death of the deceased but contended that after analyzing the evidence and submissions before it, the trial Court ought to have weighed both the mitigatory and aggravating circumstances in order to arrive at a just sentence. It was argued that a conviction for murder with extenuating circumstances attracted a maximum sentence of life in jail and the sentence of life imprisonment meted out to the Appellant is severe and does not reflect the leniency due to a first offender.

Learned Counsel for the Appellant called in aid the case of **Solomon Chilimba v The People** <sup>(1)</sup> in which it was held that unless a case presents extraordinary features which aggravate the seriousness of the offence, a first offender ought to receive a minimum sentence. We were urged to interfere with the sentence on the basis that it was severe and ought to come with a sense of shock and warranted being set aside and in its place a more reasonable sentence be imposed.



In response to the Appellant's arguments, the State, being alive to the holding in the **Solomon Chilimba case** and the provisions of **Section 201 of the Penal Code**, submitted that the offence of murder does not provide for a minimum sentence. It was further submitted that no leniency could be extended to the Appellant because circumstances of the case were aggravated by the sheer brutality with which the Appellant stabbed the deceased. The State opined that there was no principle of law that protects a first offender from life imprisonment where the gravity of the offence and the circumstances in which it's committed, call for it.

We are grateful to Counsel for their submissions and note that this appeal is not against conviction but against sentence only.

We have considered the Appellant's argument that he is entitled to leniency but we are also cognizant of the fact that the lower Court considered the circumstances of the case and commented on the brutal manner of the murder. We agree that save for aggravating or other special circumstances, a first offender is entitled to leniency. The principles of sentencing are firmly established in numerous cases including **Benai Silungwe v The People** <sup>(2)</sup> and **Chilimba v The People**.

The Appellant was convicted of murder with extenuating circumstances on the basis of his failed defence of provocation. A conviction with extenuating circumstances presupposes leniency because in the case of murder the sentence, which should have been death is reduced to any sentence other than death. **Section 201 (1) (b)** of the Penal Code reads as follows;

***201. (1) Any person convicted of murder shall be sentenced-***

***(a) to death; or***

***(b) where there are extenuating circumstances, to any sentence other than death:***

***Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under section two hundred and ninety-four.***

***(2) For the purpose of this section-***

***(a) an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt;***

***(b) in deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a***

*class of the community to which the convicted person belongs.*

An extenuating circumstance was defined in the case of **John Musonda Mwanamwenge v the People** <sup>(3)</sup> as follows:

*"The mitigating circumstance or fact or situation does not justify or excuse a wrong act or offence but reduces the degree of culpability and this may reduce the damage (in case of a civil case) or the punishment (in a criminal case) the fact or situation does not bear on the question of the defendant's guilt but is considered by the court in imposing punishment and especially in lessening severity of the sentence."*

The law on a failed defence of provocation was explained in the case of **Whiteson Simusokwe v The People** <sup>(4)</sup> where the Appellant caught his lover in the act of intimacy with another man. A fight ensued and the man he found with his wife ran away and the Appellant turned onto his wife and beat her with a stick. She later died and he secretly buried her. The Appellant pleaded the defence of provocation and this is what the Supreme Court had to say;

*"...However, in reverting back to the defence of provocation, one of the elements is that the reaction of the accused person must be proportionate, with the result that any evidence of excessive force defeats the defence. It has been pointed out in*

*this particular case that according to the postmortem report far from using a stick, the appellant had inflicted serious injuries with an iron bar. That use of excessive force immediately defeated any defence of provocation so that it is not possible to reduce this case to manslaughter.*

*However, 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. In the circumstances, we quash the death sentence. We must point out that as a general rule an extenuated murder will still be treated a little bit more severely than a manslaughter case although both might carry the life sentence. From the facts of this case, a very suitable sentence to impose is one of twenty (20) years imprisonment with hard labour..."*

In the cited case the Appellant hit the deceased with a stick but in casu the Appellant launched a vicious and savage attack with a knife stabbing her several times. PW1 an eyewitness testified to the intensity of the attack on his defenseless wife and in front of his children.



The trial judge was on firm ground when he considered the aggravating circumstances of this case. Therefore, the sentence of life imprisonment does not strike us with a sense of shock and the appeal is consequently dismissed.

**Dated this                      day of November, 2018**



**F.M. CHISANGA**

**JUDGE-PRESIDENT**



**C.K. MAKUNGU**

**COURT OF APPEAL JUDGE**



**M.M. KONDOLO SC**

**COURT OF APPEAL JUDGE**