

IN THE SUPREME COURT OF ZAMBIA

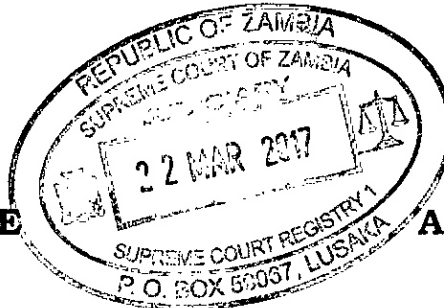
APPEAL No. 286/2014

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

VICTORIA KAMUSEMBE



APPELLANT

VS

THE PEOPLE

RESPONDENT

CORAM: Muyovwe, Kabuka, Chinyama, JJS

On 7th February, 2017 and 14th March, 2017

For the Appellant: Ms. Liswaniso, Legal Aid Counsel on behalf
of Mr. V.N. Michelo of V.N. Michelo & Partners

For the Respondent: Mr. R.L. Masempela, Deputy Chief State
Advocate, National Prosecutions Authority

J U D G M E N T

MUYOVWE, JS delivered the judgment of the court.

Cases referred to:

- 1. Shamwana and 7 Others vs. The People (1985) Z.R. 41**
- 2. Phillip Mhango vs. Dorothy Ngulube and Others (1983) Z.R. 61**
- 3. Saluwema vs. The People (1965) Z.R. 4**

The appellant was tried and convicted by the Kitwe High Court of the offence of murder contrary to Section 200 of the Penal Code. She was initially charged with Lewis Lufungulo, her cousin, who

has since withdrawn his appeal. The particulars of the offence alleged that the duo on the 24th June, 2013 at Kitwe, jointly and whilst acting together murdered the appellant's husband Abraham Chibale (hereinafter called "the deceased").

The background to this appeal is that on the material day around 18:00 hours, Joseph Muyunda Mubita found Lewis Lufungulo, the appellant and the deceased fighting. According to Joseph, the two men were using bamboo sticks to hit each other while the 2nd appellant was using a pot to hit the deceased. Joseph managed to grab the bamboo sticks from the two men, stopped the fight and proceeded on his journey. Joseph did not observe any injuries on the deceased or indeed on either of the assailants. A few days later the deceased passed away.

On 26th June, 2013 before burial of the deceased's body, the relatives among them, the deceased's brothers, decided to prepare the body for burial. The appellant informed them that she had already cleaned his body and advised that the body should straightaway be placed into the coffin. The family, however, insisted on washing the body. As they washed the body, it was

discovered that the body of the deceased had some injuries on the back and the manhood was also swollen. They confronted the appellant who explained that the deceased and Lewis Lufungulo had been involved in a fight. It was then decided to report the matter to the police which culminated in the apprehension of the appellant and Lewis Lufungulo. A postmortem examination was conducted which revealed that the cause of death was a ruptured spleen and internal bleeding. The pathologist explained that the spleen is located in the abdominal cavity and can rupture if a person is hit with a stick or a hard instrument or a kick. The appellant and Lewis Lufungulo were subsequently charged with the subject offence which they denied.

In his longwinded defence, Lewis Lufungulo who strongly denied fighting with the deceased, told the court that Joseph was the deceased's brother. According to Lewis Lufungulo, Joseph passed through the deceased's home on the material day; that he drank beer with the deceased and when he (Lewis Lufungulo) left, the deceased was in good health.

The appellant's defence was that Lewis Lufungulo and the deceased fought on the material day. In her defence she said the following:

“Around 17 hours, my husband came back home with chibuku in a 2.5 litres container and kapenta. He found Lewis and they greeted each other. They sat down together drinking and chatting. I just started cooking. Then my husband told my brother-in-law that I love you my brother-in-law but what you did when you left our house was not good. I really trust you and we have lived together for a long time. The insults which you showered my wife with, that she wanted you to be staying home to be having sex with her. He said that he was really hurt because of those insults. That’s how they started quarreling where they were seated drinking. The deceased then told A1(Lewis Lufungulo) that he had banned him from coming to our house. A1 answered him that he could not be stopped from coming to the farm when it was not even his. That’s when A1 got annoyed and kept saying you cannot chase me from this farm because it isn’t yours. They held each other as they were fighting then A1 kicked him between the manhood and the belly button. Then the deceased bent down and bowed down in pain. Then he stood up and fell at the place where I normally used to dry my plates. After that the dish stand fell apart and then A1 got a bamboo stick from there and the deceased also got a bamboo stick. So then they were fighting I was just restraining A1 from fighting my husband by telling him to leave him as he was just drunk. Then I saw Muyunda (Joseph) showed up and found them fighting Then Muyunda grabbed both sticks and that’s how he managed to stop the fight. A1 won that fight because my husband didn’t have much strength as he was drunk. It was my husband who was injured where he was whipped with a bamboo stick on the rib case right side and he complained of pain where he had been kicked. ... The fight took place on Friday, the following day my husband told me that his stomach was paining a lot, even on Sunday the complaints were the same so on Monday I had planned to take him to the clinic or hospital. But around 04.00 hours on Monday he passed away.”

In her judgment, the learned judge accepted that the deceased was the aggressor; that the fight ensued as a result of the fact that before Lewis Lufungulo left the deceased's home, he insulted the appellant; that Joseph found Lewis Lufungulo and the appellant assaulting the deceased and he separated the fight. The learned judge rejected the appellant's story that she was not a participant in the fight between her husband and Lewis Lufungulo. The learned judge found that Joseph had no motive to implicate the appellant. On the authority of **Shamwana and 7 Others vs. The People**¹ she accepted the appellant's evidence which incriminated Lewis Lufungulo, her cousin. She also accepted the State's submission that Lewis Lufungulo and the appellant acted together in assaulting the deceased. The failure by the appellant to report the fight to the police or the relatives of the deceased as well as her failure to take the deceased to the clinic, in the opinion of the learned judge, pointed to the appellant's guilt. The learned judge took the view that if the appellant was innocent, she would have voluntarily informed the deceased's relatives about the fight. Looking at the circumstances of the case, the learned judge found that malice

aforethought was established as the appellant and Lewis Lufungulo should have known that assaulting the deceased in the manner they did would grievously harm the deceased. In her view, Lewis Lufungulo and the appellant were not justified in their actions. She convicted Lewis Lufungulo and the appellant as charged.

Coming to sentence, according to the learned judge, extenuating circumstances existed in this case on the ground that Lewis Lufungulo and the deceased had been drinking and that the deceased was the aggressor. She sentenced Lewis Lufungulo and the appellant to 15 years imprisonment with hard labour.

Counsel for the appellant Mr. Michelo filed a Notice of Appeal advancing three grounds of appeal.

In grounds one and two, Counsel attacked the learned judge's finding that the appellant participated in the fight between the deceased and Lewis Lufungulo and for failing to find that the fatal blow came from Lewis Lufungulo.

In ground three, Counsel raised issue with the sentence of 15 years which in his view is excessive under the circumstances.

Mr. Michelo, filed written heads of argument, in which he combined the arguments on grounds one and two.

The gist of Counsel's argument in the first two grounds is that the trial court misdirected itself when it believed Joseph's evidence to the effect that the appellant participated in the fight leading to the death of her husband. Counsel urged us to reverse this finding of fact in line with our holding in the case of **Phillip Mhango vs. Dorothy Ngulube and Others.**² He submitted that this is in view of the fact that the quarrel leading to the fight was between the deceased and Lewis Lufungulo. Counsel argued that the circumstances support the appellant's assertion that the fatal blow came from Lewis Lufungulo. He submitted that the appellant's version of events was more plausible than Joseph's version.

In relation to ground three, Counsel argued that the sentence of 15 years is excessive for a first offender.

At the hearing of the appeal, Mr. Masempela the learned Deputy Chief State Advocate rightly conceded that the appellant's conviction could not be sustained. Mr. Masempela also conceded

cavity and cannot easily rupture unless the victim is hit by a hard object or a kick. There was further evidence from the relatives who washed the deceased's body that his manhood was swollen. It is, therefore, obvious that had the learned judge properly directed her mind to the evidence before her, she would not have concluded that the appellant acted in collusion with Lewis Lufungulo. In fact the learned judge should have given reasons for accepting part of the appellant's evidence while rejecting the other part.

In **Saluwema vs. The People**³ the court of appeal, the forerunner to this court, held that:

If the accused's case is reasonably possible although not probable, then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof.

Having considered the evidence on record, we agree with Mr. Michelo that the conviction is unsafe, as it is obvious that the prosecution did not prove its case against the appellant beyond reasonable doubt.

In passing, we must mention that during the hearing, we raised issue regarding the appropriateness of the charge of murder

preferred against the appellant and her co-accused. Mr. Masempela agreed with us that having regard to the facts of this case where death ensued from an altercation, followed by a fight between two people who were drunk, the appropriate charge should have been manslaughter. Clearly, the prosecution evidence did not establish malice aforethought and the learned judge should have been alive to this.

In conclusion, we find merit in this appeal, quash the conviction and set aside the sentence and the appellant is acquitted accordingly.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE