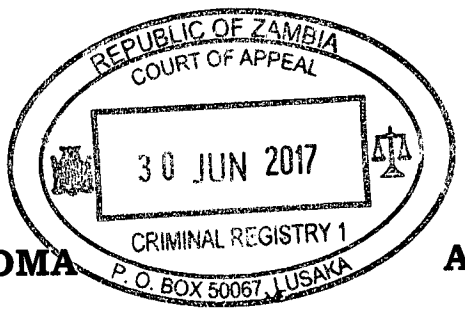
IN THE COURT OF APPEAL FOR ZAMBIA **NO. 031/2017**
HOLDEN AT LUSAKA
(Civil jurisdiction)



BETWEEN:

ANTHONY MBOLOMA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: ***C.K. Makungu, F.M. Chishimba & M.M. Kondolo S.C. J.J.A***
On 11th April and 30th June, 2017

For the Appellant: No appearance

For the Respondent: Mrs. M. Lungu Senior State Advocate – National Prosecutions Authority.

JUDGMENT

C.K. MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *R v. Shippey and Others (1980)GRIM L.R 767*
2. *Woolmington v. D.P.P (1935) AC 462 HL*
3. *The Attorney General v. Marcus Kampumba Achuime (1983) ZR 1*
4. *Gilbert Chileya v. The People (1981) Z.R 33 (SC)*
5. *The People v.Njobvu (1968) Z.R 123*
6. *Jack Chanda and Kennedy Chanda v. The People (2002) Z.R 124*
7. *Peter Yotamu Haamenda v. The People (1977) Z.R. 184 (S.C.)*
8. *Kazembe Zulu v. The People SCZ Judgment No. 29 of 2015*
9. *Kenneth Chisanga v. The People (2004) Z.R. 93*

Legislation referred to:

1. *The Penal Code Chapter 87 of the Laws of Zambia - Sections 200, 201, 204*
2. *Court of Appeal Act No. 7 of 2016 - Section 16 (5) (b)*

Other authorities cited:

1. *Jonathan Herring, Criminal Law text and materials, (2nd edition) 2006, Oxford University.*

This is an appeal against conviction and sentence. The appellant was tried and convicted of murder. The allegations levelled against him were that on the 14th day of September, 2013 at Ndola in the Ndola District of the Copperbelt Province of the Republic of Zambia, he murdered **BARBRA KOMBE**. Upon conviction, he was sentenced to 50 years imprisonment with hard Labour.

The prosecution evidence was to the effect that on 7th September, 2013 between 20:30hrs and 23:30hrs PW1, PW2 and PW3 were awakened by the cries of the deceased during a fight which ensued between her and the appellant who was her husband. These witnesses were neighbours to the appellant. PW2 then went into the house of the appellant and found the appellant standing by the bed side with the deceased's head between his thighs. The appellant was then seen hitting the deceased on her head with an empty bottle of castle larger and she started bleeding. Thereafter, the appellant left the house.

It was also in evidence that PW3 saw the appellant coming out of the house with blood on his hands. He heard the deceased shouting that she was dying. Later, the deceased was taken to her brother(PW4). When PW4 asked the deceased why she opted to come to his house instead of going to the hospital or police, she stated that she had no money. So he gave her some money. The following day, the deceased was taken to the hospital where she was treated for her wound. She eventually died at home on 14th September, 2013.

PW5 in his attempt to investigate the case, instituted a manhunt in pursuit of the appellant. On or about 19th September, 2013 he received information that the appellant was at Ndola Central Hospital Psychiatric Ward. He therefore went there and apprehended him. After interviewing him, he charged him with the offence of murder. He produced in evidence a postmortem report dated 16th September, 2013 which indicates that the cause of death was subdural hemorrhage. He also produced the broken glass from the bottle that was used on the deceased as a weapon.

The appellant's sworn evidence was that on the material date, he had come from a drinking spree and found the keys to the house at PW1's house as his wife was not home. Later that evening, around 23:00hrs, his wife came back home drunk. They then got involved in an altercation and a fight. He told the court that in the course of the fight, the deceased held his manhood and in an attempt to defend himself, he got a bottle and hit her with it.

In cross-examination, he said the issue of him getting the keys from the neighbour only came up for the first time during trial. Further that, it was impossible for a person whose head was being held between the legs to hold someone's private parts. He also said that on the material date, after the fight, he went straight to his sister's house instead of the hospital. He further stated that hitting someone with a bottle on the head would cause very serious injury to that person or death.

The appeal is based on four grounds and they are as follows:

1. *The learned trial Judge erred in law and in fact when he held that the appellant was guilty of murder when there was conflicting evidence from the prosecution witnesses.*
2. *The learned trial judge erred in law and in fact when he held that the appellant was guilty of murder when there was a dereliction of duty on the part of the investigating officer.*
3. *The trial judge erred in law and in fact by holding that the appellant was guilty of murder when there was evidence of a fight.*
4. *The lower Court erred in law and in fact when it dismissed the appellant's defence of self-defence.*

At the hearing of this appeal, the appellant's advocate was absent and no reasons were advanced for his non-attendance. Notwithstanding that, we have considered his skeleton arguments filed herein on 13th April, 2017.

In support of the 1st ground of appeal, it was submitted that a perusal of the evidence on record shows that there were a lot of inconsistencies in the evidence led by PW1, PW2 and PW3. Counsel highlighted the inconsistencies to the effect that, PW1 referred to the person she called for help as **'father to Joseph'** and that this was the person that entered the house, whereas PW2 stated that he heard someone shouting **'Bashi Joyce'** meaning father to Joyce." Further that, PW2 met PW3 in the passage. He added that the evidence of PW3 was different from what actually transpired. He in this regard referred to the case of ***R v. Shippey and others*** [1]wherein Turner J. stated that:

> ***"Picking out all the 'plums' and leaving the 'duff' behind, the Judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness"***

It was on this basis, that counsel submitted that owing to the conflicting evidence from the prosecution witnesses, the conviction was not safe as doubt was created on the true account of what transpired on the material date. He went on to refer to the case of ***Woolmington v. DPP*** [2] wherein it was established that the prosecution must prove that the accused did commit the offence beyond all reasonable doubt. He stated that the prosecution had not reached this threshold owing to the inconsistencies in the evidence of PW1, PW2 and PW3.

In response to the 1st ground of appeal, Mrs. Lungu indicated that she supported the conviction. She submitted that the evidence of PW2 that he witnessed the appellant hit the deceased with a bottle while her head was in between his legs was not disputed by the appellant. She contended that any inconsistency pertaining to the names used by PW1 does not go to the root of the matter.

She further submitted that the issue of the deceased having pulled the appellant's manhood was brought up by the appellant late in the trial. The testimony of PW5 was to the effect that at no point did the appellant tell him that his manhood was pulled during the fight. Counsel argued that it was an afterthought and a fabrication by the appellant. She urged us to note that the evidence by the appellant to the effect that the deceased was not home when he arrived and that he had to get the keys from PW1 was a fabrication and an afterthought as well, because PW1 was not cross-examined on that issue.

The first point we wish to make on the issue of conflicting evidence of PW1, PW2 and PW3, is that they all gave their evidence from different positions. The post mortem report and the appellant's oral evidence to the effect that he hit his wife on the head with a bottle, supports PW2's evidence. The fact that PW2 was referred to by two different names does not change the fact that PW2 was indeed at the scene and that the appellant unlawfully assaulted the deceased with an empty bottle.

On page seven of the judgment, the learned Judge accepted the evidence of PW2 that he saw the accused holding his wife's head between his thighs when he hit her head with the bottle. His reason for this finding was that in his evidence, the accused did not dispute that he had been holding his wife's head between his thighs at the time that he hit her with a bottle. The Judge rejected the accused's story, that the deceased was holding on his private parts.

In the case of ***The Attorney General v. Marcus Kapumba Achuime***[3] the Supreme Court held that an appellate court will not interfere with findings of fact made by a trial judge unless the findings are perverse or made on the wrong interpretation of the facts.

In *casu*, we are of the view that the learned Judge's findings were properly based on the evidence before him. Mention should be made that the trial Judge was entitled on the evidence to believe or accept the evidence of DW2 that he entered the house and found the appellant with his wife's head between his legs. We therefore find no reason to interfere with these findings. The Judge was in a better position than us to decide who to believe and to make those findings because he saw the witnesses and was able to determine their demeanor. It follows that the conflict in the evidence was resolved by the judge when he believed the evidence of PW2 rather than the evidence of the accused.

Coming to the second ground of appeal, it was submitted on behalf of the appellant that the arresting officer's failure to produce in evidence the statement made to the police by the deceased was a clear dereliction of duty. He relied on the case of ***Gilbert Chileya v. The People*** [4] where the Supreme Court held as follows:

> ***"Dereliction of duty in failing to make a test which could conclusively prove one way or another the claims of the contending parties would result in a presumption, albeit a rebuttable one in favour of the applicant."***

He went on to submit that the deceased's statement would have had a material effect on the judgment.

In response, Mrs. Lungu submitted that there was no dereliction of duty on the part of the arresting officer(PW5) in failing to produce the statement that was taken from the deceased. She stated that the evidence of PW2 to the effect that he witnessed what transpired was sufficient. The statement of the deceased would have amounted to hearsay evidence. It might have been admitted in evidence merely to show that it was in fact made but not to prove the truthfulness of its contents. She stated further that there was nothing on record to show exactly when the statement was made. It would be difficult to classify the statement as *res gestea* or a dying declaration because the state the deceased was in when she made it is not known.

In determining whether there was dereliction of duty on the part of PW5, we refer to the case of ***Peter Yotamu Haamenda v. The People*** [7] wherein the Supreme Court held as follows:

> ***"Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the Investigating Agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result; in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty. (Underlining is ours for emphasis)***

In the present case, we are of the considered view that even without the evidence of the deceased, the evidence on record is sufficient to support a conviction. It was not in dispute that the appellant assaulted his wife, only the circumstances were contested. The prosecution evidence is so overwhelming so that it offsets any prejudice which might have arisen from the dereliction of duty. Therefore, the second ground lacks merit and we dismiss it.

We will deal with the third and fourth grounds of appeal together because they are interrelated.

In support of the third ground, the appellant's advocate submitted that it is trite law that where there is evidence of a fight, an accused

can only be convicted of the offence of manslaughter. Further that, the prosecution did not establish that the appellant had malice aforethought. He referred to Section 200 of the **Penal Code** [1] which reads:

> ***"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."***

He also referred to Section 204 of the same Act which states as follows:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:***
>
> ***a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;***
>
> ***(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;"***

He therefore prayed that the accused be acquitted.

In response to ground three, Mrs. Lungu contended that it was not practically possible for the deceased to pull the appellant's manhood when her head was in between his thighs. PW2 was not cross examined about that. She went on to submit that the trial Court was right in dismissing the appellant's allegation of self-defence. She concluded that the trial Court was on firm ground in both law and fact when it convicted the appellant for murder. It was her prayer that we dismiss the appeal and uphold the conviction.

As regards ground four, the appellant's advocate argued that his client acted in self-defence. He pointed out that it is doubtful whether PW2 saw the appellant with the deceased's head in between his thighs. Further that, PW1 told the Court that the accused left the house before PW2 entered and this was corroborated by the testimony of PW3. He in this regard stated that PW2 was not telling the truth.

He referred to **Jonathan Herring**, in his book **Criminal Law Texts and Materials** [1] on self-defence as follows:

> ***"1. The defendant was (or believed he was) facing an unjust threat from the victim.***
>
> ***2. The defendant used a level of force against the threat (or the threat as it was believed to be) which was reasonable in the circumstances."***

He said in similar vein, Section 17 of the ***Penal Code*** [1] provides as follows:

"Subject to any other provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person, if the means he uses and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack."

He therefore argued that the appellant hit the deceased with a bottle because she was pulling his manhood. The retaliation was justifiable under the circumstances. In conclusion, he urged us to acquit the appellant.

In response to the fourth ground, Mrs. Lungu submitted that PW1's testimony was that she did not go into the house when the deceased called her but that it was PW2 who went in the house and witnessed what transpired on the material date. In view of what PW2 saw, it is counsel's submission that by hitting the deceased on the head with the bottle, the appellant knew or ought to have known that his actions would cause serious bodily harm or indeed death.

She also referred us to the case of ***The people v. Njovu*** [5] wherein the Supreme Court held as follows:

"To establish "malice aforethought" the prosecution must prove either that the accused had an actual intention to

kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone."

In conclusion, she argued that the post mortem examination report indicates that the deceased suffered multiple serious injuries. In her opinion, it was the appellant who caused all those injuries.

It is our considered view that the appellant, whom we consider as a reasonable person, knew or foresaw that serious harm is a natural and probable consequence of hitting somebody on the head with a bottle. In cross examination he confirmed that he knew the natural consequence of that kind of assault. We therefore uphold the trial Judges finding that the appellant used unlawful means to cause the death of the deceased, with malice aforethought. The case of ***The people v. Njovu*** [5] applies.

In order for a plea of self- defence to succeed, the conditions set out in Section 17 of the Penal Code (1) must be fulfilled. The requirement that a person under attack should by all means retreat if the circumstances permit, is one of the factors to be taken into account in determining the reasonableness of any actions taken by that person at the material time. The extent of the reaction in relation to the threat is also a crucial factor.

We are of the view that it is not in every case where there is evidence of a fight that the Court will convict the accused of manslaughter and not murder. Courts decide each case on its own merits. In this case, there was evidence that a fight took place

between the appellant and the deceased. On pages six and seven of the Judgment, the trial Judge inferred from the evidence before him that the appellant arrived home late from a drinking spree on the material date. He rejected the evidence of the appellant that he arrived home earlier than his wife and that he got the house keys from PW1. The Learned Judges analysis of the evidence on these issues was correct.

The Judge was on firm ground when he found that the accused did not dispute that he had been holding his wife's head between his thighs at the time that he hit her with a bottle. The trial Judge rightly rejected the evidence that the deceased was holding onto the accused's manhood when he hit her with a bottle because PW2 was not cross examined about that and the appellant did not seek immediate medical attention for his manhood. He therefore found no justification on the ground of provocation or self-defence.

In our view, the deceased called for help because she was overpowered by the appellant. She then gave PW1 the house keys through her bedroom window. All these actions indicated clearly that she was unwilling to continue fighting. The appellant therefore had an opportunity to leave the house but he did not. The post mortem report showed that apart from the head injury which she died of, the deceased had suffered other serious injuries including liver laceration which caused blood to accumulate in the abdominal cavity. Even if we were to accept that the deceased had pulled the accused's manhood, we would not accept that under the circumstances, the accused's retaliation was proportionate to the deceased's action because it was possible for the appellant to use

his hands to repel her or cause her to let go instead of assaulting her with a bottle after having seriously injured her in other parts of the body. We are therefore satisfied that the appellant did not act in self-defence at all and there was insufficient evidence of provocation.

Although the Notice of Appeal states that this is an appeal against both conviction and sentence, neither party has made any submissions about the sentence of fifty years imprisonment with hard labour with effect from 19th September, 2013.

The defence counsel had made a mitigatory statement in the court below before sentence was passed. In his submission he raised the issue of drunkenness of the appellant. He also raised the issue of provocation due to the harsh words uttered to the appellant by the deceased. When sentencing, the Judge considered what was said in mitigation, Section 201 of the Penal Code on extenuating circumstances and the Supreme Court decisions to the effect that even a failed defence can be taken as an extenuating circumstance. In the premises, he accepted counsel's submission that the death penalty should not be imposed. He justified the sentence by stating that it was in order to discourage gender based violence.

In the case of ***Kazembe Zulu v. The People,*** [8] the Supreme Court stated as follows:

> ***"As we held in Jack Chanda case[2] and indeed on many occasions when we have been called upon to consider the issue of extenuating circumstances;***

"A failed defence of provocation, evidence of witchcraft and evidence of drinking can amount to extenuating circumstances. What we consider paramount to none is that the question of extenuating circumstances is a question of fact to be decided on the merits of each case. The finding of extenuating circumstances must be evidence-based and not based on speculation and cursory statements and claims. In our view, the test of evidence based reasonableness should never be ignored in deciding the presence or otherwise, of extenuating circumstances in the behavior of a convict as against the standard behavior of an ordinary person of the community to which he belonged."

In the present case, the appellant (Mboloma) said he was drinking from 15:00 hours to 19:00 hours. However, there was no evidence of how much beer he had consumed, whether or not he was drunk and whether the alcohol had impaired his moral responsibility. To the contrary, there is ample evidence to the effect that he was fully aware of the events of that fateful night.

In the ***Kazembe Zulu*** [8] case at page 13 of the judgment, the court held that:

"It would be absolutely unconscionable to suggest that any person who merely states that he drunk beer must be presumed to have been either drunk or adversely affected by it and therefore morally diminished in responsibility.

There is no such presumption acceptable at law. To the contrary, when a person commits an act constituting a criminal offence, the law presumes that he was of full mental capability and responsible for the consequences of such an act unless the contrary is proved."

In this case, the learned Judge made no finding as to whether the appellant was drunk or not. In light of the submissions by his counsel, it was desirable for the judge to comment specifically on that issue.

We have considered the evidence of the appellant on page 50 of the record to the effect that the deceased had insulted him by calling him a senseless fool. We are of the view that a reasonable man such as the appellant living in Kabushi compound, Ndola would find those words insulting. Under the circumstances, we cannot fault the trial judge for finding that there were extenuating circumstances including the failed defences of provocation and self defence.

In the case of ***Kenneth Chisanga v. The People*** [9] the Supreme Court held as follows:

1. ***It was not proper to enhance a sentence simply because the appellate court, had it tried the case, would have imposed a somewhat greater sentence.***
2. ***An appellate court will not interfere with a sentence as being too low, unless it is of the opinion that it is totally***

inadequate to meet the circumstances of the particular offence.

3. ***Where a court has imposed a sentence within its power, it cannot be said to be wrong in principle.***

These principles are also laid down in Section 16 (5) (b) of the Court of Appeal Act of 2016 which provides:

> ***"The court may, on appeal, whether against conviction or sentence, increase or reduce the sentence, impose such other sentence or make such other order as the trial court could have imposed or made, except that -***
>
> ***(b) the court shall not interfere with a sentence just because if it were a trial court it would have imposed a different sentence, unless the sentence is wrong in principle or comes to the court with a sense of shock."***

Having carefully reflected on the aforementioned principles of sentencing, we are of the opinion that the sentence imposed on the appellant in the case before us is not too low to meet the circumstances of the case. The sentence is not wrong in principle and does not come to us with a sense of shock. It is therefore upheld.

For the foregoing reasons the appeal has no merit and it is dismissed forthwith.

Dated at Lusaka this 30th day of June, 2017

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE