**IN THE SUPREME COURT FOR ZAMBIA** **Appeal No. 31/2016**

**HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

**BETWEEN:**




**PENIAS MWANZA** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

**Coram: Muyovwe, Malila and Kabuka, JJS**
**on the 4th October, 2016 and 7th March, 2017**

For the Appellant: Mr. K. Muzenga, Deputy Director Legal Aid Board with Mr. W.S. Mundia Legal Aid Counsel and Mrs. M.K. Liswaniso, Legal Aid Counsel

For the Respondent: Mrs. R. Khuzwayo, 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. **Joe Banda vs. The People Appeal No. 183 of 2013**
2. **Tony Manganda Kawimbe vs. The People (1982) Z.R. 32**
3. **Gideon Hammond Millard vs. The People (1998) Z.R. 52**
4. **Mbaye vs. The People (1975) Z.R. 74**
5. **Charles Safeli vs. The People Appeal No. 206/2012**
6. **Joseph Mutaba Tobo vs. The People (1990 - 1992) Z.R. 140**

**Legislation referred to:**

1. **The Constitution of Zambia, Cap 1 of the Laws of Zambia**
2. **The Supreme Court Act, Cap 25 of the Laws of Zambia**
3. **The Penal Code, Cap 87 of the Laws of Zambia**
4. **The Criminal Procedure Code, Cap 88 of the Laws of Zambia**

**Materials referred to:**

1. **Concise Colour Medical Dictionary, Oxford University Press, 1994, New York.**

The appellant was convicted of the offence of murder contrary to Section 200 of the Penal Code Cap 87 of the Laws of Zambia. It was alleged that on 23rd November, 2009 at Chipata in the Eastern Province of the Republic of Zambia, he murdered his wife Suzan Mulenga Mwale (hereinafter referred to as 'the deceased').

The background to this case is that on 23rd November, 2009 Florence Kaunda, a neighbour to the deceased, was at her home when the deceased ran into her house with the appellant in hot pursuit. The deceased ran straight into Florence's bedroom and the appellant requested Florence to get her out from there but she refused to do so. According to Florence, the appellant told her that he had found the evidence which he had been looking for in the directory

of the phone, which had been given to the deceased by a man friend. The appellant thereafter left Florence's house only to return shortly, armed with a knife and when Florence tried to advise him to go and deal with his matrimonial problems in his own home, he threatened to kill her and she ran out to call for help from the deceased's brother, Wilson. At some point, the appellant and the deceased came out of the house both covered in blood but then the appellant again charged at the deceased with a brick and they both went back inside Florence's house. This time, the appellant locked the door. The appellant later emerged from the house with his clothes and hands soaked in blood and proceeded to his house where he washed off the blood and changed into some fresh clothing. He informed Wilson, his brother-in-law that he had killed his sister after which the appellant then left the premises and his whereabouts were unknown.

The deceased's lifeless body was found in a pool of blood sprawled on the floor of Florence's house and the matter was reported to the police. On 4th December, 2009 the appellant surrendered himself at Chipata Police Station. He was later charged with the subject offence which he denied.

The appellant was found with a case to answer. At that stage, Counsel for the appellant applied under **Section 17 (1) of the Criminal Procedure Code** that the appellant be medically examined to ascertain his mental condition at the time of commission of the offence. The learned trial judge dismissed the application on the ground that there was nothing that had occurred during trial to compel the court to invoke the section.

Further, learned Counsel indicated to the trial court that they intended to call a medical doctor but the same did not materialise.

In his defence, the appellant, a driver with Kavulamungu Transport in Chipata, stated that a friend of his informed him that he had seen his wife having a drink with a man who worked for Zamtel. The appellant then went home and told his wife to prepare so that they could travel to her village and an argument ensued. According to the appellant, he has been an epileptic patient since 2007 after a motor vehicle accident and due to the illness, he could not recollect what happened. He stated that he only found himself at Luangwa where he phoned his brother in Lusaka who informed him that he had received information that he (the appellant) had killed his wife.

On the advice of his brother, he travelled to Lusaka where he stayed for sometime while his condition was being monitored. The appellant then returned to Chipata where he surrendered himself at Chipata Police Station.

It was the appellant's evidence that his medication for epilepsy ran out on 22nd November, 2009. The appellant who admitted that he killed his wife denied that he was insane but stated that he could not recall what happened or how he got to Luangwa.

After analysing the evidence, the learned judge rejected the defence of insanity under **Section 167 (1) of the Criminal Procedure Code.** The learned judge found that although the appellant was an epileptic patient, there was no suggestion that he was insane by reason of this condition. Further, the learned judge found that the documents produced by the defence to show the appellant's epileptic condition were dated between 9th and 11th October, 2009 and did not reveal the appellant's state of mind on the 23rd November, 2009 the day the offence was committed. There was also no evidence that the appellant was prone to black outs and violent episodes in the past due to his epileptic condition.

The learned judge found that the appellant had failed to prove that he was insane at the time of the commission of the offence. This was because he was able to tell the police what happened, where it happened, the weapon used and that he gave evidence in court freely and in a composed manner. The learned judge took the view that the defence of insanity could not succeed in the face of evidence presented by the prosecution which clearly established malice aforethought as the appellant ought to have known that such a brutal attack on the deceased would result in her death. The learned judge concluded that the prosecution had proved their case beyond reasonable doubt and found the appellant guilty as charged and convicted him accordingly.

In this court, the appellant has advanced two grounds of appeal couched in the following terms.

1. **That the learned trial Judge misdirected himself in law and in fact when he dismissed the application made by the defence for the medical examination of the accused at the start of the defence.**

2. **That the learned trial Judge erred in law when he failed to consider suspicion of infidelity and the epilepsy of the accused as extenuating circumstances.**

At the hearing of the appeal, Mr. Muzenga filed the appellant's heads of argument which he relied on.

In arguing ground one, Counsel for the appellant submitted that **Section 17 of the Criminal Procedure Code** gives discretion to the court at any stage of the proceedings to allow an application for an accused person to be medically examined whether it is at trial or defence stage. Counsel submitted that in this case, the application was made at the commencement of the appellant's defence in order to ascertain his state of mind at the time of commission of the offence as well as whether he was fit to stand trial, take plea and follow the proceedings in court.

It was contended that there is no legal requirement that the application to have the accused person medically examined be made at the commencement of trial. That in this particular case, looking at the circumstances of the case and the gruesome manner in which the murder occurred, this should have warranted the court to have the appellant medically examined in order to ascertain his state of mind in the interest of justice.

Counsel argued that the refusal by the court to allow the appellant to be medically examined before rendering his defence denied him of a fair trial which is his constitutional right under **Article 28 of the Constitution of Zambia**.

In ground two, Mr. Muzenga raised two issues which he urged us to consider as extenuating circumstances. The first is the fact that the appellant was an epileptic patient whose medication had run out at the time this offence was committed and this fact, according to Mr. Muzenga was not challenged by the prosecution. He contended that the learned judge should have considered the appellant's epileptic condition as an extenuating circumstance in terms of Section 201 of the Penal Code. Counsel also sought solace in the case of **Joe Banda vs. The People**[1] where we stated that:

> **"The accused person is entitled to bring up any issue relevant to his defence. And in our considered view, the appropriate time to do so is when it is his turn to give evidence in his defence."**

It was contended that looking at the brutal and savage manner in which the murder was committed raises issues of the appellant's state of mind at the time of the commission of the offence. Counsel

strongly argued that the appellant's epileptic condition had the ability to morally diminish his guilt in view of the fact that he could not remember what transpired on the material day.

Secondly, it was submitted that the record clearly shows suspicions of infidelity by the deceased which were confirmed by the appellant in a directory of the phone which the deceased was given by a man.

In summing up the two grounds, Counsel submitted that the appellant was not accorded a free and fair trial as a result of the refusal by the court below to grant the application to have him medically examined. And that as a consequence, there was a miscarriage of justice as the appellant did not have the opportunity to defend himself fully.

We were urged to allow the appeal and find that extenuating circumstances exist, set aside the sentence of death and in its place impose a befitting sentence.

In his brief augmentation, Mr. Muzenga conceded that the defence of insanity should have been advanced from inception adding

that this was a case of extreme negligence by Counsel for the appellant in the lower court. Nevertheless, Mr. Muzenga argued that it was not too late in the day to make the application and that being the case, the learned judge should have granted the application at that stage. Mr. Muzenga took the view that the appellant did not have a fair trial following the refusal by the trial court to allow him to be medically examined.

Further, Mr. Muzenga agreed that epilepsy is not a form of insanity but argued that the appellant exhibited strange behaviour. Mr. Muzenga's argument is that although after the attack the appellant appears to have come to his senses, had the court allowed the application for him to be medically examined, the appellant's status would have been clear.

Mr. Muzenga also argued that the evidence of infidelity on the part of the deceased should not be ignored. It was pointed out that witnesses did allude to the fact that the appellant said he had found evidence of infidelity. He urged us to closely examine the evidence and put to bed the gaps left by the defence Counsel in the court below.

On behalf of the State, Mrs. Kuzwayo filed heads of argument which she relied on. She referred us to the case of **Tony Manganda Kawimbe vs. The People**[2] where we stated as follows:

> (1) **The onus of establishing unsoundness of mind at the time of commission of the offence is on the accused.**
>
> (2) **Sufficient medical or scientific evidence supporting the defence that the accused was mentally incapacitated is required to displace the presumption of mental capacity. The accused's bald word cannot suffice.**

Mrs. Kuzwayo submitted that the appellant could have benefited from Section 160 of the Criminal Procedure Code (CPC) had his Counsel made an application under the said section to have him medically examined on his fitness to stand trial. She contended that had an application been made pursuant to Section 160 of the CPC, the trial court would have been obliged to order that the appellant be medically examined. Counsel submitted that because the application was not made pursuant to Section 160 of the CPC, the appellant could not benefit from the provisions of the said section. With regard to **Section 17 (1) of the CPC** which the appellant relied on in the lower court, Mrs. Kuzwayo submitted that the section gives discretion to the trial court on whether or not to grant the application. It was

submitted that the lower court cannot be faulted for exercising its discretion especially that there is nothing on the record indicating that the appellant had developed a condition which, if examined, would resolve any matter before court. It was submitted that the trial court cannot be faulted for the incompetent manner the defence was conducted in the court below. We were referred to the case of **Gideon Hammond Millard vs. The People**[3] where the appellant in that case was represented by two legal practitioners at trial and this court expressed satisfaction that he was ably represented and rejected arguments to the contrary. In the case in *casu,* we were urged to note that two Legal Aid Counsel represented the appellant in the court below and that obviously they prosecuted the appellant's defence according to his instructions. That it was clear from the record that defence Counsel in the court below obtained instructions and were able to conduct the defence from inception of trial. It was submitted that there was no indication from any of the witnesses that the appellant was insane or had exhibited strange behaviour from time to time. It was pointed out that the appellant clearly fled the scene of crime and headed to Lusaka. He went into hiding and at an appropriate time reported himself to the police. He explained what

had happened and the learned judge was on firm ground to reject the defence of insanity. Counsel urged us to dismiss the first ground of appeal as the trial court in its Ruling properly exercised its discretion.

In the alternative, Counsel submitted that should we be inclined to allow the first ground of appeal, we should invoke the proviso under Section 15 of the Supreme Court Act and send the appellant to Chainama Hills Hospital to be held under the President's pleasure pursuant to Section 167 of the Criminal Procedure Code.

No submissions were offered on the second ground of appeal as it relates to sentence.

We have carefully considered the arguments advanced by the parties on the two grounds of appeal.

In ground one, the gist of the argument by Counsel for the appellant is that the refusal by the learned judge to grant the application to allow the appellant undergo medical examination to ascertain whether he was under an epileptic attack at the time of commission of the offence was prejudicial to the appellant resulting in

an unfair trial. In our analysis of the facts of this case, we will begin by looking at Section 160 of the CPC. Section 160 states that:

> **Where on the trial of a person charged with an offence punishable by death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability, incapable of making a proper defence, the court shall inquire into and determine such question as soon as it arises.**

On the interpretation of Section 160 of the CPC, in the case of **Mbaye vs. The People**[4] we held, inter alia, that:

> **(i) Section 160 of the Criminal Procedure Code imposes a mandatory obligation on the court not only to inquire into the question of the ability of an accused person to make a proper defence but also to determine that question as soon as it arises.**

In our recent case of **Charles Safeli vs. The People**,[5] the **Mbaye**[4] case was cited with approval on the procedure to be adopted by the trial court once an application has been made pursuant to Section 160 of the CPC.

We are mindful, however, that in the case in *casu*, the application was made pursuant to **Section 17 of the Criminal Procedure Code** which states that:

**"A court may, at any stage in a trial or inquiry, order that an accused person be medically examined for the purpose of ascertaining any matter which is or may be, in the opinion of the court, material to the proceedings before the court."**

In our view, Section 17 of the CPC gives the court discretion whether or not to refer an accused for medical examination. The discretion is exercised on the basis of evidence either from the prosecution witnesses or the court's own observations. In his Ruling the learned judge, had this to say:

**"I have considered the arguments by both Counsel. Section 17(1) which the defence has referred me to authorized me to halt proceedings and refer the accused person to be medically examined. During the life of these proceedings there is nothing that has occurred to compel me to invoke this section. The application then is accordingly dismissed."**

It is clear that the court did not observe anything unusual in the appellant's conduct; and there was therefore, no material on which to exercise its discretion in favour of referring the appellant for medical examination. The question is whether the learned judge took the correct position when he refused the application. In addressing whether the learned judge was on firm ground, it is necessary to refer to the evidence that was adduced in the court below. It is not in

dispute that the issue of the mental status of the appellant arose at the time the appellant was about to open his defence.

After the application was dismissed, the appellant proceeded to give his defence. The appellant said he was suffering from epilepsy from the time he was involved in an accident sometime in 2007 and was on treatment at the time this offence was committed. According to the appellant, all he could recall on the material day was that he had an argument with the deceased when she refused to go to the village. He said later he found himself at Luangwa and he could not recollect how he got there. We note that in his defence, the appellant sought to show that during the commission of the offence he was under an epileptic attack and that, therefore, he was not aware of what he was doing and he could not recall what happened. Under cross-examination the appellant said the following:

**"Q. Are you admitting that you killed your wife?**

**A. Yes**

**Q. Tell the court what happened when you were killing her?**

**A. I do not remember**

**Q. When you were arrested did you not give a statement to police?**

**A. I did**

**Q. In the statement you explained exactly what happened at the time you were killing your wife?**

**A. I did**

**Q. What you said to the police as circumstances leading to the death were the same as what the witness said?**

**A. There may be differences as I was told on issues of my illness I would explain at court.**

**Q. You told the police the weapon used; where the killing took place at your neighbour's house, even the reason for your act?**

**A. Yes I told the police the weapon I had used to kill my wife and also the place where I killed my wife.**

**Q. Did you tell the police that after the murder you went home to change the shirt?**

**A. Yes I told them**

**Q. But today you are lying that you cannot recollect when at the time you saw police you told them?**

**A. It is not a lie but the police told me that they would rely on the statement and they beat me.**

**Q. Were the witnesses present when you were narrating to the police?**

**A. They were not there**

**Q. Therefore you gave your statement independently?**

**A. Yes**

**Q. You said you found yourself at Luangwa how did you get there?**

**A. I do not know."**

From these questions and answers, it is clear that the appellant was able to recall how he killed his wife in detail as per his statement given to the police. The memory lapse in our view was selective. Further, from the excerpt of the evidence above, we note that the appellant attributed his lack of memory to his epileptic condition.

The question is, was the appellant an epileptic patient and if he was, what effect did this have on him? We have carefully perused the medical records produced by the appellant in the court below. The medical records show that on 9th October, 2009, the appellant had convulsions, twice at 14:00 hours and at 16:00 hours which compelled him to seek treatment at the hospital and he was attended to at 18:40 hours. The appellant was admitted and the diagnosis was convulsive disorder. The doctor's notes show that the appellant was not a "known epileptic."

According to the Concise Medical Dictionary, a convulsion is an abnormal, involuntary contraction of the muscles producing contortion of the body and limbs. We take judicial notice of the fact that when a person has an epileptic attack, he experiences bouts of convulsions and basically becomes incapacitated as in the case of the appellant who was admitted after having convulsions at 14:00 and 16:00 hours in one day. A person who suffers from convulsions or epilepsy is not a mental patient or an insane person.

From the facts on record, the appellant was involved in an argument with his wife; he brutally attacked her with a knife and brick in the neighbour's house and thereafter he told the brother to the deceased that he had killed his sister. True to his word, the deceased died at the scene and was pronounced dead at the hospital. We take the view that this incident was a stand-alone incident. There was no evidence adduced by the prosecution and even the appellant that he had the propensity to exhibit such violent behaviour as a result of his alleged epileptic illness. The attempt to blame the appellant's conduct on lack of medication for epilepsy cannot hold

water because, as was stated by the learned judge, epilepsy is not a mental illness which can cause someone to attack another person in such a brutal manner. And as we have stated above, a person under a convulsive attack is in a helpless condition and incapable of attacking another let alone kill a person. It follows that there is no truth in the appellant's defence that he murdered his wife because he was under a convulsive attack which was the result of lack of medication.

Further, it is noteworthy shows that none of the witnesses were cross-examined on the mental status of the appellant at the time of the commission of the offence. In the case of **Joseph Mutaba Tobo vs. The People**[6] we had occasion to consider an appeal in which the defence of insanity was raised at defence stage. However, this case can be distinguished from the case of **Joseph Mutaba Tobo vs. The People**[6] in that during trial some of the prosecution witnesses were cross-examined on the mental status of the appellant at the time the offence was committed. In the **Joseph Mutaba Tobo**[6] case, we stated that:

**"...We also note from the record that PW2 was cross-examined at great length as to the appellant's mental state. We further note that PW3 was also questioned at some length by the Court as to the mental condition of the appellant. In our view this shows that before and during trial both the defence and the Court were anxious as to the appellant's mental condition at the time of commission of the offence."**

In that case, we faulted the learned trial Commissioner on interpretation of the medical report on the mental capacity of the appellant. In the case in *casu*, however, we are of the view that the defence of insanity was rather an afterthought and an attempt to escape the long arm of the law. And we believe the learned judge and other court players were stunned at the sudden turn of events. The position we take is that the learned judge was on firm ground when he declined the application as there was no evidence which could persuade him to send the appellant for medical examination especially after hearing the prosecution's evidence. Consequently, the appellant was not prejudiced. Ground one fails.

Coming to ground two, part of the ground challenges the learned judge's failure to consider the appellant's alleged epileptic condition as an extenuating circumstance. We have already considered this

issue in ground one, where we referred to the appellant's medical records which clearly did not confirm that he was an epileptic patient. Further, we have already stated that an epileptic patient is not a mental patient or a lunatic. This issue having been adequately covered in ground one cannot succeed as an extenuating circumstance.

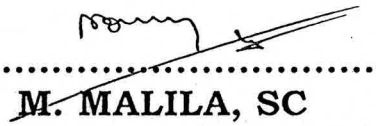
The other limb under this ground attacks the learned judge's failure to consider suspicion of infidelity as an extenuating circumstance. At sentencing stage, Counsel for the appellant in the court below informed the court that there were no extenuating circumstances and the learned judge meted out the mandatory death sentence. In this court, Counsel for the appellant has put up spirited arguments that the learned judge should have considered the issue of suspicion of infidelity as an extenuating circumstance. We take the view that mere suspicion of infidelity cannot amount to extenuation as this would be stretching the principle to unacceptable levels. We cannot fault the learned judge for the position he took. Ground two also fails.

In the circumstance we uphold the conviction, the mandatory death sentence and dismiss the appeal for lack of merit.



.....

**E.N.C. MUYOVWE**
**SUPREME COURT JUDGE**



.....

**M. MALILA, SC**
**SUPREME COURT JUDGE**



.....

**J.K. KABUKA**
**SUPREME COURT JUDGE**