

IN THE HIGH COURT FOR ZAMBIA

HJ/111/2017

HOLDEN AT CHIPATA

(Criminal Jurisdiction)

BETWEEN:



THE PEOPLE

AND

TOBIAS MWALE

**BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 25TH DAY
OF APRIL, 2018.**

APPEARANCES

FOR THE PEOPLE: MRS. A.N. SITALI, DEPUTY CHIEF STATE ADVOCATE,
APPEARING MR. M. LIBAKENI ACTING SENIOR STATE
ADVOCATE OF NATIONAL PROSECUTIONS
AUTHORITY.

FOR THE ACCUSED: MR. J. PHIRI, SENIOR LEGAL AID COUNSEL OF LEGAL
AID BOARD.

J U D G M E N T

LEGISLATION REFERRED TO:

1. THE PENAL CODE, CHAPTER 87 OF THE LAWS OF ZAMBIA

CASES REFERRED TO

1. TEMBO V THE PEOPLE (1972) Z.R (C.A)
2. MUNKALA V THE PEOPLE (1966) Z.R 12 (C.A)
3. NYAMBE MUBUKWANU LIYUMBI V THE PEOPLE (1978) Z.R 25 (S.C)
4. NYAMBE MUBUKWANU LIYUMBI v THE PEOPLE (1978) Z.R. 25 (S.C.)
5. MAKOMELA V THE PEOPLE (1974) ZR 254
6. PHILLIPS V R (1969) 53 CR. APP. R 13
7. LEE CHUN-CHUEN V R (1963) A.C220

Tobias Mwale, the accused person, was arraigned for the offence of Murder of **Mumba Kalaba**, his spouse at Katete in the Eastern Province of the Republic of Zambia on the 16th July, 2017 contrary to *Section 200 of the Penal Code Chapter 87 of the Law of Zambia*. He pleaded not guilty.

The prosecution called nine witnesses in a bid to prove their case.

The first prosecution witness was 15 year old **Chama Kalaba**, (PW1) the deceased's young brother. His narration to the events of the fateful Sunday, 16th July, 2016, was that he had gone to church with the deceased and the children of the family. PW1 asserted that whilst at church the deceased received incessant phone calls from her husband (the accused) asking her to go back home. The witness stated that later the deceased left PW1 as well as the two children at church when the accused told her she urgently needed to get home. PW1 went on to state that they left the church for home at 12:00 hours and when they reached home they found the accused and deceased fighting in their bedroom.

PW1 recounted that he heard the accused demanding to be reimbursed the sum of K30, 000.00 forthwith which he had spent on the wife's education. The witness testified that when the deceased requested to be given more time to arrange for the reimbursement of the said money, the accused was still unyielding. PW1 said the accused was uncompromising even when his sister PW5, urged him to leave the wife alone. He further explained that their efforts to solicit for help within the

neighbourhood proved futile because most of the people had gone to church. The witness also narrated that when **Tikozenji (PW5)**, who at the time had mobility problems, asked them to access the matrimonial bedroom the accused threatened that he would stab whoever attempted to go in with a knife.

It was PW1's assertion that the accused only opened their bedroom door when **Marvis Zulu (PW2)** and two other elders from the church arrived at the scene. The witness indicated that when the door was opened he saw his sister lying on the floor and it was at that point that the accused struck her on the neck with a machete. It was PW1's evidence that upon inflicting severe injuries on the deceased, the accused attempted to escape but was quickly apprehended.

In cross-examination, PW1 confirmed that when he returned home from church he found the deceased and the accused already quarrelling. According to the witness it appeared the major issue in contention was the money that the accused wanted to be refunded. When asked whether he recalled the deceased informing the accused during the quarrel that she had found another man and wanted to leave him, PW1 responded in the negative.

Marvis Zulu of Ibex compound in Katete District was the second prosecution witness (**PW2**). Her testimony was that on 16th July, 2017 around 12:00 to 13:00 hours as she was at Reformed Church of Zambia (RCZ) her son **Moses Mwale** went to fetch her because the accused and the deceased had engaged in a scuffle.

She stated that her son also informed her that the accused had been threatening to kill the deceased with a knife. PW2 testified that she requested three elders namely; **Leonard Banda, Mr Mwale** and **Mr Chisala** to accompany her to the couple's home. The witness stated that upon reaching the deceased's house they found the deceased in her underwear lying on the floor in a pool of blood whilst the accused stood over her with a machete in his hands. The matter was then referred to the police and the accused was taken along.

Under cross-examination, PW2 said she only saw PW1 outside the house after she left the accused's bedroom. The witness indicated that she did not actually see the accused striking the deceased with the machete.

The third prosecution witness (**PW3**) was **Fanwell Chisala** a peasant farmer of Chibolya compound in Katete District. PW3 basically confirmed that he was one of the church members from RCZ who went to the home of the accused and deceased on 16th July, 2017. PW3 in his evidence equally relayed that they found the body of the deceased lying in a pool of blood in the main bedroom as the accused stood over it holding a machete in his hand. The witness recounted that after the accused left his yard he said he wanted to report himself at the police because he had killed the deceased. The accused was apprehended and taken to the police.

When cross-examined, PW3 stated that he did not know the reason why the accused killed the deceased.

Philimon Mwale a businessman/farmer of Chibolya compound in Katete District was the fourth prosecution witness (**PW4**). PW4's evidence was substantially similar to that of PW2 and PW3 as such it will not be reproduced.

The fifth prosecution witness (**PW5**) was **Tikozenji Mwale** the elder sister of the accused person. PW5 informed the Court that during the period in question she had been living with the accused and deceased as she was undergoing physiotherapy treatment in Katete. Her version of the events of 16th July, 2017 was that the accused and the deceased remained home while the children had gone to church. PW5 narrated that as she was sleeping in her bedroom she heard the accused and deceased quarrelling over messages, pictures and chats which were in the deceased's phone. According to PW5 she heard the deceased admit to dating another man in Kasama who was financially well off than the husband. The witness also stated that the deceased further expressed her intention of getting married to the other man.

She asserted that a fight erupted during which accused lamented as to why his wife wanted to leave him after what they had been through as a couple. PW5 testified that as the couple was embroiled in a scuffle which lasted about 30 minutes the children returned from church. The witness recalled that as she was unable to separate the fighting couple she sent word through PW1 and Moses for some neighbours to come to their aid. PW5 informed the Court that she learnt of her sister in law's demise

after PW2 and her other church members went to the couple's bedroom.

There were no issues raised in cross examination.

The sixth prosecution witness, (**PW6**), was **Sergeant Mutomola Mutomola** based at Katete Police Station. He testified that on 16th July, 2017 at around 13:00 hours he and other police officers went to the scene of crime after receiving a tip off from the members of the public. PW6 told the Court that he collected the body of the deceased and deposited it at St Francis Mission Hospital Mortuary pending post-mortem.

Detective Sergeant Frank Chinkelenga a scenes of crime officer based at Chipata was the seventh prosecution witness **PW7**. His evidence was basically that he was led by the accused to the scene of crime on 18th July, 2017 where he took pictures and compiled a photographic album. PW7 also indicated that he took photos of the deceased's body at St Francis Mission Hospital Mortuary. The witness produced the photographic album in Court as part of his evidence and it was marked as exhibit "**P2**"

The witness was not subjected any cross-examination.

PW8 was **Stanley Mumba Kalaba** of Mansa Resettlement Scheme the father of the deceased herein. His testimony was simply that before the post-mortem examination was conducted he identified the body of the deceased at the mortuary as that of his daughter Mumba Kalaba.

There were no issues raised in cross examination.

The final prosecution witness, (**PW9**), was **Detective Inspector Siame** of Katete Police Station. The arresting officer testified that after being assigned this matter on 17th July, 2017 he made inquiries as a result of which he charged the accused for the offence which he is now facing. PW9 told the Court that upon being warned and cautioned the accused admitted killing his wife due to a long standing marital dispute between them. The witness also stated that during the course of his investigations he obtained the two mobile phones a black Itel phone belonging to the deceased and a yellow Nokia phone for the accused and he produced them as exhibits "**P5**" and "**P6**". PW9 also produced as part of his evidence the machete, the warn and caution statement he recorded from the accused and the post-mortem report which were marked as exhibit "**P1**", "**P3**" and "**P4**" respectively.

Under cross-examination, PW9 testified that he did not go through the deceased's phone (**exhibit P5**) to ascertain the alleged pornographic content as it was password protected. The witness went on to confirm that he did not seek the services of any expert to unlock the said phone for him.

PW9 also confirmed that the accused mentioned to him that in exhibit P5 was a conjoined photo of the deceased and another man who were both half naked. The witness however refuted the accused mentioning about the messages regarding the marriage proposal exchanged between the deceased and the other man

during the recording of the warn and caution statement. When asked whether he paraphrased the accused's warn and caution statement, he responded that he did not.

In re-examination PW9 clarified that the contents of the warn and caution statement (**exhibit P3**) reflected the exact words that were uttered by the accused.

After the close of the prosecution's case I found that the state had established a *prima facie* case against the accused person and I found him with a case to answer. When put on his defence in compliance with *Section 291(2) of the Criminal Procedure Code*, the accused elected to give sworn evidence and did not call any witnesses.

The accused's account of the events leading to the accusation against him was that in the morning of 16th July, 2017 he was at home with his wife the deceased herein because they had planned to later visit his sick aunt at the hospital. He said that morning the children had gone to church. The accused explained that at some point he overheard the wife talking on the phone in their bedroom. According to the accused, the wife in her phone conversation expressed how she loved and missed the person on the line. He stated that his wife abruptly ended her conversation upon seeing the accused. The accused asserted that his wife was immediately confronted and when he checked her phone it was established that she was talking to a person named **Darlington**. The witness testified that when he further checked the communication between his wife and Darlington on

whatsApp and text messages he came across a bunch of romantic conversions and pornographic pictures which suggested that the two were engaged in an illicit affair. The accused only proceeded to show the Court one photo on the deceased phone (**exhibit P5**) where the said Darlington and his wife were in underwear in two separate photos which were edited and fused as one photo. The witness also read out some text love messages that his wife and Darlington exchanged on 14th July, 2017.

It was the accused's further evidence that after seeing the aforementioned pictures and messages he called Darlington who admitted having a relationship with the deceased. The accused went on to narrate that a fight thereupon ensued between him and the deceased. He said during the fight there was an exchange of words and punches and the deceased told him that Darlington was a better man than him. Accused stated that it was at that point he became incensed, grabbed a machete that was nearby and slashed her several times with it

He asserted that the deceased fell down and was bleeding profusely. The accused testified that PW2 and others went in the main bedroom and found the deceased lying on the floor. The witness stated that he was taken to Katete police station where he was arrested and detained.

In his further evidence the accused denied finding any love text or whatsApp love messages on the wife's phone at the time he visited her in Kasama in March, 2017, contrary to what was recorded in the warn and caution statement (exhibit P3) . He

went on to assert that he had a cordial relationship with deceased when he left Kasama.

Under cross-examination, the accused testified that the contents of the warn and caution statement did not reflect what happened because some of the words were not his. The accused affirmed that a marriage was an agreement that could be terminated by way of instituting divorce proceedings. He further informed the Court that their marriage was contracted under customary law and that the couple was duly counselled on the need for dialogue when they faced marital challenges. The accused testified that he acquired the machete in 2016 because of rampant crime in their area and kept it for self-defence. He conceded that striking a person with a machete could either cause injury or death.

When asked whether his marriage had been characterized by infidelity problems, he declined and further stated that he would not have sponsored his wife's training if that was the case.

Contrary to his assertion in his warn and caution statement, the accused disputed having noticed a change in his wife's attitude towards him during his February, 2017 visit to her. The accused insisted that he had a cordial relationship with the deceased until 16th July, 2017 when he found the love messages in her phone.

In further cross-examination the accused disowned his own statement to the police to the effect that his deceased wife told him in April, 2017 that she had lost interest in him. The accused was further referred to a text message he sent to the wife on 8th

July 2017 in which he indicated that she had shut him out for four months. He explained that the deceased had sent him out in terms of romance.

In further cross-examination the accused conceded that he had never found Darlington and his wife in bed together.

After the close of the case, only defence Counsel filed written submissions for which I am greatly indebted.

Mr J Phiri on behalf of the accused submitted that there was no doubt that the accused person killed the deceased person, but he however contended that he acted under extreme provocation.

Counsel remonstrated that almost all prosecution witnesses conceded that on the material day the accused person had a heated argument with the deceased. The deceased was killed during the said argument. Counsel also submitted that the accused suffered serious provocation which was deeply rooted in extreme betrayal.

In the case of **Tembo v The People**¹ it was held that:-

“An argument followed by a fight can amount to provocation sufficient to reduce from murder to manslaughter a fatal blow struck with a lethal weapon in the heat of such fight.”

It was further submitted that the accused suffered cumulative provocation on the material day. Mr Phiri contented that the mere discovery that his spouse was in contact with her lover was provocative. Secondly it was provocative to find a co-joined picture of semi-naked wife with a semi naked lover. Thirdly it was provocative for the accused to find messages in his wife's phone where she was agreeing to marry another man. Finally it was extremely provocative for the deceased to admit that she had another man in her life. This admission came suddenly. This was sudden provocation. The Court's attention was drawn to the case of **Munkala v The People**² where it was held that:

"For provocation to reduce murder to manslaughter, it must be 'sudden.'"

In **Nyambe Mubukwanu Liyumbi v The People**³ it was held that:-

"There are three inseparable elements to the defence of provocation-the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available."

It was pointed out that the accused person suffered extreme betrayal and shock. Therefore the mode of retaliation could not completely be said to have been excessive.

Counsel further expostulated that there was no evidence of premeditation on the part of the accused. He did not attack the

deceased immediately she visited him. Moreover their relationship was cordial on the material day. It was Counsel's further submission that the quarrel arose when the accused learnt of his wife's infidelity as she was talking with her lover on phone. Mr Phiri contended that the evidence that the accused had a difference with the deceased when he visited her in Kasama did not have a direct bearing on the events of the 16th July, 2017.

I am grateful to defence Counsel for his submission and I have taken them into consideration in arriving at my decision

I have considered the entire evidence led before me and I find that it is not in dispute that Mumba Kalaba was killed by the accused on 16th July, 2017. It is also not in dispute that prior to her demise, Mumba Kalaba was involved in an altercation with the accused who was her husband. It is common cause that a machete (**exhibit P1**) was used by the accused to almost sever his wife's head and inflict the other injuries on her body.

According to the post-mortem report which was admitted into evidence as (**exhibit P2**), the cause of Mumba Kalaba's death was severe anaemia due to the cut on the fungular vein. I find these facts to have been proved. The only issue for the determination of this Court is the defence of provocation as advanced by the learned defence counsel on behalf of the accused.

The law on provocation is to be found in *Section 205 of the Penal Code* which provides as follows:

- (1) *When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only*
- (2) *The provisions of this section shall not apply unless the court is satisfied that the act which causes death bears a reasonable relationship to the provocation.*

There is a string of cases which set out the correct approach to the defence of provocation. The cases such as **Nyambe Mubukwanu Liyumbi v The People**⁴, **Esther Mwiimbe v The People**, **Makomela v The People**⁵, **Phillips v R**⁶ and **Lee Chun-Chuen v R**⁷ all establish that provocation in law consists mainly of three inseparable elements, namely the act of provocation, the loss of self-control both actual and reasonable, and the retaliation proportionate to the provocation. All three elements must be present before the defence is available.

In the instant case, it is a matter to decide whether in fact the explanation for what the accused did was a sudden loss of self-control on his part.

It is clear that a careful scrutiny of the accused's sworn and caution statement which was admitted into evidence as exhibit "P3" revealed that the accused's relationship with the deceased was stormy; since the year 2014 the couple had a difference

which culminated into the deceased leaving the matrimonial home. In 2015 the deceased was sponsored to train as a nurse. She was deployed to work in Kasama in January, 2016. From the time the wife was deployed to work in Kasama the accused's communication with his wife was strained. When the accused visited his wife in March, 2017 to ascertain her unusual behaviour, their relationship was further subjected to excessive tension when he discovered pornographic content on her phone and established that the deceased had been communicating with another man. Between April and May, 2017 the deceased communicated her loss of interest in the accused and expressed her intentions of picking up the children from the accused in June, 2017. The deceased eventually went to Katete unannounced to collect the children on 12th July, 2017. Efforts by the accused to persuade his wife not to end the marriage for the sake of their children proved futile. The deceased remained estranged during the whole period she was in Katete. She would mostly chat on her phone and could only retire to bed at 23:00 hours. The couple finally agreed that the deceased would depart on 16th July, 2017 while the accused was to remain with their daughter Cleopatra. According to exhibit P3 the fight was triggered after the deceased's lover confirmed to the accused that he had been dating the wife. It is clear to me that the deceased was being economical with the truth when he informed the Court that the deceased told him that she had found a better man who was ready to refund him all the monies he had used to educate her.

There is no portion of the accused's statement where it is indicated that prior to the events of the afternoon in question, the deceased uttered the alleged provocative and demeaning words.

The accused's catalogue of events in exhibit "**P3**" is supported by the various communication exchanged between the couple contained in "P5" the accused's mobile phone.

I have decided to reproduce the messages that passed between the accused and the deceased from 17th May, 2017 to 10th July, 2017 for ease of reference.

Mumba - ***Its better you discuss with me. The more people you involve the more further you are drifting from me.***

17th May

Tobias - *I have tried but you have completed distance yourself. Anyway answer my questions
Have you forgiven me over getu issue.*

Mumba - **No.**

Tobias *Why*

Mumba - ***It too big for me to handle and you are not remorseful. Instead of you asking for forgiveness you are beating me and looking for faults. I have had enough.***

Tobias - *So what is your way forward with this marriage.*

Mumba - ***I do not know, when I decided I will tell you and do not rush me. Give me time and space to think***

Tobias

This time and space is up to when

Mumba

- ***When I decide, no specific time***

Tobias

Whilst waiting for your decision shall we go on separation

Mumba

- ***What does being on separation mean***

Tobias

- You had a year, did not forgive. Today you want unspecified space and time. Being on separation means you have unspecified time and space without me as husband interfering in your conduct while deciding e.g issue of exez.

Tobias

- Separation is not divorce when you are done deciding you let the other partner know the way forward

Mumba

- *Whatever it means just allow me to think.*

Tobias

- What are my expectations does and don'ts

Mumba

- *I do not know you tell me.*

Tobias

- You have all the freedom to do anything you want. You treat me as one of your exes, no commitment. You take the kids Chama, Sharon and Cleo. You only visit me upon deciding on way forward. The same terms applies to me. Is this what you want? Simplify unlimited space and time so I understand what to expect.

Tobias

- *You there?? Waiting for your response.*

Mumba

- *Just tell me what you want*

Tobias

- *My concern is you had a year thinking. No decision on way forward. Today you are not clear as to how I should treat you during your thinking. I do not want to pick fights so guide me I know my boundaries.*

Mumba

- **Later**

Tobias

Still waiting for your guidance. I have apologized for my sin. Truth is forgiveness is

not forced. What you are doing to me is punishment and revenge. All I asked is for you to be free and speak your heart if you feel you can keep me by your side let me know. We are still young to live like this. With me I still love you from my heart.

Tobias - Now that you have heard my point may I talk to bana Kaibondole.

Mumba - That is why I ask you to allow me think. Do not pressure me. If you cannot manage do what you can afford

Tobias - Any way I think I have gotten your point do not bother bana Kaibondole. Gnt

Mumba - No

18th May

Tobias - I have given you two week to think and decide up to 1st June, 2017. I will contact you then for your decision. There is no person who can have unspecified space and time. Has come to wishing you best in your thinking. Make the best decision without my interference

- Bana Lucky says she will be quitting on month end due to operation she has. Though you should know

Mumba - Thanks good night.

Tobias - Good morning my sweetheart. Missing you. Are still at the farm.

20th May

Tobias - Morning baby. Have left for Kasama.

Mumba - No.

Tobias - Evening sweetie, how was your day. I will not give up on you even if you give me the harshest treatment. My love for you is genuine, deeply grounded in my heart. You are my crush missing you your mtn is of.

Mumba - I have arrived in Kasama.

Tobias - Praise God for safe travel.

21st May

Tobias - Zambia 2 Portugal 0

Mumba - Woow

Tobias - 2 – 1 Zambia won

Mumba - Okay nice.

22nd May

Tobias - Salaries are ready. I have made our budget it has come to K3,000.

23rd May

Tobias - May I talk to you on mtn. Beep me when it is on or you can call

- Putting mtn let me call you.

Mumba - I have put in mtn

Tobias - How I wish we could rekindle our love, put all the bitterness behind and live happily married life. Our kids have bonded so well that it hates to see us doing the opposite. My love I beg you to put the bitterness away.

26th May

Tobias - Good morning sweetheart. How are you today. I have minutes in mtn put it in and beep me.

Mumba - I am responding you are not there.

Tobias - What happened? You did not excuse yourself I kept waiting for your response. Now have you eaten supper

Mumba - Yes I have.

28th May

Tobias - Evening, may I find out if you are done thinking. If so what is your decision?

Mumba - ***If I was done I would have called you thanks anyway***

Tobias - *Love should not be a burden, forgiveness should not be forced, commitment should not be imposed. Marriage is not a punishment. I will wait until first June 2017 to get your decision. All is well.*

Mumba - ***Do not do this***

Tobias - *Put mtn talk time has finished. I have minutes in mtn.*

- *It is better for me to know my fate than being treated as trash. Let me know my fate please I also got a life. You are happy allow me to be happy as well. Stop hiding in thinking just come out in the open.*

2nd June

Tobias - *Afternoon if K20 in your xapit send me I have failed to pay dstv my balance is less K108 which is the bill.*

3rd June

Tobias - *Ka talk time kapwa. Grab yourself something and eat.*

- *You do not respond to my text on whatsapp, sms, calls. You are treating me like I am not important. Communication is the engine of a long distance marriage. You are my crush, I think of you always. Stop this treatment it is weakening us both. We have come a long way. I still love you my beautiful Mumba.*

- *Uefa final just starting. Real Madrid vs Juventus what is your prediction?*

Mumba - ***Real Madrid they will win***

Tobias - *I am for Real as well 3-1 my prediction*

Mumba - ***Okay tell me the score line after 90 minutes.***

- Tobias - 3-1 we are winning.
- Sleep well my love.

6th June

- Tobias - Tell me about sex. Are you sexually in bed with me.

- Mumba - Is that even a valid question that I should answer.**

- Tobias - Why do you fill it is not a valid question

- Mumba - For five years this is when you ask that**

- Tobias - I am sensing that you do not want sex with me

- My wife are you there

- Mumba - Why? And since when did you start sensing**

- **You have not answered**

- Tobias - Actions are louder than words. But still answer my question about sex.

7th June

- Tobias - Good morning bana Cleo. How is work today
- Truth is I love you my wife and crave for you a lot. I remember those days we would chat on Zamtel 60 minutes mine and 60 minutes yours continuously. Forgiveness, intimacy, trust and commitment are pillars of any marriage. Let us do the hard work for our marriage. I am missing your love sweetheart. Forgive me let us rejuvenate our love.

8th June

- Tobias - Evening beautiful

- Mumba - Evening**

- Tobias - You will not answer my question about sex.

- Mumba - No**

Tobias - What should I do for you to be satisfied

9th June

11th June

Tobias - Tell me with all honesty, have you found another man. I am beginning to sense so. Its better then you just tell me you no longer want me and release me than threat me like this.

12th June

Tobias - Is it true that you planned what you are doing last year. Let this separation be official then. I am just not good enough for you. I am convinced this treatment I am receiving is because of new found love. You are happy without me so be it. I have finally accepted it and I want you to come this weekend we talk about Cleo. I cannot carry this load anymore.

19th June

Tobias - Honestly I had hoped to discuss with you this week so I know our way forward. I will wait for you to come but please come with a decision. I am sure you are done thinking now.

- I stand by my 2014 November decision to have you as my wife. But now it is in your hands. This treatment you giving me shows you have no more love for me. I leave it up to you I am ready for it.

Mumba - **You can decide as well.**

23rd June

Tobias - Mumba you cut a call on me. I already know that we are parting company but I expect you to still have respect for even if I am broke.

28th June

Tobias - True friends must be like two zeros (0,0)

*when you add them the answer is zero,
when you subtract them the answer is zero,
when you multiply them the answer is zero
again but when divide them the answer is
impossible! Let us stay in touch like two zero
and be impossible to divide. You still are my
love lets love each other like never before.*

8th July

Tobias

- *I have done all I can afford to show you I
love you. But you have shut me off for four
months now, tell me do you feel proud of
yourself for this treatment. Is this how you
expect us to live or there is no more us? I still
love you and want you to be my only wife till
death missing you.*

It is evident from the above correspondence retrieved from "P5" that on the fateful afternoon the accused was aware that there was no cordial relationship that existed between him and the deceased. He was also aware that their marriage was basically hanging in the balance. In view of the foregoing I find the accused's explanation in Court with regard to the events leading to his wife's death to be an afterthought aimed at misleading this Court. The said explanation by the accused is hereby disregarded

Given the tempestuous relationship the accused had with the deceased, the crucial question at issue is whether in the face of the accused's eccentricity and highly abnormal obsessional personality, as seen from the afore text messages, he can be entitled to claim sudden loss of self-control. Further can the accused be said to have a justifiable sense of being seriously wronged? I think not. This is so because the accused was the sole instigator of the troubles that rocked their marriage. The

extreme provocation he claimed to have triggered the violence was infact self-induced.

I must mention here that contrary to the picture portrayed by the accused, the tenor of the deceased's responses reproduced above clearly suggests that her disposition was that of a tolerant and collected individual.

In **R v Clinton 2012 EWCA Crim 2** it was aptly put that in cases of sexual infidelity the charge of murder can only be reduced to manslaughter where killings are based on anger if the loss of self-control was attributed to things said or done (or both) which constituted circumstances of an extremely grave character and caused the accused to have a justifiable sense of being wronged.

In the case before me the accused could not be said to have a justifiable sense of being seriously wronged as he was already aware that there was technically nothing left of their marriage as the deceased had flatly refused to forgive him, over the Gertu issue. The accused's loss of self-control was not induced by what the deceased said but rather by the accused's own jealous rage. The accused clearly resented the deceased's newly found confidence and ambition after having benefited from his sponsorship; these issues coupled with his realisation that she would have the children and move on with her new found love are in my considered opinion what triggered his rage to attack and repeatedly struck the deceased with a machete.

Pursuant *Section 205(2) of the Penal Code* I have not established any direct connection between the killing of the deceased and the alleged cumulative provocation the accused claims to have suffered.

Thus, the prosecution has discharged its burden and I have not found any reasonable explanation that can exonerate the accused. I have considered pursuant to *Section 201 of the Penal Code* whether there are extenuating circumstances present in this case, but I find that there are none.

In the circumstances I find the accused person guilty of murder contrary to *Section 200 of the Penal Code* and I convict him accordingly.

Delivered in open Court at Chipata this 25th day of *April*, 2018.



.....
M.CHANDA
JUDGE