

IN THE COURT OF APPEAL OF ZAMBIA

Appeal No. 149/2020

HOLDEN AT KABWE

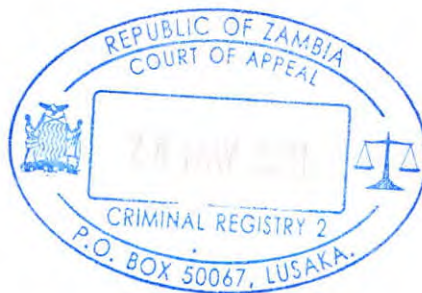
(Criminal Jurisdiction)

BETWEEN:

MARK MUSEFU

VS

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 18th May 2021 and 28th May 2021

For the Appellant : Mrs. L.T. Tindi, Legal Aid Counsel - Legal Aid Board

For the Respondent : Ms. S. Muwamba, Acting Deputy Chief State
Advocate - National Prosecution Authority

JUDGMENT

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Dorothy Mutale & Another vs The People* (1997) SJ 51 (SC)
2. *Whiteson Simukoko vs The People* (CAZ Appeal No. 36/2020)
3. *Nkhata & Others vs The Attorney General* (1966) Z.R. 124.
4. *William Muzala Chipango & Others vs The People* (1978) Z.R. 304 (S.C.)

5. *Chabala vs The People* (1976) Z.R. 14

6. *Precious Longwe vs The People* (CAZ Appeal No. 182/2017)

1.0 INTRODUCTION

1.1 The appellant, Mark Musefu, was convicted of murder contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence alleged that on 19th May, 2019 at Choma in the Choma District of the Southern Province of the Republic of Zambia, he did murder Lawrence Mizinga.

1.2 Following his conviction, he was sentenced to death by Mrs Justice C.B Maka-Phiri.

2.0 EVIDENCE OF THE COURT BELOW

2.1 The prosecution evidence was given by 9 witnesses before the trial court. The following is a summary of the prosecution evidence.

2.2 Phyllis Hanyinenda was the first prosecution witness who told the court that on 16th June, 2017 the appellant made a false complaint at the Police Station to the effect that she had stolen his e-voucher card. The police interviewed the appellant in the presence of Phyllis but it was later discovered that the card was actually in the appellant's pocket all along.

2.3 Unhappy with the appellant's conduct, Phyllis sued the former for defamation of character in the local court which ruled in

her favor. The appellant was subsequently ordered to pay Phyllis K1,700 as compensation. His appeal to the Subordinate Court was dismissed with costs.

- 2.4 Phyllis subsequently issued a notice of taxation which was assigned to the deceased to deliver to the appellant. Lawrence Mizinga (the deceased herein) was assigned by the Clerk of the Local Courts to deliver a notice of taxation to the appellant at his village. The deceased at the material time was an employee of the judiciary under the rank of Local Court messenger.
- 2.5 According to Emmanuel Musefu (PW2) the appellant's son, at the time deceased reached the village, the appellant was not home as he had gone to the field which is located nearby. Emmanuel Musefu, then led the deceased to the field but they met the appellant along the way as he was now returning home.
- 2.6 The appellant decided to use a short cut while Emmanuel Musefu and the deceased used a long route. The deceased eventually reached at the appellant's house and sat where he had earlier been offered to sit. In the meantime Emmanuel had remained behind to chat with his friend but was able to see the deceased from a distance.
- 2.7 Shortly after the deceased explained to the appellant the purpose of his visit, he rushed behind his kitchen to retrieve a

home-made non-conventional firearm which was loaded with cartridges. According to Emmanuel Musefu, he heard his father telling the deceased the following words:

"I know you are together with Phyllis doing corruption, you are trying to get my money, today I am going to kill you!"

It was then that the deceased arose from the seat explained to the appellant that he had nothing to do with the alleged issue and that he should be left alone.

- 2.8 Emmanuel ran towards his father to try and disarm him but before he reached, the latter discharge a bullet to the deceased who subsequently fell to the ground.
- 2.9 Martha Mwenda (PW9) was the arresting officer who rushed to the crime scene to retrieve the deceased's body. The body was inspected and found with a gunshot wound on the left back side.
- 2.10 PW2 was Canan Chibawe a Catholic Priest who narrated that on 22nd May, 2019 around 11.00 hours, he saw the appellant as he was driving to St. Marks Secondary School. He stopped the vehicle and asked if he could give a lift to the appellant. The appellant agreed and along the way he confessed to the priest that he was the one who shot and killed the deceased. Canan Chibawe then drove to Mapanza Police post where he handed over the appellant to the police officers.

2.11 Gilbert Mubita (PW7) was the medical doctor who conducted a post mortem examination on the deceased body on 22nd May, 2019. He gave a detailed explanation of his findings after examination. The long and short of which was that the deceased died of 'severe hemorrhagic shock' as a result of the injury to the chest. Put differently the deceased died from excessive loss of blood which rendered the heart ineffective.

2.12 In his defence, the appellant confirmed having met the deceased as he was coming from the field and later at his house. His version, however was that he expressed surprise as to why the Court documents were brought to him on a Sunday by a local court messenger instead of a magistrate court messenger. It was at this point that the deceased uttered insults to him and accused him of sleeping with his mother. He then got his firearm from behind the kitchen with the intention of scaring the deceased.

2.13 After his son saw the firearm, he rushed to him and a wrestle for the gun ensued. In the process the son pulled the trigger resulting in a shot to the deceased, who was trying to run away. When he realized that the deceased had died on the spot, he hid the firearm and left the place. He later met with Canan Chibawe two days later who escorted him to Mapaza Police Post.

3.0 FINDINGS AND DECISION OF THE COURT BELOW

3.1 After the close of the proceedings the court below found the following facts to have been established:

1. The deceased visited the appellant's house on the material day with a view to serve court documents from the Subordinate Court.
2. After the deceased explained why he was there, he was fatally shot at with a backyard firearm belonging to the appellant.
3. The deceased subsequently died on the spot as a result of a gunshot wound.

3.2 She identified the issue in contention as being whether the appellant was the one who shot and murdered the deceased. After examining the evidence, she accepted the testimony of Emmanuel Musefu as the correct and credible version when he stated that the appellant discharged the fatal shot before he reached to disarm his father. The learned Judge rejected the defence of provocation and accidental discharge suggested by the defense. The appellant was subsequently convicted and slapped with a death sentence.

4.0 GROUND OF APPEAL

4.1 Disenchanted with the judgment of the lower court, the appellant launched the present appeal on the following grounds:

“1. The learned trial court erred in law and fact when the court failed to take into account the possibility of false implication when considering the evidence of PW2 a witness with a possible interest to serve.

2. The trial court erred in law and in fact when the court neglected to take into account the failed defence of provocation as an extenuating circumstance.”

5.0 APPELLANT’S ARGUMENTS

5.1 Pertaining to ground one Mrs. Tindi on behalf of the appellant submitted that Emmanuel, having been the only eye witness to the events that led to the death of the deceased and having struggled with the appellant for the gun, is a witness with a possible interest of his own to serve. Counsel vehemently argued that it is therefore difficult to tell who exactly fired the gunshot that killed the deceased. The case of ***Dorothy Mutale & Another vs The People***¹ was called in aid for the proposition that where several inferences are possible, the court should adopt the one that is favourable to the accused. It was contended that Emmanuel tailored his evidence to suit himself and save his own skin.

5.2 In relation to ground two Mrs. Tindi submitted that the appellant in his testimony narrated that the deceased hurled insults at him hence his resorting to getting the firearm to scare him. That this was a reasonable explanation that should have led the trial court to find that the appellant was

provoked. She argued that although the retaliation was excessive, as a failed defence it suffices as an extenuating circumstance. We were referred to the case of **Whiteson Simukoko vs The People**² where it was held: “*that a failed defence of provocation affords extenuating circumstances*”.

5.3 It was counsel’s prayer that the appeal be allowed and the conviction and sentence be set aside.

6.0 HEARING OF THE APPEAL AND ARGUMENTS CANVASSED

6.1 On behalf of the State, Ms. Muwamba gave *viva voce* submission at the hearing of the appeal. In relation to ground one she argued that the lower court believed the evidence of Emmanuel Musefu concerning the events that took place on the material day. That the trial court found support for Emmanuel Musefu’s testimony from the admission that the appellant made to Fr. Canan Chibawe whom the appellant met after the incident. Ms. Muwamba further pointed out that the evidence of Emmanuel Musefu is supported by the evidence of the appellant running away after the shooting. She contended that these factors ruled out the fact that Emmanuel Musefu could have been a witness with a possible interest to serve.

6.2 Pertaining to ground two, Ms. Muwamba spiritedly argued that since the lower court believed the evidence of Emmanuel Musefu, the issue of provocation does not arise as the purported insults allegedly hurled at the appellant were an

afterthought. She contended that the defence of provocation was never raised at all in the court below.

6.3 On the basis of the foregoing submissions, Ms. Muwamba urged the court to dismiss the appeal and uphold the conviction and sentence of the court below.

6.4 In reply Mrs. Tindi reiterated that the appellant in his testimony indicated that he did not have the intention to kill the deceased. She beseeched the court to find the appellant guilty of murder with extenuating circumstances.

7.0 CONSIDERATION AND DECISION OF THE COURT

7.1 We have painstakingly examined the record of proceedings, the arguments by the appellant as well as the prosecution and the cases referred to in arriving at our decision.

7.2 In the first ground of appeal the appellant is greatly displeased with the trial court's alleged failure to take into account the possibility of false implication by PW1 who was a witness with a possible interest to serve.

7.3 There were two versions of how the deceased met his demise. The first version was narrated by the appellant's son, PW2. He narrated that after they had arrived at the appellant's home and whilst he was at a short distance conversing with his friend he saw his father surface from the rear of the kitchen with a firearm. According to him he overheard his father have

an altercation with the deceased, that he accused him of corruptly wanting to get money from him as he was in cahoots with PW1. It was his evidence that the appellant threatened to kill the deceased. Frightened by these utterances he went to try and dissuade his father from carrying out the threat but alas he was too late as the appellant had already put into motion his threat by discharging the firearm. Unrelenting PW2 tried to retrieve the firearm from the appellant and there was a struggle between them. PW2 was threatened with being shot if he did not retreat. It was at this juncture that PW2 retreated.

7.4 On the other hand the appellant's account of what transpired on that fateful day was that when he inquired what the deceased's involvement was in the matter the latter allegedly responded by hurling insults which incensed him. This is what triggered the appellant's not so bright idea to merely scare away the deceased by pointing a firearm. It is at this point that his son, PW2 saw him, rushed towards him and a struggle for the firearm ensued and unfortunately PW2 accidentally pulled the trigger and shot the deceased.

7.5 After a careful consideration of the two versions the trial judge rejected the appellant's side of the story and believed PW2's story that at the time he struggled with the appellant for the gun, the appellant had already shot the deceased. He went further to state that when the second shot was fired it was

when PW2 attempted to wrestle the gun from the appellant to stop him from firing another shot but was overpowered. The trial Judge found as a fact that the appellant intentionally shot at the deceased as the deceased was trying to run away from him.

- 7.6 In order to assail the findings as an appellate court we are alive to the guidance given in a multitude of cases that the findings must be perverse, or not supported by the evidence. The case of ***Nkhata & Others vs The Attorney***³, among others, articulate the foregoing.
- 7.7 Having addressed our minds to the evidence, the reasoning of the trial judge in the judgment sought to be impugned and the law regarding reversing the decision we see no basis upon which we can uphold the 1st ground of appeal. This is notwithstanding the fact fact that indeed PW2 being a witness with a possible interest to serve.
- 7.8 There are a chain of authorities on the need for the trier of fact to be cautious when dealing with the evidence of a witness with an interest of his own to serve. It has been argued that PW2 fell into this category and “*tailored his testimony to suit himself and save his own skin.*”
- 7.9 The case of ***William Muzala Chipango & Others vs The People***⁴ has been called in aid where it was pointed that:

“Where the prosecution puts a witness forward as one who at the very least has an interest to exculpate himself the court cannot decline to treat him as such without some very positive reasons. Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once a witness may be an accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded.”

7.10 In our viewpoint the lower court scrutinized the totality of the evidence on record and went on to state that:

“Between PW2 and the accused, I find PW2 to be a more credible witness with no motive whatsoever to falsely implicate the accused.”

7.11 She spurned the contention that PW2 was a witness with an interest of his own to serve. Further, that she was of the view that the appellant had a high propensity to lie and accordingly found his defence to be an afterthought.

7.12 In light of what we have stated in the preceding paragraphs it is therefore inaccurate to state that the court did not consider the possibility of false implication by PW2, being a witness with a possible interest to serve.

7.13 In our eyes, she was on firm ground when she rejected the tissue of lies as presented by the appellant and accepted as the true version of events as narrated by PW2. The court eloquently explained why she discounted the evidence of the appellant.

7.14 We therefore find no merit in the 1st ground of appeal and dismiss it.

7.15 Turning to the 2nd ground of appeal, the appellant is unhappy with the fact that the trial court concluded that there was no failed defence of provocation that could be an extenuating circumstance.

7.16 According to Counsel for the appellant the deceased provoked the appellant by unleashing insults on the appellant, who in turn reacted by getting a gun to scare him which gun fired accidentally and killed the deceased. Significantly that the explanation advanced was a reasonable one but was rejected by the court below. Counsel has placed great store on the case of ***Chabala vs The People***⁵ where in relation to tendering a reasonable explanation it was observed that:

“If explanation is given, because guilt is a matter of inference, there cannot be conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say that the accused must give satisfactory explanation. There is no

onus on an accused to prove his explanation. The court is required to consider whether the explanation might reasonably be true."

7.17 As far as we are concerned the court below addressed its mind to our holding in ***Precious Longwe vs The People***⁶ where we said:

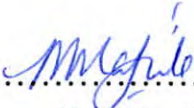
"A failed defence of provocation becomes an extenuating circumstance in cases where there is a provocative act and loss of self-control but the retaliation is not proportionate to the provocation."


7.18 Guided by our holding she went on to find that there were no provocative acts that could have propelled the convict to act in the manner he did. The trial Judge dismissed the purported insults and was of the view that there were his own creation in a desperate attempt to escape liability and punishment. It was on that basis that she found there was no failed defence of provocation that could have amounted to extenuation. In ***Whiteson Simusokwe vs The People***² it was held that *"a failed defence of provocation affords extenuation for a charge of murder."* We wish to add that it is not in every circumstance. Each one must be decided on its own merits. One ought to take to take into consideration the totality of the evidence on the record before considering whether the defence is available. In this case the court considered the explanation which she considered was a fabrication and dismissed it. Our stand

point is that she cannot be faulted for her rejection of the appellant's explanation. We find ground two to be bereft of merit for the reasons advanced and dismiss it forthwith.

7.19 All in all, we find no merit in both grounds of appeal and dismiss them. The conviction and death penalty imposed by the court below is upheld.


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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT


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B. M. Majula
COURT OF APPEAL JUDGE


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K. Muzenga
COURT OF APPEAL JUDGE