

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA  
(Appellate Jurisdiction)

CAZ APPEAL 129/2020

BETWEEN:

GEORGE MAMBWE SAKALA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba and Sichinga, JJA

On 24<sup>th</sup> March 2021 and 26<sup>th</sup> August 2021

For the Appellant: M. Kapukutula, Legal Aid Counsel, Legal  
Aid Board

For the Respondent: M. Kapambwe-Chitundu, Deputy Chief State  
Advocate, National Prosecution Authority

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## J U D G M E N T

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Mchenga DJP, delivered the judgment of the court.

**CASES REFERRED TO:**

1. Joseph Mulenga v The People, SCZ Appeal No. 128 of 2017
2. Shawaz Fawaz and Prosper Chelelwa v The People [1995-1997] Z.R. 3
3. Jack Chanda v The People [2002] Z.R. 124
4. Precious Longwe v The People CAZ Appeal No.182/2017

**LEGISLATION REFERRED TO:**

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Court of Appeal Act No. of 2016

**WORKS REFERRED TO:**

1.Blackstone's Criminal Practice, 2017, Oxford University Press

**1. INTRODUCTION**

1.1.The appellant, appeared before the High Court (Mwikisa, J.), sitting at Chipata, on a charge of murder contrary to **section 200 of The Penal Code**. The allegation was that on 29<sup>th</sup> April 2019, he murdered Dailess Banda.

1.2.He denied the charge and the matter proceeded to trial. At the end of the trial, he was found guilty of committing the offence and condemned to suffer capital punishment.

1.3.He has now appealed against both the conviction and the sentence imposed on him.

**2. CASE BEFORE THE TRIAL COURT**

2.1.The evidence before the trial judge was that on the 29<sup>th</sup> of April 2019, at around 13:00 hours, Violet Sakala and her daughter, Silvia Davis, were having lunch in their house in Msoro chiefdom, in Mambwe District.

2.2. They heard someone scream and soon thereafter, Dailess Banda came running to their house. She was holding her chest and she told them that she had been stabbed by the appellant.

2.3. When they noticed that she was bleeding, they organised transport and rushed her to St. Luke's Clinic, where she was referred to St. Francis Hospital, in Katete. She received treatment but did not survive, she died the following day on 30<sup>th</sup> April 2019.

2.4. A post-mortem examination was conducted on her body on 3<sup>rd</sup> May 2019. The pathologist observed two stab wounds on the body. One was on the left breast, while the other one was on the left side of the abdomen.

2.5. On further examination, the pathologist found that the stabbing on the left side of the abdomen, had pierced the liver and it caused her to bleed to death.

2.6. The appellant who fled soon after the stabbing, was only apprehended two weeks later.

2.7. On his apprehension, he told the police officers that on 22<sup>nd</sup> April 2019, he received information that



his wife has having an affair with one Leonard Kasonde.

2.8. On the 29<sup>th</sup> of May 2019, while they were in the kitchen at their house, he asked his wife about the affair. She denied the allegation, saying she did not know anything about it and he was free to do whatever he wanted.

2.9. That statement annoyed him and he slapped her. He also pushed her. She fell on where the plates were stacked and was stabbed by a knife that was on the stack. He then ran away out of fear.

2.10. He was to repeat the same story in court, when he testified in his defence.

2.11. The trial judge rejected the appellant's defence that his wife fell on the knife. She opined that if she had really fallen on the knife, she would not have suffered two stab wounds.

2.12. The trial judge also took the view that if the injury had been as a result of a fall, the appellant would have taken her to the hospital and not run away.

2.13. At this point, we must also mention that when Violet Sakala and Silvia Davis were testifying, counsel who

was representing the appellant was stopped from asking them what the appellant said was the reason for the altercation between him and his wife. The trial judge took the view that since the issue was not raised when both witnesses were being examined-in-chief, he could not be questioned in cross-examination.

### 3. GROUND OF APPEAL

3.1. Two grounds have been advanced in support of this appeal.

3.2. The first ground of appeal is that the appellant was denied the opportunity of having a fair trial when the trial judge curtailed the cross-examination of some of the prosecution witnesses.

3.3. The second ground of appeal relates to the sentence. It is the appellant's position that he should not have been condemned to suffer capital punishment because there were extenuating circumstances.

### 4. ARGUMENTS IN SUPPORT OF THE APPEAL

4.1. In support of the first ground of appeal, Mr. Kapukutula referred to the cases of **Joseph Mulenga v**

**The People**<sup>1</sup> and **Shawaz Fawaz and Prosper Chelelwa v**

**The People**<sup>2</sup> and submitted that the trial judge's interference with the cross-examination of the two prosecution witnesses, prevented the appellant from having a fair trial.

4.2. He argued that the appellant was prejudiced by that interference because he was denied the opportunity of extracting evidence favourable to his defence.

4.3. Coming to the second ground of appeal, he referred to the case of **Jack Chanda v The People**<sup>3</sup> and submitted that the appellant should not have been condemned to suffer capital punishment because there were extenuating circumstances.

4.4. Mr. Kapukutula argued that the death of the appellant's wife was grounded on her having an extra marital affair. In the circumstances, the trial judge should have found that there were extenuating circumstances anchored on a failed defence of provocation because the appellant acted in the heat of the moment.



## 5. RESPONDENT'S ARGUMENTS

5.1. In response to the first ground of appeal, Mrs Kapambwe-Chitundu conceded that the trial judge erred when she curtailed the cross-examination of the two prosecution witnesses.

5.2. However, she argued that the appellant suffered no prejudice because he was subsequently allowed to cross-examine them, but counsel declined to do so.

5.3. As regards the second ground of appeal, Mrs. Kapambwe-Chitundu submitted that there were no extenuating circumstances in this case.

5.4. She argued that none of the ingredients of the defence of provocation, as it is set out in **section 206(1) of the Penal Code**, were proved. That being the case, it cannot be said that there was a failed defence of provocation that amounted to extenuating circumstances.

## 6. CONSIDERATION OF APPEAL AND COURT'S DECISION

6.1. We will first deal with the first ground of appeal.

6.2. According to **Blackstone's Criminal Practice 2017**, in paragraph F7.5, the object of cross-examination is:

- (a) To elicit from the witness evidence supporting the cross-examining party's version of the facts in issue;
- (b) To weaken or cast doubt in the accuracy of the evidence given by the witness in chief; and
- (c) In appropriate circumstances, to impeach the witness's credibility.

6.3. In paragraph D16.33 of the same works, the editors have also pointed out that cross-examination can be limited by legislation. It can also be limited in exercise of the court's duty to restrain lengthy cross-examination on matters not in issue or which otherwise unnecessarily prolonging the proceedings.

6.4. In this case, the trial judge curtailed the cross-examination of the two prosecution witnesses on the ground that the issues it was intended to elicit where not raised in examination-in-chief.

6.5. In our view, that was a misdirection.

6.6. It was a misdirection because the questions counsel intended to ask related to whether the appellant explained to the witnesses what happened before his



wife was stabbed. It is apparent that the questions were intended to lay the ground for the appellant's defence that he was provoked into stabbing his wife.

6.7. However, **section 16(1) of the Court of Appeal Act** sets out the circumstances in which an appeal against conviction can be allowed. It provides the grounds as being:

- (a) **The conviction, in all the circumstances of the case, is unsafe or unsatisfactory;**
- (b) **The conviction is based on a wrong decision on a question of law; or**
- (c) **There was a material irregularity in the course of the trial.**

6.8. In addition, subsection (2) of the same provision, provides that:

**'Despite subsection(1), where the Court is of the opinion that the point raised in the appeal might be decided in favour of the appellant, the court may dismiss the appeal if it considers that no miscarriage of justice has actually occurred.'**

6.9. Following the curtailed cross-examination of Violet Sakala and Silvia Davis, another witness testified. Thereafter, the trial judge informed the parties that she had realised that she wrongly curtailed the cross-examination of the two witnesses.

6.10. She also informed counsel who was representing the appellant that she was going to allow the witnesses to be recalled so that he could cross-examine them.

6.11. Counsel declined the offer.

6.12. Counsel who was representing the appellant, having declined to have the witnesses recalled for the very cross-examination that is now being complained against, it is our view that it cannot be argued that the appellant's case was prejudiced by the judge. We find no basis on which it can now be claimed that the appellant was prejudiced when an opportunity to cross-examine the witnesses was availed.

6.13. Since no prejudice was suffered, we find that there was no miscarriage of justice because the opportunity to cross-examine was availed but not taken up.

6.14. Consequently, the first ground of appeal, which is the appeal against conviction, must fail and we dismiss it.

6.15. Coming to the second ground of appeal, which is against the sentence, in the case of **Preciuos Longwe**

**v The People<sup>4</sup>**, we held that there is a failed defence of provocation where:

**'... there is an act of provocation and loss of self-control, but the retaliation is not proportionate to the provocation. Where the trial court finds that there was no provocation, there can be no extenuation as a result of a failed defence of provocation.'**

6.16. In this case, the appellant's position from the time of his apprehension and in court, was that his wife fell on the knife when he slapped and pushed her. That evidence pointed at a possible defence of accident and not provocation.

6.17. However, that account of how Dailess Banda was stabbed was rejected by the trial judge. In the face of evidence that she suffered two stabs, it is our view that the trial judge was entitled to take that position.

6.18. Since the appellant denied having stabbed his wife, can it be said that he stabbed her in a feat of rage after her provocative conduct? We do not think so.

6.19. It is our view that there was no credible evidence on which the trial judge could have considered the defence of provocation. This being the case, the



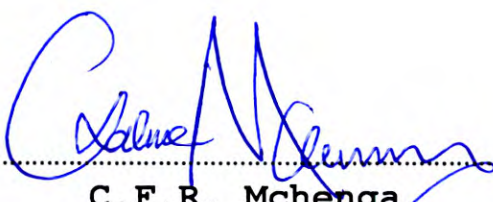
question of there being a failed defence of provocation cannot arise.


6.20. We are satisfied that there being no extenuating circumstances, capital punishment is the only sentence that the trial judge could have imposed. We find no merit in the appeal against the sentence and we dismiss it.


## 7. VERDICT

7.1. Both grounds of appeal having failed, we find no merit in this appeal and we dismiss it.

7.2. We uphold the appellant's conviction for the offence of murder and the capital sentence imposed on him.

  
C.F.R. Mchenga  
DEPUTY JUDGE PRESIDENT

  
F.M. Chishimba  
COURT OF APPEAL JUDGE

  
D.L.Y. Sichinga  
COURT OF APPEAL JUDGE