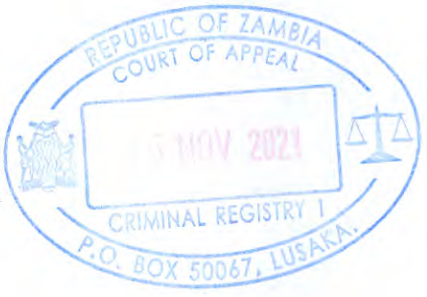
IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 222/2020
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

HUSSENI MUYAMBO **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

CORAM: Kondolo, SC, Banda-Bobo and Muzenga JJA
On 21st September, 2021 and 16th November, 2021.

For the Appellant: Mr. H. Mweemba Acting Director & Ms. A. Banda Legal Aid Counsel – Legal Aid Board

For the Respondent: Mrs. R. Malibata-Jackson, Senior State Advocate, National Prosecution Authority

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JUDGMENT

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Kahale Kanyanga v The People – Appeal No. 145, 2011**
2. **Lundendae v The People (1983) ZR 54**
3. **Jose Antonio Gollaidi v The People – Supreme Court Appeal No. 26 of 2017**
4. **Kelvin Mayanga v The People – Appeal No. 136 of 2018**
5. **Precious Longwe v The People – Court of Appeal No. 182 of 2017**

6. **Whiteson Simusokwe v The People – Supreme Court Judgment No. 5 of 2002**
7. **Kenious Sialuzi v The People (2006) ZR 87**

Legislation referred to:

1. **The Penal Code Chapter 87 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellant was charged with one count of the offence of murder contrary to **Section 200 of the Penal Code**[1]. The particulars of the offence allege that the appellant on 12th December, 2019, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder Wesley Mubanga. He was subsequently convicted and condemned to suffer the ultimate penalty of death by the High Court presided over by Mr. Justice K. Chenda.

2.0 THE PROSECUTIONS' EVIDENCE IN THE COURT BELOW

2.1 The appellant's conviction was secured by the evidence of five prosecution witnesses. The first prosecution witness was Ernest Chisha. His testimony was to the effect that on 12th December, 2019 around 16:00 hours, the appellant had a disagreement with a person by the name of Gift. The deceased intervened and separated the two. It was his testimony that because of what the deceased did, the

appellant went to confront him on his involvement in a fight he knew nothing about. The appellant slapped the deceased and the deceased threatened to hit him with a cooking stick but the two were separated.

2.2 It was PW1's testimony that the deceased reported the appellant to some cadres in the area, who instead of assisting, offered the appellant alcohol. The appellant took a sip and went away. He told the court that the police also cautioned the two but as soon as the police went away, the appellant continued quarrelling with the deceased. It was his further testimony that the deceased told the appellant that he was not interested in quarrelling with him as he had a family to take care of. The on-lookers separated the two for the third time.

2.3 PW1 further told the trial court that as he was advising the deceased to report the matter to the police, he saw the appellant coming towards him and the deceased with a knife in his hands. The appellant went for PW1 first, but in turn, PW1 threatened him with a cooking stick. The appellant moved on to attack the deceased and stabbed him with the knife. The appellant then tried to run away but was apprehended by the on-lookers. He told the trial court that he and two others rushed the deceased to Kamwala Clinic where he was eventually pronounced dead.

2.4 In cross-examination he stated that the appellant and the deceased ruffled each other on the fateful day and that the appellant was the only person with a knife. He could not confirm that the appellant had been drinking beer throughout that day.

2.5 Abraham Phiri who testified as PW2, was the deceased's son-in-law. In his testimony he narrated to the trial court how he went to the University Teaching Hospital to identify the body of the deceased.

2.6 The evidence of PW3 was to the effect that on the fateful day around 16:00 hours, he assisted the appellant to purchase a silver knife in the shop where he worked as a shop keeper. He told the trial court that the appellant was their regular customer and on that particular day he left his change and said he would pick it up later. He positively identified the said knife and the appellant in court.

2.7 In cross-examination he told the trial court that the appellant did not mention to him the purpose of the knife he was purchasing and that he was not present at the crime scene.

2.8 PW4 a taxi driver at Kamwala Market, told the trial court that on the fateful day, around 16:00 hours he saw PW1 and Brian open the back door to his taxi saying that they needed to take the deceased to the hospital as he had a bad injury. As he was trying to understand what was going on, he saw the appellant about 4 to 5

metres away from where he was, holding a knife swinging it around shouting at a mob that had gathered around him that no one should go close to him as he would stab them. He told the court that he was able to see the wounds on the deceased's chest and that he then drove to the clinic where the deceased was later pronounced dead.

2.9 In cross-examination he told the trial court that he paid attention to the people who brought the deceased to his car and he clearly heard the appellant shouting that should anyone go close to him, he would stab them.

2.10 Detective Constable Isaac Mufaya testified as PW5. He told the trial court that while on duty on 12th December, 2019 at Kamwala Police Post, he received a report from PW4 of a stabbing. He told the trial court that members of the public apprehended the appellant and brought him to Kamwala Police Post almost contemporaneously with the report. He told the trial court that he went to Kamwala Clinic to view the body of the deceased. He saw two stab wounds on it. He visited the scene of the crime and retrieved a knife which had blood on both sides of the blades. His investigation led him to PW1 and PW3. He later attended a postmortem at UTH on 16th December,

2019, with PW2 to witness the postmortem after which he collected the postmortem report.

2.11 According to the report, the deceased sustained two stab wounds, one of which was fatal on the left side of the chest, piercing both lungs and his heart. The manner of death was stated as homicide. After interviewing the appellant, he made up his mind to arrest and charge him with the offence of murder.

2.12 In cross-examination, he stated that he took down the appellant's statement that the deceased attacked him with an iron bar. He finally stated that he picked the knife from Karachi Street, Kamwala, and that he did not investigate for finger prints on the said knife.

3.0 THE DEFENCE

3.1 In his defence, the appellant opted to give evidence on oath and did not call any witnesses. He told the trial court that he was a trader operating from Karachi Street, in Kamwala, Lusaka. He recounted the events of 12th December, 2019 to the effect that when he reached his place of business, he displayed his merchandise, after which he began drinking beer. That around 13:00 hours, he met Gift who owed him a K105.00. He told the trial court that he confronted Gift and a police officer separated them.

3.2 He further told the court that he returned to his stand where he

continued to drink beer. Later he followed Gift at his place of work in pursuit of the debt. Gift had no money and this enraged the appellant who decided to take him to the police. He told the trial court that on his way to the police, he met the deceased who intervened in the matter and Gift fled. The appellant and deceased returned to their stands which were close to each other.

3.3 It was his further testimony that, he confronted the deceased that it was senseless for him to get involved in a matter he did not understand. He told the trial court that the deceased shouted at him, called him a warthog, charged and hit him with an iron bar. It was his further testimony that after an exchange of a few insults, the two parted ways. He told the trial court that his cadre friends appeared and tried to give him beer which he refused. PW1 then appeared and reprimanded the cadres for giving him beer. It was his testimony that after this, the deceased followed him and hit him for the second time. They clobbered each other and as the deceased was trying to strike the appellant for the third time, the appellant reached for a knife from his items on his stand.

3.4 He told the trial court that he got the knife in a bid to scare the deceased and that the deceased threw away the iron bar and

reached for the knife. It was the appellant's testimony that the two wrestled for the knife and in the process they both fell down. The appellant heard people saying that he had stabbed a person and should be burnt.

3.5 He further testified that the struggle with the deceased took place on an uneven surface which had an almost 30cm step below and a small water drainage. He told the trial court that the fight was dangerous such that either of them could have been hurt by the knife. According to him, during the scuffle, the deceased got stabbed in the chest and when they both fell down, the deceased got stabbed on the back. He testified that when people gathered around accusing him of stabbing the deceased, he lifted the knife and then threw it down after which he was captured and taken to the Police where he was placed in custody.

3.6 In cross-examination he refuted the allegation that he bought a knife on that fateful day. He went on to say that the deceased's involvement in his matter with Gift angered him. He also told the court that PW1, PW3 and PW4 connived to lie about the knife.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The learned trial court considered the evidence and written

submissions presented before it by both parties. The trial court was satisfied that the appellant perpetrated the act which caused the death of the deceased. The trial court further found that the attack on the deceased was premeditated and intentional.

4.1 After considering all the possible defences which were available to the appellant, the trial court found them not plausible in the circumstances. The appellant was found guilty of the offence of murder and sentenced him to death, after finding no extenuating circumstances.

5.0 GROUND OF APPEAL

5.1 Disconsolate with the conviction and sentence, the appellant filed one ground of appeal couched as follows:

1. **The learned trial judge erred both in law and fact when he sentenced the appellant to death when on record there is evidence of extenuating circumstances.**

6.0 APPELLANT'S ARGUMENTS

6.1 In supporting the sole ground of appeal learned Counsel submitted that there is evidence on the record that on the fateful day, the appellant had been drinking beer. Counsel contended that the circumstances of the case are such that no reasonable person properly directing their mind to the issue could kill except if influenced

by alcohol. Counsel referred us to the provisions of **Section 201 (2) of the Penal Code** and submitted that given the facts herein, the appellant qualifies to be afforded extenuation because there was evidence of drinking.

6.2 Counsel brought to our attention the case of **Kahale Kanyanga v The People**[1] in which the Supreme Court guided that:

> **"Section 201 should be read with Black's Law Dictionary Eighth Edition by Bryan A. Garner at p. 260, which defines extenuation as: "Mitigating circumstance, means a fact or situation that does not justify or excuse a wrongful act or offence, but that reduces the culpability and this may reduce punishment. A fact or situation that does not bear on the question of a defendant's guilt, but that is considered by the court in imposing punishment and especially in lessening severity of a sentence."**

6.3 It was contended that the trial court should have considered the evidence of beer drinking on the record to reduce the moral blameworthiness of the acts of the appellant.

6.4 It is was counsel's submission that the learned trial judge properly found that the defence of intoxication, provocation and self defence failed as the facts did not support them, but forgot to indicate that a failed defence of provocation can amount to extenuating circumstances. In summation it was contended that on the facts of

this case, there were extenuating circumstances and urged us to so find so as to allow the setting aside of the death sentence.

7.0 RESPONDENT'S ARGUMENTS

7.1 The State supported the conviction and sentence. In responding to the sole ground of appeal, they contended that the trial court was on firm ground when it held that there were no extenuating circumstances and imposed a death sentence on the appellant. We were referred to the case of **Lundendae v the People**[2] where the Supreme Court held that:

> **"evidence of heavy drinking, even to the extent of affecting the co-ordination of the reflexes is insufficient in itself to raise questions of intent unless the accused person's capacities were affected to the extent that he may not have been able to form the necessary intent."**

7.2 It was contended that the evidence on the record shows that the appellant had consumed some alcohol but there was no evidence that his capacity may have been affected or impaired by the alcohol he drunk. It was submitted that PW1 testified that after stabbing the deceased, the appellant ran away from the scene. It was contended that this is not indicative of the fact that he was too drunk to the point that he did not know what he was doing. We were

further referred to the case of **Jose Antonio Gollaidi v The People**[3] where it was held that:

> **"It is not enough to merely say he was drinking, the evidence must show that he was adversely affected and failed to appreciate what he was doing."**

It was counsel's submission that there is no evidence that this was the case in this matter. According to Counsel, the trial court was on firm ground when it found that the defence of intoxication was not available to the appellant and that the mere fact that the appellant was drunk does not amount to extenuating circumstance.

7.3 With respect to provocation as an extenuating circumstance it was submitted that there was no provocative act hence the defence of provocation was not available to the appellant. It was the state's contention that the evidence on the record support the fact that the appellant was the aggressor against the deceased and not the other way around. It was submitted that even if the appellant was being referred to as a warthog, that did not warrant the reaction. We were referred to the case of **Kelvin Mayanga v The People**[4] where we considered the insults by the deceased to the appellant not to be of a nature as likely to deprive an ordinary person to which the appellant belongs, of his power of self control.

7.4 We were also referred to the case of **Precious Longwe v The People**[5] where we held that **"a failed defence of provocation becomes an extenuating circumstance where a provocative act and loss of self-control are proved but the retaliation is found not proportionate."**

7.5 It was further contended that a good analysis of the facts on the record reveal that the appellant intentionally stabbed the deceased and that it was a premeditated attack. It was contended that the appellant used excessive force by stabbing the deceased twice. We were referred to the case of **Whiteson Simusokwe v The People**[6] where it was held that **"excessive force immediately defeats the defence of provocation."** In summation, it was contended that the trial court was on firm ground by convicting the appellant. We were urged to find that there was no extenuating circumstances. On this basis we were asked to uphold the decision of the trial court and dismiss the appeal.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

8.1 At the hearing of the appeal, learned Counsel for the appellant Mr. Mweemba and learned Counsel for the respondent Mrs. Malibata-Jackson placed full reliance on their respective filed arguments. We are grateful for their submissions.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully scrutinised the record, the arguments by both Counsel and the judgment of the court below. The issue in this appeal is whether or not extenuating factors exist?

9.2 In the first limb of their arguments, counsel for the appellant contends that the appellant was drinking beer on the day in question and that it was the alcohol which prompted him to act in the manner in which he did. It was contended that this qualified as extenuating circumstances.

9.3 We note that the learned trial court accepted that the appellant had taken some beer. This was largely because PW1 stated that cadres gave the appellant some beer, from which he took a sip. No other witness saw the appellant drinking beer. The appellant gave evidence to the effect that he had been drinking beer on the material day since morning. The learned trial court accepted the evidence of PW5 to the effect that the appellant did not appear drunk and proceeded to find that the appellant was not drunk at all.

9.4 We find no reason to fault the lower court's findings in this respect. In fact there is no evidence on the record of general or heavy drinking on the part of the appellant. It does not follow that whenever an appellant drinks beer or takes part in drinking alcohol,

then automatically extenuating circumstances avail to him. The Supreme Court in the case of **Jose Antonio Golliadi** *supra* stated that:

> **"We must emphasize that trial courts must be wary of finding drunkenness as an extenuating circumstance in every case where the offence is committed at a drinking place or where the accused claims he was drinking or was drunk. It is important to consider the peculiar facts instead of applying drunkenness as an extenuating circumstance in every single case which would lead to injustice."**

9.5 The appellant well-orchestrated the murder of the deceased. He purchased a knife from a shop in which PW3 worked and stabbed the deceased 15 minutes later. This is certainly not a mind that is adversely overwhelmed by intoxicating liquor.

9.6 We therefore find that in the circumstances of this case, the alcohol consumed by the appellant does not afford him extenuating circumstances. We agree with counsel for the respondent on this score and find no merit in this argument.

9.7 The final limb of learned counsel for appellant's argument is that a failed defence of provocation amounted to extenuating circumstances.

9.8 The learned trial court considered the possible defence of provocation. The evidence on the record is that the appellant had

quarrelled with a lot of people on the fateful day. The only wrong thing the deceased did was to separate or stop the quarrel between the appellant and a person called Gift. Can that be accepted as a provocative act? Certainly not. The deceased was a peace maker in an environment of turmoil occasioned by the appellant. The appellant was the aggressor and a provocateur. The defence of provocation was therefore not available to him.

9.9 We note that the learned trial court considered a number of defences which were apparent on the record. This is ordinarily in accordance with the requirement of the law in our jurisdiction. A trial court is required to consider all the possible defences available to the accused, where there is some evidence of it (see **Kenious Sialuzi v The People**[7]). It does not follow, however, that having been so considered, such a defence becomes a failed defence as to avail an accused person extenuating circumstances.

9.10 We therefore find that there was no evidence to support the defence of provocation in order to qualify as a failed defence. We agree with learned counsel for the respondent and equally find no merit in this argument.

9.11 We note that when the trial court was considering whether or not extenuating circumstances were available on the record, he took a

general consideration of the evidence without making reference to issues of alcohol consumption and provocation. This is notwithstanding that they featured prominently on the record. This was a misdirection by the trial court. He should have specifically considered them and noted his reasoning. We are, however, satisfied that had the trial court properly directed his mind as aforesaid, he would have reached the same conclusion.

9.12 We therefore find no merit in the sole ground of appeal. We dismiss it. The conviction and sentence of the lower court is upheld.

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE