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IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 001/2021**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

ILUNGA GEORGE PABIPE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga, Kondolo, SC, and Banda-Bobo, JJA
On the 19th October, 2021 and 25th day of March, 2022.

For the Appellant: Mrs. Banda of Messrs Legal Aid Board

For the Respondent: Mrs. Bauleni of Messrs National Prosecution Authority

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JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court.

Cases referred to:

1. Katebe v. The People[1] (1975) ZR 13 (SC)
2. Mutambo and Others v. The People (1965) ZR 15
3. Sammy Kambilima Ngati Mumba, Chishimba Edward and Davy Musonda Chanda v. The People (SCZ Judgment No. 14 of 2003)
4. Nyambe v. The People (1973) ZR 228
5. Lajabu v. The People (1973) ZR 74
6. Kateka v. The People (1977) ZR 184
7. Muvuma Kambanja Situma v. The People (1982) ZR 115 (SC)
8. Jack Chanda and Another v. The People (2002) ZR
9. Alimony Njovu and Felix T. Njovu v. The People (1988 – 1989) ZR 5 (SC)
10. Edgington v. Fitzmaurice (1885) 29 Ch.D 459
11. Abedinegal Kapeshi and Best Kanyakula v. The People (SCZ Selected Judgment No. 35 of 2017)
12. R v. Fabian Kinene S/O Mukye and Others (194) EACA 96
13. Mwansa Mushala and Others v. The People (1978) ZR 58 (SC)

Legislation referred to:

- The Penal Code, Chapter 87 of the Laws of Zambia

Other Works referred to:

- Hodge M. Malek - Phipson on Evidence, 17th Edition

1.0 Introduction

1.1 This is an Appeal against the Judgment of Mr. Justice D. C. Mumba rendered on 26th October, 2020, in the High Court, sitting at Mansa. The Appellant, Ilunga George Pabipe, had been arraigned, together with three others, on a charge of Murder. The Appellant was tried, convicted and sentenced to death for the murder of Goodface Kabungo, village Headman Bundebunde, while the others were acquitted and the juvenile sent to a reformatory school. This appeal is only against the Appellant herein.

2.0 Brief Background

2.1 In the indictment in the lower Court, it was alleged that the Appellant herein and his three-fellow accused, committed murder contrary to Section 200 of the Penal Code Cap. 87 of the Laws of Zambia. It was alleged that on 21st September, 2018, at Mwense, in the Mwense District, jointly and while acting together, the quartet murdered Goodface Kabungo.

They all pleaded not guilty to the charge and the matter went to trial. Five witnesses were called by the State in support of their case.

3.0 **Evidence in the Lower Court**

3.1 The evidence adduced in the lower Court was that there had been suspicion of witchcraft in the village due to unexplained deaths, and so the villagers contributed money to go and see a witchfinder for purposes of finding the witch. People were chosen to go to the witchfinder on 21st September, 2018. The purpose was to discover who was responsible for a piece of cloth in the ground that people perceived to be the one killing people in the village.

3.2 Two witchfinders were visited and both of them fingered Goodface Kabungo (deceased) as having charms and being the owner of the cloth. This upset the deceased, who vehemently protested his innocence. While they were still with the witchfinders, phone calls were made back to the village alerting the villagers of the outcome of the visit to the witchfinders, namely that the person responsible for the deaths in the village was the village headman who had charms and fetishes.

3.3 Upon their return to the village, the deceased entered his house but people gathered outside the palace and asked him to come outside. People started stoning the house, and he was forced to come out. He asked them if they had evidence regarding the accusation. It was then that someone threw a stone and hit him on the ankle and he fell down. The irate mob continued throwing stones. Then the shelter/kitchen at the back of the house was set on fire, as was the house for the deceased.

3.4 There was evidence that prior to the death of the deceased, there was a white cloth that villagers believed had some charms and was causing deaths in the village, and the death rate had increased. People were thus living in fear, as they did not know who would die next. Hence the idea of contributing money for a witchfinder was mooted. It emerged that people in the village strongly believed in witchcraft.

3.5 Further that there was a lot of confusion on the night in question.

3.6 It was heard that the Appellant hit the deceased with a wooden stool twice on the heard, after which he ran away into the mob. There was evidence that that they took the deceased

to the clinic, but were referred to the District Hospital, but before they could leave, the deceased died.

3.7 There was testimony relating to the apprehension of the Appellant for the offence of murder.

3.8 The matter was investigated by the police through **Detective Constable Saviour Bwanga**, **PW5** of Mwense Police Station. He investigated the death of the deceased after receiving information that the deceased had been stoned to death by his subjects on suspicion that he was practising witchcraft. He undertook an examination of the body, which showed a cut at the back of the neck; bruises on the back and the ribs. That the house of the deceased had been burnt. He had the body of the deceased deposited in the Mwense Mortuary, awaiting post mortem; which was later conducted. That it was revealed that the deceased died of haemorrhage. It was his evidence that on 4th March, 2019, he went to the subject village with other officers where he arrested the Appellant. He charged him with the subject offence.

3.9 He testified that the Appellant had told him that he was at the lay-by in Bundebunde Village at a bar and that he went to the bar to confirm. However, he did not record any

statement from anyone as the bar was closed and the owner had run away because he was scared as he was a witchdoctor.

At the close of the prosecution's case, the learned trial Judge found the Appellant with a case to answer and put him on his defence. He elected to give evidence on oath.

4.0 **Evidence by the Appellant**

4.1 The Appellant in his evidence spoke to the cloth in the village that had brought problems. It was his evidence that at least three to four people would die in a week and this disturbed villagers. That it was decided by the villagers that they contribute money to go and see a witchfinder and people were chosen to go to the witchfinder and this was done on 21st September, 2018.

4.2 It was his testimony that on that day, he had gone to the river and came back around 10:00 hours. That at 13:00 hours he had been at the roadside bar and started drinking. He said his wife picked him up around 17:30 hours and walked back home around 18:00 hours and that he slept after eating, around 19:00 hours. That it was only the following day around 04:00 hours that his wife told him about the killing

of the deceased. He said after burial, they continued staying in the village until 4th March, 2019, when he was arrested.

4.3 Under cross examination, the witness confirmed that prior to the material date, he had resided in Bundebunde Village and that the deceased had been his village headman. He said around 14:00 hours on the material day, he had been at the bar, drinking and that his wife picked him up around 17:00 hours; and had been at home around 18:00 hours in the subject village; but did not hear anything that happened that night in the village.

5.0 **Decision of the Lower Court**

5.1 After considering the evidence and skeleton arguments by counsel for each party, the trial Court found that Goodface Kabungo was village headman Kabungo, that in September, 2018, a cloth was found in the village which villagers believed was a charm responsible for some deaths that occurred in the village. That the villagers had contributed money to send some people to go to a witchfinder to consult on who was responsible for the deaths in the village. That two witchfinders were consulted by the people who were chosen and both witchfinders alleged that the deceased was a wizard,

and was responsible for the charm that was causing deaths in the village. When the group returned to the village, a mob gathered at the deceased's house and during the commotion that ensued, the deceased's house and shelter were burnt and he was assaulted. He later died as a result of the assault

5.2 That a post-mortem conducted on the body showed that the cause of death was haemorrhage and multiple organ failure.

5.3 The Court, substantively dealt with the issue of witnesses with an interest to serve, because some witnesses were related to the deceased, and therefore could have had an interest to serve and could be biased. After considering submissions on this issue from both sides, and the evidence on record, the Court found no evidence suggesting that the witnesses had any motive or incentive to falsely implicate any of the accused persons. He found the witnesses to be truthful, credible and reliable. He thus excluded the danger of false implication of the accused.

5.4 Regarding the alibi raised by accused, the Court resorted to the case of **Katebe v. The People**[1]. The Court found that each accused person gave a different story. With regard to the Appellant herein, the Court said the issue of concern had

been where he had been at the time the crime was being committed. The Court noted that the arresting officer did not talk about the Appellant's alibi in his evidence in chief, though he had confirmed in cross examination that he had told him about being at a bar in the area, between 13:00 hours and 17:30 hours. However, the Court said this period of time was of no significance to the time the alleged murder took place, and consequently irrelevant to the purported alibi. That the Appellant herein only brought up the issue of being with his wife at home for the first time in his defence. The Court reasoned that raising the defence of alibi by the Appellant for the first time in Court was purely an afterthought. The Court thus rejected his defence of alibi, as he deemed it false. The Court said since the Appellant lived within a walkable distance from the murder scene, it would have been possible for him to move from his house to the scene of the crime, commit the crime and move back home and pretend as though he had never been at the scene of the crime. The Court said the Appellant had properly been recognised as having been at the scene.

5.4 As regards the issue of common intention to commit a crime, the Court relied on Section 22 of the Penal Code, Cap. 87 of

the Laws of Zambia; as well as the case of **Mutambo and Others v. The People**[2] among others. He found that the Appellant and his colleague were confederates, whose criminal liability attached to each one of them for the criminal acts of the other. That it was the nature of the assaults which was such that their cumulative effect overcame the deceased. The Court was satisfied that the prosecution had discharged its burden of proof to the required standard. He found the Appellant and his colleague unlawfully assaulted the deceased in line with a common scheme to cause grievous harm or death; and did so with malice aforethought. He convicted the Appellant of the offence of murder. He found no extenuating circumstances. The Court said it was alive to the fact that the death of the deceased arose from suspicion that he was practising witchcraft through a cloth that was strange to the villagers in Bundebunde village. However, that it was clear from the evidence that the Appellant did not plead guilty to the charge of murder and thereby raise the defence of the belief in witchcraft. That he simply denied ever participating in killing the deceased. The Court went on to state that extenuating circumstances in this case could only be available to a convict in considering any other sentence

other than the capital punishment of death for the offence of murder, where there is evidence to support such extenuating circumstances. That in the instant case, no such evidence existed.

6.0 **The Appeal**

6.1 Dissatisfied with both the verdict and sentence of the lower Court, the convict has launched this appeal, citing two grounds of Appeal, thus:-

(i) The learned trial court erred in law and in fact when he convicted the Appellant based on the evidence of a single identifying witness when the possibility of an honest mistake had not been ruled out;

(ii) In the alternative, the learned trial Court erred in law and fact when the Court neglected to take into account witchcraft as an extenuating circumstance when meting out the sentence.

7.0 **Appellant's Heads of Argument**

7.1 The Appellant filed Heads of Arguments in support of the Appeal. In ground one, the Appellant seeks to impugn the learned trial Judge for convicting him on the evidence of a single identifying witness, claiming that the possibility of an honest mistake was not eliminated. A plethora of authorities were proffered in support. The case of **Sammy Kambilima Ngati Mumba, Chishimba Edward and Davy Musonda Chanda v. The People**[3] was cited for the principle that a court can convict on the evidence of a single identifying witness provided the possibility of an honest mistaken identity is eliminated. Further, the case of **Nyambe v. The People**[4] and **Lajabu v. The People**[5] were adverted to for the principle that there is a great danger of honest mistake in identification, especially where the accused was not previously known to the witness and that the greatest care should be taken to test the identification and that the witness, in such circumstances should be prodded to provide as much detail of the accused, namely, what features or unusual marks if any, he alleges that he recognised the caused. We were referred to the case of **Kateka v. The People**[6] not only on what should be canvassed from a witness

previously unknown to the accused, but also that the question is not one of credibility in the sense of truthfulness, but of reliability and that the greatest care should be taken to test the identification. The next case brought to our attention was that of **Muvuma Kambanja Situma v. The People**[7] where it was held that:-

> **"(i) The evidence of a single identifying witness must be tested and evaluated with the greatest care to exclude the dangers of an honest mistake; the witness should be subjected to searching questions and careful note taken of all the prevailing conditions and basis upon which the witnesses claim to recognise the accused.**
>
> **(ii) If the opportunity for a positive and reliable identification is poor, then it follows that the possibility of an honest mistake had not been ruled out unless there is some other connecting link between the accused and the offence which would render mistaken identification too much of a coincidence."**

7.2 In marrying the above cases to the matter before us, counsel, submitted that they were alive to the fact that the Court could convict on the evidence of a single identifying witness, but that the possibility of an honest mistake must be excluded.

It was submitted that in order to convict on the evidence of a single identifying witness there must be evidence of something more in support to connect the Appellant to the commission of the crime. It was submitted that it is trite law that a Court will only convict on the evidence of a single identifying witness provided the issue of honest mistake has been ruled out.

7.3 It was submitted that in casu, the possibility of an honest mistake was not eliminated because of the number of people who were present at the scene; and the time it occurred. That therefore, PW3, on whose evidence the prosecution relied, could not have seen the Appellant clearly. Counsel also said since this happened at night, after 18:00 hours, the visibility was poor, that it could not enable PW3 to clearly identify PW3 as the one who hit the deceased with a stool on the head, and that this is exacerbated by the fact that the stool was never found with the Appellant, nor was it recovered. It was further argued that the witness (PW3) did not describe the perpetrator in detail, considering that it is trite that the witness should describe the perpetrator. Counsel took issue with the lack of an identification parade which she said would

have ruled out the possibility of a mistaken identity and opportunity for a positive and reliable identification. We were urged to uphold ground one.

7.4 In ground two, the learned trial judge was faulted for neglecting to take into account witchcraft as an extenuating circumstance when meting out the sentence. In support of this ground, we were referred to the cases of **Jack Chanda and Another v. The People[8],** and **Alimony Njovu and Felix T. Njovu v. The People[9].**

Substantively, the argument was that the Court should have accepted the clear account of witchcraft practices as an extenuating circumstance in favour of the Appellant when meting out the sentence. It was submitted that PW1, PW2 and PW3 had all confirmed that there had been deaths in the community which led to the villages seeking help from witchfinders. That it was these witchfinders who named the deceased as the wizard behind the deaths in the village and villagers believed this to be true.

7.5 Counsel implored us to take judicial notice of the fact that the offence was committed in a village set up, where villagers believe in witchdoctors and herbalists as their doctors; and

that in this matter, they believed the deceased was a wizard. It was submitted that this evidence, when accepted should have been accepted as a whole and not in isolation whether favourable or against the Appellant.

7.6 It was also submitted that since there was no evidence to show that the Appellant delivered the blow that caused death, the Appellant should have been convicted of the offence of manslaughter as opposed to murder. We were urged to upend the Appellant's conviction for murder and sentence of death and substitute them with the lesser offence of manslaughter and sentence him accordingly.

7.7 In the alternative, it was prayed that if this Court took the view that the Appellant was properly convicted for the offence of murder, he should be convicted instead for murder with extenuating circumstances and sentenced accordingly.

8.0 **Respondent's Heads of Arguments**

8.1 The Respondents filed Heads of Arguments in response, on 18th October, 2021; in which they said they supported both the conviction and sentence of the lower Court.

8.2 In responding to ground one, the Respondent agreed that it is competent for a court to convict on the evidence of a single identifying witness provided the possibility of an honest mistaken identity is eliminated. The Respondents placed reliance on the cited case of **Sammy Kambilima Ngati Mumba, Chishimba Edward and Davy Musonda Chanda v. The People**[3] as well as the works of Hodge M. Malek, Phipson on Evidence, 17th Edition, paragraph 1401 at page 403, where it was said:-

> **"As a general rule, courts may act on the testimony of a single witness, even where there is no other evidence which supports it."**

That therefore the trial judge did not err when he convicted on the evidence of a single identifying witness. It was contended that the record of appeal at page J8 line 24, the evidence of PW3 shows that he saw the Appellant hit the deceased with a stool twice on the head, and that the Appellant ran away with the said stool. That on page J10 (193) lines 3 – 8, the record shows that PW3 was able to identify the Appellant and the role that he played as there was sufficient light from the fires and also the moon. That of

utmost importance, PW3 had known the Appellant for 18 years as they lived together in the same village, and they used to greet each other. Further that the witness said he observed the events from 18:00 hours to about 22:00 hours on that day, as per page J11 (194) line 3. It was submitted that clearly, there had been sufficient time for the witness to identify the Appellant and observe the role he played.

8.3 Counsel went on to submit that the trial Court had warned itself of the danger of convicting on a single identifying witness as appear at J77, (260) lines 7 – 14 of the Record of Appeal; and went on to analyse the evidence of PW3 in detail. That the trial Court took into account the time it took for the crime to be committed, the lighting from the fire which was at the scene, what the Appellant actually did to the deceased, and the period PW3 had known the Appellant. It was submitted that the Court found the evidence of PW3 regarding the identification of the Appellant, overwhelming and therefore, was satisfied that there was no possibility of an honest mistake in the identification of the Appellant. It was submitted that PW3 had a good opportunity to observe the Appellant and he saw the Appellant hit the deceased twice in the head using a stool; that PW3 had known the Appellant

for 18 years as they lived together in the same village and used to greet each other. Counsel submitted that the Court was on firm ground to eliminate the possibility of an honest mistake on the identity of the Appellant and subsequently convict him on the evidence of a single identifying witness. The Respondent prayed that ground one be dismissed.

8.4 In responding to ground two, which was argued in the alternative, it was counsel's contention that the trial Court properly arrived at the decision that there were no extenuating circumstances in this case. That the Court had considered the fact that the death of the deceased arose from a suspicion that the deceased was practising witchcraft through a cloth that was strange in the village. It was submitted that the Record of Appeal at page 265, (J82), lines 3 – 8 shows that the trial Court found that there was no evidence to support the Appellant's suspicion of witchcraft by the deceased. That the Court did not find extenuating circumstances. It was submitted that a belief is just that, namely a subjective process not inspired by any tangible evidence. That unlike other mitigatory factors, what a person says they believed in may not be easy to ascertain as it is highly subjective. To support, the case of **Edgington v.**

Fitzmaurice[10], was adverted to where Bowan, L J observed that:-

> **"The state of a man's mind is as much a fact as the state of his digestion..."**

8.5 That any person convicted of murder to state in mitigation that they were driven to commit murder by a belief in witchcraft and particularly that they believed that the person killed was involved in witchcraft, is a claim that is hardly open to proof. That because of its highly subjective nature as a mitigatory factor, it calls for maximum caution in considering it as it can easily be an escape route from the deterrent effects of the mandatory sentence for murder. In furtherance of this argument, the case of **Abedinegal Kapeshi and Best Kanyakula v. The People**[11] was resorted to where the Court held that:-

> **"a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor to an accused person facing a charge of murder. There is absolute need to protect victims of witchcraft accusations from unproved allegations leading invariably to multiple violations of their rights and in some cases death. It is for the reasons we have given that we think that although a**

belief in witchcraft may in rare and appropriate circumstances still be regarded as an extenuating circumstance, it generally should not offer solace to perpetrators of violence that results in death. For a belief in witchcraft to be treated as an extenuating circumstance, it ought to go further than merely someone's subjective thought process. There has to be verifiable set of circumstances that motivated such belief, allowing them to escape the ultimate sanction for murder".

The case of **R v. Fabian Kinene S/O Mukye and Others**[12], was also cited, in which objective conditions existed to find the belief in witchcraft. It was submitted that in the latter case, the accused persons appeared before a Ugandan court, charged with the murder of an old man in the village. Their explanation was that the victim was discovered in the middle of the night **"naked, with strange objects and acting surreptitiously"**. The court found that:-

"The victim was caught performing an act which the accused genuinely believed to be an act of witchcraft and they killed him in the way, in the olden times, was considered proper for killing a wizard ..." The court lowered the charge from murder to manslaughter reasoning that the act of attempted

witchcraft might constitute "grave and sudden provocation.""

8.6 It was submitted that in casu, there was no evidence to support such a belief of witchcraft as an extenuating circumstance. That the court was on firm ground to convict the Appellant and sentence him as it did. We were urged to uphold both the Conviction and Sentence.

9.0 **Hearing**

9.1 At the hearing, counsel for the Appellant, Mrs. Banda, Legal Aid Counsel relied on the grounds of Appeal and Heads of Argument filed on 12th October, 2021. Mrs. Bauleni, State Advocate, with leave of Court, filed their arguments in opposition and on which she subsequently relied. She augmented viva voce, which in our view was merely a rehash of their written arguments in ground one.

9.2 As regards ground 2, it was her contention that there is no evidence on record to substantiate that the Appellant had a belief in witchcraft.

9.3 In Reply, Mrs. Banda, referred to page 191 of the Record of Appeal, line 12 and said the witness had said there had been

a lot of smoke from the fire, and counsel said she understood this to mean that there was insufficient light for the witness to have had a good observation and thus be able to identify the Appellant.

9.4 As regards ground two, her reply was that all the witnesses said there had been a belief in witchcraft in Bundebunde village. Upon an inquiry from Court, whether her client had told her that he killed deceased because he believed the deceased was a wizard, Mrs. Banda admitted that he never said so, but that she was of the view that, because the evidence of the prosecution, was admitted in evidence, the same should have applied to the Appellant.

10.0 **Consideration of Appeal and Decision**

10.1 We have considered the Record of Appeal, the Judgment of the Lower Court and the arguments filed by the parties. We intend to consider the two grounds separately and as presented, because ground two was argued in the alternative. In dealing with ground one, counsel for both parties have pointed out that a court is competent to convict on the evidence of a single identifying witness provided the possibility of an honest

mistaken identity has been eliminated. As correctly pointed out by both parties, the case of **Sammy Kambilima Ngati Mumba Chishimba Edward and Davy Musonda Chanda v. The People**[3] is instructive on this issue, where the court held that:-

> **"It is settled law that a court is competent to convict on a single identifying witness provided the possibility of an honest mistaken identity eliminated."**

The case of **Mwansa Mushala and Others v. The People**[13] is also relevant, where it guides on what else to consider when dealing with the evidence of a single identifying witness, where the court held that:-

> **"The credibility of a witness is not the only consideration in a single witnesses' identification as in this case. The guidelines in identification cases were laid down in R v. Turnbull (i),; the Court of Appeal in England stressed that although recognition may be more reliable, than identification of a stranger, even when the witness is purporting to recognise someone whom he knows, the trial judge should remind himself that mistakes in recognition of close relatives and friends are sometimes made. Even in recognition cases, a trial judge should warn himself of the need to exclude the**

possibility of honest mistake and the poorer the opportunity for observation, the greater that possibility ..."

10.2 In this case, the learned trial Court placed the Appellant, after rejecting his alibi, on the scene. At page 253, lines 19 – 24, the Court found that the defence had not contested the fact that the Appellant was a murder suspect, as they had not, through cross examination taken the opportunity to show that the Appellant did not participate in the commission of the crime on ground that he was not present at the time the crime was committed. At page 254, line 16 – 17, the learned trial Court categorically stated that he was satisfied on the evidence before him that the Appellant was properly recognised as the person who was at the scene of the crime. At page 266, lines 9 – 14, the Court stated that it was satisfied that there was no possibility of an honest mistake in the identification of the Appellant as one of the people who were on the scene. The Court further referred to the post mortem report, exhibit 'p1' at page 260 lines 18 to 24, stating that the findings therein were consistent with the assault that killed the deceased.

10.3 We on our part have no hesitation in agreeing with the lower Court that the identity of the Appellant as one of the persons who attacked the deceased on the material date, was correct as he was properly identified by PW3. We agree with counsel for the Respondent, that the evidence of PW3 shows that he saw the Appellant hit the deceased twice with a stool on his head after which he ran away with it. Further, PW3 identified the Appellant firstly because there was light from the fires from the burnt house and the kitchen, as well as the moon. Secondly, the witness had known the Appellant for a period of eighteen (18) years, and finally, the commotion began around 18:00 hours up to about 22:00 hours. We agree that would have been sufficient time for the witness to properly observe the events and enable him to positively identify the Appellant and the role he played.

10.4 On the basis of the evidence before us, we are of the view that the trial Court was on firm ground when he convicted the Appellant on the evidence of a single identifying witness. This ground therefore has no merit and is dismissed.

10.5 In ground two, the Court is faulted for having convicted and sentenced the Appellant to death in the face of extenuating

circumstances, namely, the issue of the belief in witchcraft by the whole village. We have critically analysed the submissions and the lower Court's reasoning on this issue. As a starting point, we find that at no point did the Appellant place himself at the scene of the crime, despite stating that there was a belief in the issue of the cloth being responsible for the many deaths in the village and also contributing money to engage a witchfinder. At J81 (264) of the Record of Appeal, lines 20 – 21, the lower Court had this to say:-

> **"... I am alive to the fact that the death of the deceased arose from the suspicion that he was practising witchcraft through a cloth that was strange to the villagers in Bundebunde village. <u>However, it is also clear from the evidence that none of the two offenders pleaded guilty to the charge of murder</u>, and so, therefore raised the defence of the belief in witchcraft. Both of them simply denied ever participating in killing the deceased. I find that extenuating circumstances can only be available to a convict in considering any other sentence other than capital punishment of death for the offence of murder, where there is evidence to support such extenuating circumstance"** (underline ours for emphasis only)

10.6 The Court found that there were no extenuating circumstances. The case of **R v. Fabian Kinene**[12] cited to us is pertinent to the issue under this ground. In that case, the appellants were accused of murdering an old man in their village, who according to them, was found in the middle of the night "naked with strange objects and acting surreptitiously". The charge was reduced to manslaughter from murder on the ground that the acts of attempted witchcraft might constitute "grave and sudden provocation."

10.7 Having critically considered the evidence before court, we agree with the reasoning of the lower Court when it found that there was no evidence of extenuating circumstance, to allow him to mete a sentence other than capital punishment. Our reasoning is premised on the fact that the Appellant had totally removed himself from the scene. Much as there had been a strange cloth, the deceased was not caught in any act, with strange objects and acting surreptitiously, like in the **Kinene** case. On the facts of this case, there is no basis to reduce the charge to manslaughter, as the Appellant did not plead that he killed the deceased because he believed the deceased was a witch. He totally denied any involvement in the crime. Therefore, his belief in witchcraft in the

circumstances of this case cannot aid him. We see no reason to interfere with the sentence, and we refuse to interfer with it.

10.8 We find no merit in this ground. The upshoot of our decision is that both grounds of appeal having failed, the Appeal is dismissed for lack of merit.

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C. F. R. MCHENGA
COURT OF APPEAL JUDGE

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M. M. KONDOLO
COURT OF APPEAL JUDGE

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE