

IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

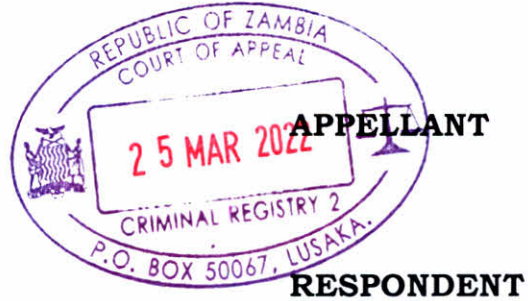
APPEAL NO. 104/2021

BETWEEN:

KATIBA PUMULO SINDWA

AND

THE PEOPLE



Coram: Makungu, Sichinga and Muzenga, JJJA

On 16th February, 2022 and 25th day of March, 2022

For the Appellant : Ms. S. F. Bwalya, Legal Aid Counsel - Messrs Legal Aid Board

For the Respondent : Mrs. M. G. Kashishi-Ngulube, Principal State Advocate - National Prosecution Authority

J U D G M E N T

Makungu, JA delivered the judgment of the court.

CASES REFERRED TO:

1. Chisempi Chinkashila v The People (1978) ZR 217
2. Herman Mvula v The People (1990 – 1992) ZR 54
3. Kanyanga v The People SCZ Appeal No. 145 of 2011
4. Jack Chanda & Kennedy Chanda v The People (2002) Z.R 124
5. Elias Mukala & Major Shindanji v The People CAZ Appeal No. 219 of 2020
6. Jose Antonio Golliadi v The People SCZ Appeal No. 26 of 2017
7. 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 Criminal Procedure Code Chapter 88 of the Laws of Zambia.

1.0 INTRODUCTION

- 1.1 The appellant was convicted of murder contrary to **section 200 of the Penal Code Chapter 87 of the Laws of Zambia**, by the High Court and sentenced to death.
- 1.2 It was alleged that Katiba Pumulo Sindwa, on 20th March, 2018 at Kasamba Village of Shangombo District in the Western Province of the Republic of Zambia, did murder Misipili Sheleni. The appellant pleaded not guilty to the charge.
- 1.3 This appeal is against the sentence only.

2.0 BACKGROUND

- 2.1 Prior to trial, on the application of the defence, the lower court referred the appellant to Chainama Hills Hospital pursuant to **Section 17 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia**, to undergo a mental evaluation to ascertain his state of mind at the time of the commission of the offence, whether he was fit to take plea and to follow proceedings.

2.2 The medical report dated 22nd October, 2018, indicated that the appellant does not suffer from any mental illness but that, his own account to medical personnel suggested that he ran amok after a drinking spree and smoking cannabis. The writer of the report opined that he was laboring under intoxicating influence of alcohol and other drugs at the time of the alleged offence, and that he was fit to take plea, stand trial and follow proceedings. He then took plea denying the charge.

3.0 FACTS NOT IN DISPUTE

3.1 The evidence against the appellant came from three witnesses. PW1, Sheleni Chindunga, the father to the 11 year old boy, Misipili Sheleni (the deceased), testified that on 20th March, 2018, he took his animals out to graze and returned to the village where he found the appellant and one Lindunga. The appellant, then drove the cattle to his village leaving Lindunga behind. In the night, the appellant returned, and violently killed a dog and threatened other villagers present with a stick. PW1 and the other villagers fled, but the deceased remained with his aged grandmother, Kwitimona Meleki, PW2.

- 3.2 According to PW2, after the others ran away, the appellant pulled open the door to the house, and picked up the deceased whom he struck with a piece of wood on both shoulders. Then he carried him off on his shoulders to the stream. At this point, PW2 managed to make a run for it and hid in the maize field until one Kawaye and Limunga, who had been sent to call her, arrived. As the duo arrived with some lighting system, the appellant ran away.
- 3.3 The following morning, Kawaye went to the stream where he retrieved the body of the deceased and took it to Shang'ombo Police Station.
- 3.4 The Arresting Officer, PW3 Detective Chief Inspector Gilbert Muzuni, told the court that the appellant was apprehended on 21st March, 2018 by the community and taken to the police. In cross-examination, PW3 stated that the witnesses he interviewed informed him that the appellant was in the habit of pretending to be insane and harassing members of the public whenever he smoked dagga.
- 3.5 PW3 stated that a postmortem was conducted on the body of the deceased child and it was discovered that the cause of death

was drowning in stagnant water. The body was also found to have blood in the nasal cavity and bruising on the left trunk.

3.6 The appellant elected to remain silent and called no witnesses.

4.0 DECISION OF THE LOWER COURT

4.1 The learned trial Judge considered the evidence on record and found that there was no dispute that the appellant was generally peaceful and interacted well with other members of the community. However, as the line of cross-examination of the witnesses suggested that the appellant was not in charge of his mental faculties at the time of the incident as his behaviour was strange, the learned Judge considered the medical report and possible defences.

4.2 The first defence considered, though not raised by the defence, was automatism. The lower court considered the case of **Chisempi Chinkashila v The People** ⁽¹⁾ which extensively addressed automatism. He reasoned that where an accused person alleges that he does not recall the events that led to his acts or omissions, there must be something more than just a mere loss of memory to satisfy the court that the accused was

laboring under automatism. The judge found that this defence could not stand.

- 4.3 The second defence considered by the learned Judge was “*diminished responsibility*” which is provided for under **Section 12A (1) of the Penal Code**. In light of the case of **Herman Mvula v The People**, ⁽²⁾ he noted from the medical report that the appellant told his examiner that he was not in full control of his mental faculties because he could not recall what transpired on the fateful day and he had been drinking and smoking cannabis. That the prosecution evidence suggested that his behavior was out of character. The learned judge found that the short-term effects of intoxication do not suffice as a disease or injury of the mind that can substantially impair the mental responsibility referred to in subsection 1. For that reason, the defence was not available to the appellant.
- 4.4 The third defence considered was intoxication under **Section 13(2) to (5) of the Penal Code**. The trial judge found no evidence of “*insanity caused by intoxication*” and this defence also failed.

4.5 Consequently, the appellant was convicted as charged and sentenced to death.

5.0 GROUND OF APPEAL

5.1 The appellant filed one ground of appeal as follows:

The learned trial court erred both in law and fact when it sentenced the appellant to death without considering the extenuating circumstances.

6.0 APPELLANT'S ARGUMENTS

6.1 Learned counsel for the appellant, Ms. Bwalya relied on written submissions filed on 7th February, 2022. The same are to the effect that; the appellant was laboring under the influence of alcohol and other drugs at the time of commission of the offence, and these were extenuating circumstances.

6.2 For the meaning of "*extenuating circumstance*", we were referred to **section 201(2) of the Penal Code** which provides as follows:

(2) For the purpose of this section-

(a) an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt;

(b) in deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.

6.3 The case of **Kanyanga v The People** ⁽³⁾ was called in aid where the Supreme Court guided that section 201 of the Penal Code should be read together with **Black's Law Dictionary 1st edition by Bryan A. Garner**, page 260 where extenuating circumstances were defined as follows:

“...extenuating circumstance means a fact or situation that does not satisfy or excuse a wrong act or offence, but that reduces the culpability and this may reduce the 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 the severity of a sentence.”

6.4 It was submitted that the evidence of extenuating circumstances could be found in the testimony of PW1 who said

the appellant was a peaceful person who also interacted well with the other members of the community and that he looked drunk on the material day. PW1 further testified that the appellant appeared confused and at one point, attempted to feed his friend, Limunga, with cow dung.

6.5 That PW2, in her testimony, referred to the appellant as a mad man. In cross-examination, she said he was a well behaved person and that she was surprised by his behavior on the material day. It was submitted that all these facts point to there being extenuating circumstances.

6.6 Reliance was placed on the cases of **Jack Chanda & Kennedy Chanda v The People** ⁽⁴⁾ and **Elias Mukala & Major Shindanji v The People** ⁽⁵⁾ which guide that evidence of drunkenness or intoxication, though not rising to the threshold of intoxication as a defence, can amount to extenuating circumstances.

6.7 The case of **Jose Antonio Golliadi v The People** ⁽⁶⁾ was cited where the Supreme Court guided that where the accused claims that he was drunk or was drinking, the peculiar facts must be considered instead of applying drunkenness as an extenuating circumstance in every single case which would lead to injustice.

However, we were urged to find that no injustice would be occasioned if we found extenuating circumstances in this case.

6.8 In addition, it was submitted on behalf of the appellant that he was subjected to a medical examination and the doctor was of the opinion that the appellant was laboring under the intoxicating influence of alcohol and other drugs at the time of the alleged offence.

6.9 In conclusion, the appellant submitted that the lower court misdirected itself by not considering the appellant's intoxication as extenuating circumstances when passing sentence. We were urged to allow the appeal and set aside the death sentence.

7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the respondent, the Principal State Advocate, Mrs. Kashishi-Ngulube filed arguments dated 16th February, 2022 in which she submitted as follows: The trial court did not err in law and fact when it sentenced the appellant to death as the record of proceedings does not reveal any factors that amounted to extenuating circumstances.

7.2 That for intoxication to be considered as an extenuation circumstance, the accused person must have been drunk as per the decision of this Court of Appeal in the case of **Precious Longwe v The People** ⁽⁷⁾. In this case, the appellant did not raise the defence of intoxication as he opted to remain silent when he was put on his defence. However, the lower court did consider the possible defences that were available to the appellant and ruled out intoxication.

7.3 It was contended that the evidence on record does not show that the appellant was drunk at the time he committed the offence though the lower court noted from the evidence of PW1 and PW2, that the appellant behaved out of character, which had surprised them. Further, there was no evidence from any witness that they had seen the appellant consuming intoxicating substances on the material day. Thus, the trial judge did away with the issue of insanity and intoxication as a defence.

7.4 Further, the respondent pointed out that though PW1 and PW2 indicated that the appellant was acting out of character, they also highlighted incidents that showed that he knew exactly

what he was doing and was able to carry out his actions in a calculated manner. The incidents included the appellant driving PW1's cattle to his own village even when he appeared drunk; gathering the villagers in PW2's house and threatening them not to run away while bringing those that had fled back into the house; and the appellant running away to avoid being apprehended upon seeing Kawaye and Limunga.

7.5 The respondent submitted that the cited incidents are not actions of a drunk person or one that did not know what he was doing. Citing the case of **Jose Antonio Golliadi v The People Supra**⁽⁶⁾ it was submitted that it would lead to an injustice if extenuating circumstances were found to exist in this case.

7.6 As regards the medical evidence, counsel submitted that the trial court did consider the medical report which indicated that the appellant was laboring under the intoxicating influence of alcohol and drugs, and rightly ruled out the possible defences.

7.7 We were therefore urged to uphold the conviction and sentence, and dismiss the appeal.

8.0 DECISION OF THE COURT

- 8.1 We have considered the record of appeal and the submissions filed by the parties.
- 8.2 The appellant is urging us to find that there existed extenuating circumstances in this case to warrant a sentence less than “*death*”. The substance of the appellant’s submissions is that the medical evidence and the testimonies of PW1 and PW2 demonstrate extenuating circumstances.
- 8.3 The evidence on record shows that there is no dispute that the appellant went to the home of PW1 with violence: He killed a dog; rounded up the villagers and locked them up in a house; drove PW1’s cattle to another place, and then incapacitated the deceased who was 11 years old at the time; before he carried him away to a place where he drowned him in stagnant water.
- 8.4 According to the medical report at pages 74 to 77 of the record of appeal, the appellant “... ***was laboring under the intoxicating influence of alcohol and other drugs at the time of the alleged offence.***” This report was based on the assessment of the appellant’s explanation to the examiner/psychiatrist.

- 8.5 We note that none of the witnesses called to testify told the trial court that they had seen the appellant taking alcohol or any other intoxicating substance. However, the evidence of PW1 and PW2 is crucial to the determination of whether or not extenuating circumstances existed.
- 8.6 PW1 told the trial court that he was surprised by the behaviour of the appellant. In cross-examination, he stated that the appellant “... **looked like a drunk person ... though he was able to drive the cattle.**”
- 8.7 In her examination-in-chief, PW2 described the appellant as “... **a mad man ...**” who was “... **causing trouble in the village.**” She further testified that she knew the appellant and “... **never expected that he would come and do such a thing.**” Under cross-examination, when asked if she knew the appellant as a mad person or a normal person previously, she responded that “... **he was a well behaved person whenever he used to come and chat with others; he was normal. Even the time he came, we thought he had just come to chat as usual with others but we were surprised by his behaviour on this material day.**”

- 8.8 The evidence of PW1 and PW2 shows that the appellant was not known to be a violent member of the community to which he belonged but that, on the material day, he appeared to be either insane or drunk. His behaviour surprised his fellow villagers.
- 8.9 This evidence corresponds with the medical findings that the appellant was “***laboring under the intoxicating influence of alcohol and other drugs at the time of the alleged offence***”
- 8.10 The appellant elected to remain silent at trial and so the trial court had no opportunity to hear what he had to say about the events of that tragic event.
- 8.11 Applying the case of **Kanyanga v The People Supra** and **Section 201 (2)** of the **Penal Code** to the facts of this case, we take it that there was proof by PW1 and PW2 that the appellant was so drunk and drugged at the material time, so that the extent of his culpability was reduced. Surely, an ordinary member of the class of the community to which the appellant belonged could have acted in the manner that the appellant did if he or she were in that mental state.
- 8.12 It is trite law that drunkenness which may affect the actions of an accused person may be taken as an extenuating

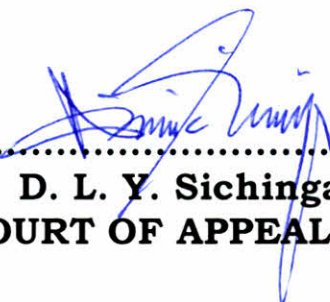
circumstance in a murder case. We are guided by the cases of **Jack Chanda & Kennedy Chanda v The People** ⁽⁴⁾ and **Jose Antonio Golliadi v The People Supra** ⁽⁶⁾. We find that there were in fact extenuating circumstances in this case. Therefore the lower court misdirected itself when it found no extenuating circumstances and sentenced the appellant to death.

9.0 CONCLUSION

9.1 In summary, the appeal succeeds as there were extenuating circumstances. Therefore the conviction is upheld but the death sentence is quashed. Instead, we sentence the appellant to life imprisonment with effect from the date of his arrest.



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C. K. Makungu
COURT OF APPEAL JUDGE



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D. L. Y. Sichinga, SC
COURT OF APPEAL JUDGE



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K. Muzenga
COURT OF APPEAL JUDGE