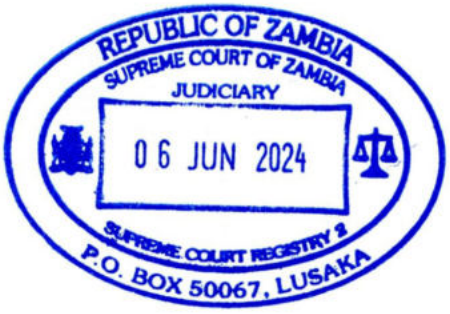
IN THE SUPREME COURT FOR ZAMBIA **APPEAL No. 11/2022**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

FRANCIS PHIRI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kaoma, and Chinyama, JJS
On 5th April, 2022 and 6th June, 2024

For the Appellant : Mrs. K. C. Bwalya, Legal Aid Counsel

For the Respondent : Mrs. A. Bauleni, State Advocate

J U D G M E N T

KAOMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **The People v. Njovu (1968) Z.R. 132**
2. **The People v. Lewis (1975) Z.R. 43**
3. **The People v. Elisha Tembo (1980) Z.R. 206**
4. **Palmer v. R. (1971) ALL ER. 1077**
5. **Nyendwa and Another v. The People (1978) Z.R. 399**
6. **Musupi v. The People (1978) Z.R. 271**
7. **Chanda and Another v. The People (2002) Z.R. 124**
8. **Liyumbi v. The People (1978) Z.R. 25**
9. **Phiri v. The People – Appeal No. 192 of 2014**
10. **Makomela v. The People (1974) Z.R. 254**
11. **Mangoma v. The People – Appeal No. 217 of 2015**
12. **Yokoniya Mwale v. The People – Appeal No. 285 of 2014**
13. **Mwenya v. The People – Appeal No. 640 of 2013**

Legislation referred to:

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

1. Introduction

1.1 The delay in delivering this judgment is profoundly regretted. This is attributable to the fact that one of our member was indisposed with ill health for a period of time.

1.2 This is an appeal against conviction and sentence. The appellant was convicted by Chawatama, J in the High Court for murder contrary to section 200 of the Penal Code, Cap 87 of the Laws of Zambia. The particulars of the offence alleged that the appellant shot the deceased, John Simpemba, with a firearm on 22nd December, 2012.

2. Evidence in the court below

2.1 The prosecution evidence adduced from two eye witnesses Chris Simutambi (PW1) and Ruth Nalwamba (PW2), was that on the material date, the deceased and PW1 were shadow boxing or sparring by the roadside near a place called Four Mixed in Chawama Compound when the appellant came out of his shop from across the road and asked them to leave. The appellant then took out a gun, shot the deceased and went back into the shop and continued attending to customers.

2.2 PW1 denied that the appellant told them that they were disturbing his business or that he was trying to separate them

from the sparring or that they were sparring in front of his shop. He said they were about eight metres from the appellant's shop.

2.3 PW2 confirmed that the appellant came out of his shop, and went across the road where the boys were playing. According to her, the appellant told the duo that they were making noise and then took a firearm from his pocket and shot the deceased. PW2 denied that the two were fighting or quarrelling.

2.4 Dennis Simpemba (PW3) a brother to the deceased rushed to the crime scene after PW2 told him about the shooting. He organised a taxi belonging to Levy Mumba (PW6) and took the deceased to Chawama Police station and later to the University Teaching Hospital. Sadly, he passed on. PW3 too said the appellant's shop was about eight metres from the crime scene.

2.5 Reuben Silwemba (PW5) went to the roadside to buy a drink. He found the appellant arguing with the deceased. He tried to separate them before entering the shop. He then heard a sound like fireworks. He peeped outside, and saw the deceased lying down. He approached him and saw a small hole on the chest. For him, the distance from the shop to where the shooting occurred was about three metres.

2.6 PW6 testified that after PW3 asked for transport to take the deceased to the hospital, he saw the culprit who was in the shop

counting money. He estimated the distance between the shop and where the deceased was lying to be about four metres.

2.7 Chief Inspector Chinyama (PW9), said the appellant admitted that he shot the deceased though accidentally as he tried to separate a fight between the deceased and another person near his shop, but PW9 established that the deceased and PW1 were sparring and not fighting. He admitted that to a by-stander the sparring might have appeared like a fight. However, the appellant disclosed that he went to the boys who were sparring because they were making noise and disturbing him as he conducted his business.

2.8 In his defence, the appellant pleaded accidental shooting. He testified that he was in his shop when he saw the deceased and PW1 fighting at the door of his shop. He went to separate them, but they turned on him and began to beat him. He got scared, thinking they would steal the money he had in his pocket. He took out the gun in order to scare them. PW1 ran away but the deceased held onto the gun and wanted to get it from him. In the struggle, the gun went off.

2.9 He admitted that the gun was loaded with live ammunition, but insisted that he did not know the deceased and had no reason

or intention to shoot him. For that reason, he used his bare hands in separating the duo.

3. <u>Decision of the High Court</u>

3.1 The learned trial judge found as a fact that the appellant shot the deceased and caused his death although he alleged that the gun fired accidentally as he was trying to protect his property and or his person. As to whether there was malice aforethought in the shooting of the deceased to satisfy the murder charge, the judge considered **section 204** of the **Penal Code** and the case of **The People v. Njovu**[1].

3.2 The learned judge further considered the evidence from PW1, PW2 and the appellant and on the basis of the latter's evidence, she concluded that he was raising the defence of self-defence. She also considered section 17 of the Penal Code and the cases of **The People v. Lewis**[2], **The People v. Tembo**[3] and **Palmer v. R**[4] and rejected the defence of self-defence and defence of property.

3.3 She found on the evidence that the defence was not available because the shooting of the deceased was way out of proportion compared to the attack on him by the two boys who were using their bare hands. She concluded that the appellant had the

intention to kill or to cause grievous harm to the deceased or knew or ought to have known that his action would be likely to cause death or grievous harm to him. Upon conviction she sentenced him to the mandatory death penalty.

4. <u>The Appeal</u>

4.1 This appeal is argued on two grounds. First, the appellant assailed the trial court for not accepting provocation as a defence on the facts of the case. In the alternative, he accused the court of failing to find extenuating circumstances to justify a sentence other than death.

4.2 In support of ground one, Mrs. Bwalya, contended, briefly that the trial court should have considered the defence of provocation based on the testimony of PW2 that the appellant left his shop and went to where the deceased and PW1 were and told them that they were making noise and the evidence of PW5 that he found the appellant arguing with the deceased and tried to separate them.

4.3 Counsel argued that the appellant and the deceased might have had an altercation because the deceased and PW1 were making noise outside his shop, which was only three metres away contrary to the evidence of the other prosecution witnesses.

Counsel cited sections 205 and 206 of the Penal Code, which deal with the defence of provocation and several authorities including the case of **Nyendwa and Another v. The People**[5].

4.4 She argued that the evidence raised various inferences and that PW1's testimony should have been taken with caution because as the deceased's friend, he was a suspect witness, thus capable of lying about material facts. Mostly he did not mention the appellant's complaint about the noise or the argument with the deceased, which PW2 and PW5 who were independent persons referred to.

4.5 She cited the case of **Musupi v. The People**[6] submitting that the danger of false implication was present and was not excluded before the conviction. We were urged to set aside the conviction for murder and the death penalty and to substitute a conviction of manslaughter and a sentence commensurate to the facts.

4.6 On the alternative ground, Mrs. Bwalya submitted, based on section 201(2) of the Penal Code and the case of **Jack Chanda and Another v. The People**[7], that the trial court should have found that the failed defences of provocation and self-defence constituted extenuating circumstances to entitle the appellant to a sentence other than death.

4.7 Mrs. Bauleni supported the conviction and sentence. In her combined response, she submitted that the appellant's act of shooting the deceased was excessive and inconsistent with the principles of provocation and self-defence and that in assessing reasonableness, we should adopt an objective test, considering how a reasonable person in society would have responded in a similar situation. She relied on the cases of **Liyumbi v. The People**[8], **Daudi Phiri v. The People**[9] and **Makomela v. The People**[10] and sections 206, 205 and 17 of the Penal Code.

4.8 On witness credibility and motive, while counsel acknowledged that the trial court did not rule out the potential danger of false implication or motive on the part of PW1, she disputed any claims of false implication or witness bias against the appellant.

4.9 She argued that the appellant did not, during the cross-examination of PW1, demonstrate any specific circumstances that would have prompted PW1 to provide false evidence or to falsely implicate him. She quoted cases such as **Mangoma v. The People**[11], **Yokoniya Mwale v. The People**[12] and **Mwenya v. The People**[13] as authority for this proposition.

4.10 Finally, on the argument that the trial court failed to consider the failed defences of provocation and self-defence as extenuating circumstances, Mrs. Bauleni asserted that the use

of a firearm resulting in the deceased's death, demonstrated malice aforethought and excessive force. Consequently, the likelihood of provocation and self defence was negated.

5. Consideration of the Appeal and Decision

5.1 We have considered the judgment of the trial court and the arguments by learned counsel on both sides. It is Mrs. Bwalya's argument on the first ground of appeal that there were many inferences that could be drawn from the evidence on record and that the defence of provocation was open to the appellant.

5.2 As we understand Mrs. Bwalya, the noise making by the deceased and PW1 and or the purported altercation between the deceased and the appellant (alluded to by PW5) was the provocative act while the production of the gun signified the loss of self-control. It seems to be her understanding that the shooting was proportionate to the provocation of 'making noise'.

5.3 There was no dispute at the trial that the deceased died from a gunshot wound to his chest or that the shot was discharged by the appellant from his firearm. The appellant's defence was that the gun fired accidentally as he struggled for it with the deceased who wanted to take it away from him. At the same time, he claimed that he was trying to separate the deceased

and PW1 who were fighting at the door of his shop, but they turned on him and began to beat him. He got scared, thinking they would steal money he had in his pocket. He removed the gun from the pocket in order to scare them.

5.4 The trial judge considered the defence of self defence and defence of property and rightly discounted that defence. Evidently, the appellant did not plead the defence of provocation and we do not see how that defence arose or could arise on the facts of this case, particularly on the appellant's own evidence.

5.5 It is plain that the eye witness account of PW1 and PW2, showed that the deceased and PW1 were sparring by the roadside when the appellant came out of his shop across the road and asked them to leave. He then took out the gun, shot the deceased and went back to his shop and continued attending to customers. PW1 refused that the appellant was trying to separate them, or that they were sparring in front of his shop.

5.6 We are also alive to the fact that whilst PW1 had denied that the appellant told them that they were making noise or disturbing his business, PW2 agreed that he told them that they were making noise and PW5 disclosed that he found the appellant arguing with the deceased and tried to separate them. This is the altercation Mrs. Bwalya mentioned in her submission.

5.7 She argued further that PW1's evidence should have been taken with caution as he was a suspect witness considering that he was the deceased's friend. She specifically mentioned the denial by PW1 that the appellant complained about the noise and the argument between the deceased and the appellant, which PW2 and PW5 who she said were independent witnesses alluded to.

5.8 In all fairness to the appellant, we are inclined to agree with Mrs. Bwalya that the above pieces of evidence should have alerted the trial judge to the danger that PW1 may not have been very truthful about the unfolding of the events that evening and she should have treated his evidence with some caution. Mrs. Bauleni in fact agreed. PW1 was not only the deceased's friend, he was also sparring with him when he was shot and denied that the appellant told them that they were making noise.

5.9 What this means is that the learned trial judge should have ruled out any motive for PW1 to lie against the appellant by looking for corroboration or something more to satisfy her that the danger of false implication had been excluded. Quite clearly, the judge did not do so.

5.10 Nonetheless, Mrs. Bwalya accepted that PW2 and PW5 were independent witnesses. Although there was mention by PW3 that PW2 was his niece (thus, a niece to the deceased), there is

nothing in the evidence, to make her a suspect witness or to show that she had any possible motive to lie or to falsely implicate the appellant in the commission of the offence.

5.11 As we said in the case of **Yokoniya Mwale v The People**[12] a conviction would be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is key being for the court to satisfy itself that there is no danger of false implication.

5.12 Therefore, PW2's evidence sufficiently corroborated the suspect evidence of PW1. She confirmed that the appellant came out of his shop, went across the road to the barbershop where the two boys were playing, told them that they were making noise, and then took a firearm from his pocket and shot the deceased. This also confirmed PW1's evidence that the two boys were sparring by the roadside and not by the door to the appellant's shop.

5.13 PW2 also firmly denied that PW1 and the deceased were fighting or quarrelling nor was there any mention in her evidence that the two pounced on the appellant as he tried to separate them and started beating him. The appellant simply took out the gun

when he came out of the shop, and shot the deceased in the chest after telling them that they were making noise.

5.14 PW5's evidence was that he found the appellant arguing with the deceased and tried to separate them. However, he did not say the deceased was the provoker or that the altercation resulted in a fight or that the deceased and PW1 were beating the appellant for him to be justified to defend himself or the money in his pocket by taking out a loaded firearm.

5.15 Although PW9 admitted that the sparring might have appeared like a fight to a by-stander, the appellant disclosed to him that he went to the boys who were sparring because they were making noise and disturbing him as he conducted his business; he did not say that he was trying to separate the boys or that the boys turned on him.

5.16 There was also the evidence of PW6 that after PW3 informed him that his brother had been shot, he saw the appellant who was in the shop counting money. This certainly shows that the appellant was indifferent to the harm he had inflicted on the deceased. If indeed the shooting was accidental as he claimed at the trial, he would have been anxious and helped the deceased to get to the hospital.

5.17 As we said earlier, the defence of provocation was not available to the appellant because the requisite elements of the defence defined in a plethora of authorities namely: proof of the act constituting provocation; loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation were and are not apparent on the evidence on record.

5.18 It is trite that a court is not called upon to consider a defence unless there is some evidence to support it. The court will not consider a defence when it has been raised in the form of a speculation from the bar as in this case.

5.19 The appellant said he did not know the deceased so he had no reason or intention to shoot him. However, he knew that the gun was loaded with live ammunition, he still took it out and deliberately shot an 18-year-old boy in the chest because he considered the sparring near his shop as noise making.

5.20 As regards self-defence and defence of property, that again, did not arise on the evidence although the trial judge did consider it, and rejected it on ground that the shooting was way out of proportion to the alleged attack on the appellant. We agree entirely with the learned judge that by shooting the deceased [in the chest], the appellant had the intention to kill or cause

grievous harm or knew or ought to have known that his actions would be likely to cause death or grievous harm to the deceased.

Conclusion

5.21 In all, both grounds of appeal must fail. The alternative ground fails because if the defence of provocation or self defence did not arise at some point on the facts of the case, then there was no failed defence of provocation or self defence to warrant consideration of extenuating circumstances.

5.22 We dismiss the appeal for lack of merit.

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SUPREME COURT JUDGE

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