IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 12/2022**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

MIKE MULOBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

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

For the Appellant: Mrs. M.K. Liswaniso, Senior Legal Aid Counsel

For the Respondent: Mrs. J.K. Mwanza, Senior State Advocate

J U D G M E N T

KAOMA, JS, delivered the judgment of the Court.

Cases referred to:

1. **Andrew Tembo v. The People - SCZ Appeal No. 13 of 2011**
2. **Whiteson Simusokwe v. The People (2002) ZR 341**
3. **Mwandema v. The People (1995 – 97) ZR 133**
4. **Palmer v. R (1971) All ER 1088**
5. **Simutenda v. The People (1975) ZR 294**
6. **Maidon Chimbila v. The People – SCZ Judgment No. 507 of 2013**
7. **The People v. Njovu (1968) Z.R. 123**
8. **Lengwe v. The People (1976) Z.R. 127 (SC)**
9. **Joseph Mwandama v. The People - SCZ Judgment No. 5 of 1996**
10. **Jabes Mvula v. The People - Appeal No. 131 of 2019.**
11. **Attorney General v. Marcus Kampumba Achiume (1983) Z.R.1**
12. **Liyumbi v. The People (1978) Z.R. 25**
13. **Makomela v. The People (1974) Z.R. 254**
14. **Jutronich Schutte and Lukin v. The People (1965) Z.R. 9**
15. **Philip Mungala Mwanamubi v. The People - Appeal No. 2/44/2011**
16. **R v. Ball (1951) 35 Criminal Appeal Reports 164**

Legislation referred to:

1. **Section 17 of the Penal Code, Chapter 87 of the Laws of Zambia**

1.0 Introduction

1.1 The delay in delivering the judgment is deeply regretted. It was occasioned by one of our number being indisposed with ill health for quite some time.

1.2 This is an appeal against conviction and sentence. The appellant was tried and convicted by the High Court sitting at Lusaka (Lengalenga J.) for murder contrary to **section 200** of the **Penal Code, Cap 87**. The allegation was that he murdered Moses Sichifuta on 8th July, 2010, at Lusaka. Upon conviction, he was given a custodial sentence.

1.3 We must state out rightly that the record of appeal comprises only the judgment of the trial court. There is on record an affidavit by Rachael Tembo, the clerk of court who compiled the record of appeal in which she deposed that the case record containing the proceedings of the trial court could not be found. She only managed to find a copy of the judgment.

1.4 In the case of **Andrew Tembo v. The People**[1], we held that an appellate Court can hear and determine an appeal where the

record of appeal comprises only a judgment of the trial Court, if the judgment sufficiently summarises the evidence of pertinent witnesses and the Court can be able to assess the weight of such evidence and to determine whether or not the decision of the lower Court being appealed against should stand. We have perused the judgment of the High Court and we are satisfied that it contains a sufficient summary of the evidence to enable us determine this appeal.

1.5 We can discern from the judgment of the trial court that the prosecution called four witnesses while the appellant testified on his own behalf and called no other witness. It was not in dispute that the appellant caused the death of the deceased by stabbing him with a knife during a scuffle over the disposal of game meat the appellant or both of them had killed.

1.6 What was in dispute was whether the appellant killed the deceased with malice aforethought. The appellant had pleaded the defences of provocation and self-defence and the trial court rejected both defences.

2.0 Prosecution Evidence

2.1 The prosecution's version of what transpired was given by PW1, Mudala Sichifuta, a brother to the deceased. He testified that on 8th July 2010 he left the appellant in the bush at the place where they used to skin animals after hunting. He left him with some customers who wanted to buy meat while he took some meat to his home. He returned to the bush with his young brother, the deceased, and two other customers.

2.2 PW1 found the appellant selling the meat and asked him who had authorised the sale in his absence. PW1 then decided that they pack the meat and take it home so that they could discuss the matter the next day. A struggle followed between them. When the deceased stood up, the appellant got a knife and stabbed him in the heart and said to PW1 "**You see; you remain with your meat**" and he ran away. PW1 tried to arouse his brother but he died after about twenty minutes.

2.3 Other people, including PW2, Greenwell Sinyinda, a crime prevention officer in the area, PW3 Kenneth Mafuka Musole, the neighbourhood watch chairman and Shibuyunji police were informed about the stabbing of the deceased, but the police said

they would go there in the morning. PW2 and PW3 went to the crime scene and verified the death of the deceased. They also checked the body and saw a very deep cut on the left side of the body. The deceased's body was collected and taken home.

2.4 The appellant was later apprehended from his house. He admitted when asked what he had done that he stabbed someone with a knife. According to PW3, when he asked the appellant why he murdered his friend, he told them that they wanted to get meat from him. The appellant was taken to the police station together with the deceased's body. The knife was recovered later from the appellant's home.

2.5 In cross-examination, PW1 testified that he had been hunting with the appellant for two months and there were no problems during that period. He said he was upset because the appellant was selling the meat in his absence. He said during the argument, the deceased was seated and did not say anything; he stood up to separate them as they were struggling.

2.6 PW4, Detective Inspector Muhau Sibwisha (then detective sergeant) received the report from PW1 of the brutal stabbing of the deceased and the body and the suspect were presented to

him. He inspected the body and saw two deep cuts, on the left side of the chest and the left shoulder. He confirmed that the knife was recovered from the appellant's home.

2.7 A postmortem was later conducted by Dr. Musonda who confirmed the cause of death as deep wounds inflicted by the stabbing. Thereafter, PW3 arrested and charged the appellant for murder, which he denied.

3.0 Defence Evidence

3.1 The appellant testified that he went hunting by the Kafue River on 7th July 2010 with his friend Phineas. He met PW1 who gave him six bullets and they agreed that he would pay him K60,000.00 after selling the animals. After the hunt, he returned with four animals. He left Phineas with the animals and went into the compound to look for customers. He met PW1 who asked for some meat for relish. He told him to wait as he was looking for customers. After he found two male customers, he bought charcoal and salt, and went to tell PW1 that he could get the relish he wanted. PW1 got the meat and left. The appellant remained drying the meat until 19:00 hours when PW1 returned with the deceased and two female customers.

3.2 The appellant told PW1 that he had made a mistake by taking the female customers there without telling him and that his male customers would buy the meat. He also told PW1 to wait for him to sell the meat so that he could give him the K60,000.00. The deceased then got a sack and started packing the meat. The appellant's customers complained and demanded for the money he had used to buy the charcoal and salt. The appellant grabbed the sack upon which the deceased started to beat him and was joined by PW1. The appellant looked for a knife, stabbed the deceased and told PW1 to get all the meat and sell it and give him the money. He took the gun and left. He slept until 01:00 hours when he was apprehended.

3.3 The appellant explained in cross-examination that he had the knife in his pocket when he was "dealing with the meat" and admitted that both the deceased and PW1 had nothing in their hands when they were beating him. He said he sustained injuries (from the beating) and was even supposed to go for an operation and that the brothers were beating him when he was in possession of the loaded gun. He further said he did not know if PW1 was a hunter since he had not seen him in action.

4.0 Decision of the Trial Court

4.1 The learned trial judge found as a fact that the deceased died on 8th July 2010 after being stabbed with a knife by the appellant who accepted having stabbed the deceased. The trial judge identified the contentious issue to be the justification for the stabbing since the appellant claimed that he stabbed the deceased while he was being beaten by the brothers.

4.2 The judge considered whether the defence of self-defence was available to the appellant and took the view that he could not avail himself of the defence on the facts of the case. She noted that both the deceased and PW1 had no weapon as conceded by the appellant, that the appellant had an opportunity to retreat by running away, if it were true that he was being beaten, and that he had an option to use something else such as a stick to repel the attack, instead he chose to fatally stab the deceased. She concluded that the degree of force used was excessive and could not justify the appellant's action.

4.3 The learned trial judge also considered the defence of provocation and held that the use of the knife which the appellant looked for was excessive and defeated the defence.

She found that he acted with malice aforethought, convicted him and imposed a prison sentence of 45 years on ground that the failed defence of provocation afforded extenuation in line with the case of **Simusokwe v. The People[2].**

5.0 Appeal to this Court

5.1 The appellant was aggrieved by his conviction and sentence and filed this appeal advancing two grounds as follows:

5.1.1 The trial Court erred in law and fact when the court found that the appellant did not kill in self-defence and was not provoked.

5.1.2 The trial Court erred in law and fact when the Court sentenced the appellant to 45 years imprisonment with hard labour.

5.2 In support of the first ground of appeal, Mrs. Liswaniso, submits that it was an error for the trial judge to reject self-defence and provocation on the facts because the appellant was in imminent danger from what she termed a murderous attack and his reaction to stab the deceased was reasonable and done in the heat of the moment to avert the danger. She relies on the cases of **Mwandamena v. The People[3]**, and the English case of **Palmer v. R[4]**, among others.

5.3 With regard to the defence of provocation, Mrs. Liswaniso has referred us to the case of **Simutenda v. The People**[5] on the elements that constitute the defence submitting that a reasonable man, in the circumstances of the case would have lost his self-control and acted as the appellant did, and that the retaliation was not excessive as it was done to dispel the attack. She prays that we allow ground one, quash the conviction for murder and set the appellant at liberty.

5.4 In response, Mrs. Mwanza, submits that the trial court was entitled to refuse to accept self-defence and provocation and properly found that the appellant had malice aforethought when he committed the offence. She quotes the case of **Maidon Chimbila v. The People**[6] as authority and argues that the use of the knife and the appellant's conduct and words soon after the stabbing, buttresses the fact that he intended to kill or to cause grievous harm to the deceased and was indifferent as to whether his conduct would cause death or grievous harm.

5.5 Thus, she submits that it is doubtful that the appellant could claim that he killed the deceased in self-defence when his actions show that he was clear about what he had done and

there was no evidence to suggest he was in any danger and his explanation of the events was properly rejected. She cites the case of **The People v. Njovu**[7] where the court said "to stab a person is unlawful, unless it appears that the stabbing was justifiable in the exercise of the right of self-defence." According to counsel, even if we were to accept the appellant's version of events, it would still not entitle him to benefit from self-defence under **section 17** of the **Penal Code** as the force employed was excessive. She also relies on **Lengwe v. The People**[8].

5.6 As to provocation, counsel cites the case of **Simutenda v. The People**[5] submitting that the elements of provocation were not satisfied and the incident was not one that would make an ordinary person lose self-control. Further, the brothers were not armed with any offensive weapon, the fight was a fist fight, and the trial judge found that the appellant looked for the knife fully aware of what harm it could cause when there were other possibilities available to him in the circumstances.

5.7 She contends that the mere fact that there was a misunderstanding and a fight over the authority to sell meat did not entitle the appellant to stab the deceased. Otherwise,

should we find that the appellant was provoked, the retaliation was not proportionate to the provocation.

5.8 In support of ground two, Mrs. Liswaniso submits that the trial court erred in sentencing the appellant to 45 years in prison in the absence of aggravating factors to warrant such a stiff sentence. She cites the case of **Simusokwe v. The People**[2] to show that once extenuating circumstances were found to exist, the sentence must reflect that fact even if the likelihood is that it will be more severe than if the conviction was for manslaughter. The case of **Joseph Mwandama v. The People**[9] is also relied on. Counsel has urged us to set aside the sentence and replace it with a prison sentence of 15 years.

5.9 In contrast, Mrs. Mwanza contends that the trial judge took into account extenuating circumstances which benefitted the appellant since he avoided the death penalty. She quotes the case of **Jabes Mvula v. The People**[10]. Counsel submits that the use of a knife to stab the deceased shows that the appellant intended to harm the deceased; he did not act in self-defence nor was he provoked; and he did not present to the court

evidence which may entitle him to a lesser sentence. Therefore, the sentence should not come to us with a sense of shock.

5.10 She also contends that the trial court had the opportunity to see and hear the witnesses and was better placed to make any findings of fact and that there can be only one conclusion, that the appellant committed the offence of murder and was appropriately sentenced. Counsel has implored us to uphold the conviction and sentence and to dismiss the appeal.

6.0 Our Consideration of the Appeal and Decision

6.1 We have carefully considered the judgment appealed against and the opposing positions taken by the parties in this appeal. From the submissions Mrs. Liswaniso has made on behalf of the appellant, the main issue is whether the trial judge rightly rejected the defences of self-defence and provocation. Whether or not the defences were open to the appellant and whether the sentence is excessive depends on the circumstances surrounding the commission of the offence.

6.2 PW1 and the appellant were the only eye witnesses to what transpired and as we said earlier, the learned trial judge did consider the defences of self-defence and provocation and

concluded that they were not available to the appellant on the facts of the case. We accept as revealed by the evidence and submitted by counsel that there was a misunderstanding and a scuffle over the right to sell the game meat. Admittedly, PW1 was upset when he returned to where he had left the appellant because the latter was selling the meat in his absence.

6.3 Whether or not PW1 was involved in the actual hunting is inconsequential at this stage because the appellant revealed that PW1 provided six bullets for hunting the animals and they agreed that he would be paid K60,000 after the meat was sold. Therefore, PW1 may have had a genuine claim to the meat or a right over the meat.

6.4 While PW1 said during the argument, the deceased was seated and did not say anything; he only stood up to separate him and the appellant as they were struggling and the appellant got a knife and stabbed him in the heart, and he refused that they beat up the appellant, the latter said he was being beaten by the two brothers when he stabbed the deceased and was badly beaten and required an operation.

6.5 Since the trial judge considered the allegation by the appellant that he was being beaten, we shall approach the matter from his viewpoint that the deceased was the one packing the meat and he grabbed the sack upon which the deceased started to beat him and was joined by PW1. We are also alive to the submission by Mrs. Liswaniso that the appellant was in imminent danger from a murderous attack and his reaction was reasonable and done in the heat of the moment to avert the danger.

6.6 We have considered the case of **Mwandamena v. The People**[3], where we said the essence of self-defence is that the accused acts quite deliberately to preserve his life or to prevent harm to himself. We have also reflected on the cases of **Palmer v. R**[4] and **Lengwe v. The People**[8] which guide that if a person is under a serious attack and in immediate peril, then immediate defensive action may be necessary. That, if the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction, and that a man cannot be expected to consider dispassionately precisely what force he may use or whether a weapon which happens to be ready to hand which he

picks up and uses in the heat of the moment is not more than the occasion warrants.

6.7 In rejecting the defence of self-defence the trial judge alluded to the appellant's claim that he was badly beaten and required an operation although she did not make any specific finding of fact on the issue. Nonetheless, we note that there was no mention of any medical evidence to support that assertion. Moreover, PW2 and PW3 who apprehended the appellant did not mention in their evidence that they saw any injury on him. Neither did PW4 who arrested him for this offence. According to PW3 when they asked the appellant why he had murdered his friend, he responded that they wanted to get meat from him.

6.8 In these circumstances, we are not persuaded that the appellant was in imminent danger from a murderous attack or that he was badly beaten and required an operation or that his reaction to stab the deceased was reasonable and done in the heat of the moment to avert the danger. Besides, the evidence of PW4 shows that the deceased sustained two deep cuts, on the left side of the chest and left or right shoulder. The appellant did not justify why he had to stab the deceased, twice.

6.9 The trial judge found on the evidence that PW1 and the deceased had no weapon, that the appellant had an opportunity to retreat by running away, and he also had an option to use something else such as a stick to repel the attack, instead he chose to fatally stab the deceased, with a knife he had to look for.

6.10 The appellant's evidence was that the knife was in his pocket. However, he admitted that after he stabbed the deceased, he told PW1 to get all the meat and sell it and give him the money. We agree with Mrs. Mwanza that the trial judge had the opportunity to see and hear the witnesses and was better placed to make findings of fact and we are generally slow to reverse findings of fact made by a trial judge (**Attorney General v. Marcus Kampumba Achiume**[11]).

6.11 For the forgoing reasons, we agree entirely with the conclusion reached by the learned trial judge that the degree of force used in the alleged self-defence was excessive and could not justify the appellant's reaction and we find no basis on which to disturb the judge's findings and conclusions.

6.12 Coming to the defence of provocation, as submitted by counsel on both sides, it is settled that provocation consists of three

elements namely: proof of the act constituting provocation; loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. Hence, if the appellant killed the deceased under the influence of provocation, and the provocation was such as likely to deprive a reasonable person of self-control, then the offence of murder should reduce to manslaughter (**Liyumbi v. The People**[12]). Further, in the case of **Makomela v. The People**[13], we said that:

> **"loss of self-control is not absolute but is a matter of degree; the average man reacts to provocation according to its degree with angry words, with a blow of the hand, or possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon".**

6.13 In the present case, Mrs. Liswaniso has submitted that a reasonable man, in the circumstances of this case would have lost his self-control and acted as the appellant did and that the retaliation was not excessive as it was done to dispel the attack. Conversely, Mrs. Mwanza submits that the trial court was on firm ground when it rejected the defence as it was wholly out of proportion to the exigency of the moment and no ordinary person would react in the manner the appellant did.

6.14 We agree again with the learned trial judge and counsel for the respondent that if at all the appellant was provoked because

the deceased and PW1 wanted to take away the meat or because he was assaulted by the brothers, his reaction of looking for the knife, which according to him was in his pocket and stabbing the deceased, twice in the chest and shoulder did not bear a reasonable relationship to the alleged provocation.

6.15 In any case, we are not persuaded that the provocation was gross to justify the use of a dangerous weapon. The argument was petty and no reasonable person in the position of the appellant would have reacted in the manner that he did. We have no reason to fault the trial judge for arriving at the conclusion that the appellant acted with malice aforethought when he stabbed the deceased. As a result, we find no merit in ground one and we dismiss it.

6.16 We come now to the second ground of appeal and whether the custodial sentence was excessive. As rightly submitted by Mrs. Mwanza, the learned trial judge found that the failed defence of provocation provided extenuating circumstances and for that reason she sentenced the appellant to a prison term of 45 years instead of the death penalty.

6.17 We are alive to the decision in the case of **Mwandama v. The People**[9] relied on by Mrs. Liswaniso and **Mvula v. The People**[10] quoted by Mrs. Mwanza. We are also alive to the principles of sentencing expounded in a plethora of cases, including **Jutronich, Schutte and Lukin v. The People**[14] and **Mwanamubi v. The People**[15]. We also take into account the decision in **R v. Ball**[16] that in deciding the appropriate sentence, a court should always be guided by certain considerations, the first and foremost being the public interest and that the criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it.

6.18 It is quite clear from all these authorities that sentencing is the discretion of the sentencing court and an appellate court does not enjoy complete freedom or power to interfere with sentences which have been properly meted out unless it can be shown that the sentencing court acted upon a wrong principle, overlooked relevant material or took into account irrelevant factors or that the sentence is manifestly excessive.

6.19 We are not satisfied in the circumstances of this case that the trial judge acted upon a wrong principle, or overlooked relevant

material or took into account irrelevant factors or that the prison sentence of 45 years with hard labour is manifestly excessive as to come to us with a sense of shock. As we have already said the scuffle over the authority to sell the meat or the alleged assault by the brothers was trivial and did not call for the fatal stabbing of the deceased in the chest. We refuse to disturb the sentence and dismiss ground two of the appeal.

7.0 Conclusion

7.1 The two grounds of appeal having failed, we uphold the conviction and sentence and dismiss the appeal in its entirety.

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