

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

APPEAL No. 03/2022

BETWEEN:

BENSON KAUNDA

AND

THE PEOPLE



APPELLANT

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. M. Muyoba - Chizongo, State Advocate

J U D G M E N T

KAOMA, JS delivered the Judgment of the Court.

Cases referred to:

1. **Musupi v. The People (1978) Z.R. 271**
2. **Simusonkwe v. The People (2002) Z.R.63**
3. **Chibangu v. The People (1978) Z.R. 37**
4. **Walker v. R (1969) 53 Criminal Appeal Reports 195**
5. **Nyendwa and Another v. The People (1978) Z.R. 399**
6. **Makomela v. The People (1974) Z.R. 254**
7. **Liyumbi v. The People (1978) Z.R. 25**
8. **Simutenda v. The People (1975) Z.R. 294**
9. **Shamwana and Others v. The People (1985) Z.R. 41**
10. **Nswana v. The People (1988 to 1989) Z.R. 174**
11. **Mutale and Another v. The People (1997) Z.R.**
12. **Mulenga and Another v. The People (2008) Volume 2, Z.R. 1**
13. **Madubula v. The People (1993-1994) Z.R. 91**
14. **Chanda and Another v. The People (2002) Z.R. 124**
15. **Wamundila v. The People (1978) Z.R. 211**
16. **Phiri (E) v. The People (1978) Z.R 112**
17. **Mvula v. The People (1990 - 1992) Z.R. 54 (S.C.),**

18. Zimba v. The People (Appeal No. 343/2011)**Legislation referred to:****1. Penal Code, Chapter 87 of the Laws of Zambia****1.0 Introduction**

1.1 The delay in delivering this judgment is deeply regretted. One of the panel members was indisposed with ill health for a period of time.

1.2 This is an appeal against conviction and sentence. The appellant Benson Kaunda was convicted for murder by the High Court sitting at Mansa (Mulanda, J). It was alleged that on 2nd June 2011, in the Nchelenge District of Luapula Province, he murdered Pardon Kangwa. Upon conviction, he was sentenced to death.

2.0 Evidence in the Court below

2.1 Five witnesses had testified for the prosecution. Gertrude Mulenga (PW1) and Belita Kombe (PW2) who were sisters and Elizabeth Chitalu (PW3), their neighbour provided details of the events leading up to the death of the deceased.

2.2 PW1 testified, in brief, that she had been married to the appellant from 2003. They separated on 28th February 2011. On 26th June 2011, he gave her a cassava field. She moved with PW2 into a rented makeshift house at the cassava field. On 2nd June 2011,

she was bathing behind the house around 20:00 hours. She left PW2 at the front, roasting groundnuts. Suddenly, she heard PW2 scream. She rushed there and saw the appellant beating the deceased. She did not know the deceased.

2.3 PW2 was the one who received the deceased. She too did not know him. He disclosed his name to her and the reason for the visit. He was looking for piece work. She asked him to wait for PW1 who was taking a bath. She entered the house to prepare the bed for her and PW1 before it got too dark. She heard a scream outside. She peeped and saw that the appellant had arrived and kicked the deceased who had fallen down. She saw him undress the deceased. He then entered the house and threw a stool, at her, twice. He went outside, held the deceased by the arm and took him to PW3's house.

2.4 PW1 and PW2 ran towards the next occupied house while shouting for help. They hid in the nearby bush for fear that the appellant may assault them. They saw him still holding the deceased who was fighting to free himself and was telling the appellant that he had stabbed him and removed his intestines. PW2 said she saw the appellant stab the deceased with a knife in the stomach at PW3's house and described the knife to the trial court. Both PW1

and PW2 denied allegations of adultery between PW1 and the deceased.

- 2.5 PW3 was called outside by her family members and heard someone shouting for her. She saw the appellant holding the deceased by the arm as he approached her house. He told her that he had found the deceased and PW1 in a sexual act in the makeshift house. She confirmed that the deceased was naked and that he was shouting for help, saying he was injured and his intestines were protruding.
- 2.6 She said the appellant went back to PW1's house to collect some exhibits. When he returned and found that the deceased had disappeared, he said he would not survive because he had injured him badly and he offered to report himself to the village headman.
- 2.7 Detective Inspector Mushitilasweni (PW5) investigated the matter. He confirmed the stabbing and that the appellant reported himself to the police and alleged that he found the deceased with his wife. At the crime scene, PW5 saw blood stains near PW3's house, and a trail of blood up to the point where the deceased was found.
- 2.8 In his defence the appellant insisted that PW1 was his wife and he found her and the deceased having sex in the makeshift house after listening to their love chit-chat for about forty-five minutes. When PW1 saw him, she pushed the deceased to the side and stood up. He approached the deceased and tried to hold him but

his body was slippery from sweat, causing him to fall. He tried to hold him again and saw him holding a knife. He held the deceased on the same hand and they struggled as he shouted for help.

2.9 He did not know what happened next. He just saw the deceased drop the knife and run away. He remained with the knife and again shouted for help. PW3 heard him and told him that the deceased had run behind her house. He confirmed telling PW3 that he found the deceased with his wife having sex and that he went back to the house to collect the deceased's clothes and PW1's under wear.

2.10 He took the knife and clothes to the police. He claimed that the police charged the deceased with criminal trespass and the next morning, he was detained for assault since the deceased had a knife wound. He refused that he undressed the deceased, although he said PW2 was his sister-in-law and he got along with her and everyone else in the family. In the end, he admitted that he fought and stabbed the deceased and caused his death, but insisted that he was provoked when he saw the deceased and PW1 having sexual intercourse.

3.0 **Decision by the High Court**

3.1 The learned trial judge evaluated the evidence before her. She acknowledged that PW2 was a sister to PW1 whom the appellant claimed to be his wife and that she had a possible interest to

serve. Hence, she warned herself that before accepting her evidence she must be satisfied that there was no motive to implicate the appellant by giving false evidence.

- 3.2 After quoting the case of **Musupi v The People**¹, she accepted PW2's evidence on ground that she had the opportunity to observe her demeanour, and found her to be a credible witness who could not have fabricated incriminating evidence against the appellant. She found PW2's evidence corroborated by PW3 in relation to the house where the deceased was taken and where the old lady who was said to have witnessed the stabbing of the deceased lived.
- 3.3 She further found that the evidence of PW2 and PW3 corroborated each other to the effect that the appellant stabbed the deceased and that he did so at PW3's house. She rejected the appellant's explanation that he might have stabbed the deceased by accident during the struggle in the makeshift house especially that the evidence of PW5 did not disclose any blood stains inside or outside the makeshift house going towards PW3's house where the appellant took the deceased. He mentioned blood drops at PW3's house.
- 3.4 The trial judge was satisfied that the appellant caused the deceased's death and that he did so with malice aforethought

because he must have foreseen that by stabbing the deceased in the stomach with a knife to the extent of the intestines coming out, he would cause his death or at least do him grievous harm.

3.5 On the defence of provocation, the learned judge opined that the appellant was not at the material time married to PW1 and found that confirmed by PW2. Citing the case of **Simusonkwe v The People**² she found that there was no intimacy between the appellant and PW1.

3.6 In case she was wrong and a valid marriage existed between the two, she asked whether there was any wrongful act the deceased did which provoked the appellant to the extent of being deprived of the power of self-control and to induce him to assault the deceased.

3.7 The trial judge found as a fact that the deceased was not known to PW1, PW2 and PW3 and other people who went to the scene; that the appellant found him outside and not inside the makeshift house around 19:00 hours and that there was nothing wrong with the deceased sitting outside as he had gone there to ask for piece work.

3.8 Citing the case of **Chibangu v The People**³ and **Walker v R**⁴, she held that there was no provocation since the appellant did not find the deceased and PW1 having sexual intercourse. He found him

sitting outside in front of the makeshift house while PW1 was having a bath behind the house. She also found no extenuating circumstances to warrant a lesser sentence.

4.0 Appeal to this Court

- 4.1 The appellant has appealed on three grounds. First, he alleges that the trial judge misdirected herself in law and fact when she did not accept the defence of provocation on the facts of the case. Secondly, he claims that the possibility of fabrication and false implication of the events had not been completely ruled out considering the several inconsistencies in the prosecution evidence. Alternatively, he accuses the trial judge of failure to analyse the existence of extenuating circumstances to warrant a sentence other than death.
- 4.2 In relation to ground one, Mrs. Bwalya, accepted that the appellant caused the death of the deceased and that the trial judge rightly considered the defence of provocation. However, she submits that the court misapplied the defence.
- 4.3 Quoting **sections 205 and 206** of the **Penal Code** and various cases on provocation such as **Nyendwa and Another v. The People**⁵, **Makomela v. The People**⁶, and **Liyumbi v. The People**⁷, she submits that an ordinary person of the appellant's community

in finding his lover with another man in a sexual act, and who was also brandishing a weapon, could have acted in the manner the appellant did. She implores us to substitute the conviction for murder with that of manslaughter and to vacate the death penalty.

- 4.4 In response to ground one, Mrs. Chizongo supports the trial court's rejection of the defence of [self-defence] and provocation.
- 4.5 Citing the cases of **Simutenda v The People**⁸, **Makomela v The People**⁶ and **Simusokwe v The People**², she asserts that none of the elements of provocation were met. First, there was no provocation; and if there was the appellant had time to cool off as he waited 45 minutes before he confronted the alleged lovers. Secondly, the retaliation was not proportionate to the provocation because there was no intimately existing relationship between the appellant and PW1.
- 4.6 On ground two, Mrs. Bwalya raises concern about inconsistencies in PW1 and PW2's evidence as to the stabbing, the existence of the marriage and the fact that PW3 did not witness the stabbing and the old lady who did so was not called as a witness. She also contends that the conclusion by the judge that the assault did not happen at PW1's house could not be the only inference to be drawn:

- 4.7 Counsel relies on the cases of **Shamwana and Others v. The People**⁹, **Nswana v. The People**¹⁰ and **Mutale and Another v. The People**¹¹ submitting that we must resolve the inconsistencies in the appellant's favour.
- 4.8 In contrast, Mrs. Chizongo argues that the possibility of fabrication and false implication was completely ruled out, that there were no inconsistencies in the prosecution evidence material to the matter, and that the trial judge carefully dealt with the possibility of false implication and considered the relationship between PW1 and PW2 and warned herself against the danger of convicting on their evidence.
- 4.9 Counsel further submits that there is nowhere in the record, where the judge found that PW3 witnessed the stabbing; that PW3 being an independent witness corroborated the story of PW1 and PW2 to the extent that PW3 heard people screaming behind her house and found the appellant holding the deceased by the arm. She relies on the cases of **Mulenga and Another v. The People**¹², **Shamwana and Others v. The People**⁹ and **Madubula v. The People**¹³ as authority.
- 4.10 The gist of Mrs. Bwalya's argument in ground three, is that the appellant tendered evidence of provocation and self-defence and the trial court should have found that the failed defences

amounted to extenuating circumstances, as provided in section 201(2) of the Penal Code and the case of **Chanda and Another v. The People**¹⁴.

4.11 In response, Mrs. Chizongo submits that since the trial court did not find any provocation, based on the case of **Simutenda v The People**⁸, no extenuating circumstances existed. In other words, the appellant killed the deceased with malice aforethought. Counsel has urged us to dismiss the appeal.

5.0 Our decision

5.1 We have considered the record of appeal and the contending positions taken by the parties, including the authorities relied on. The fact that Pardon Kangwa died on 4th June, 2011 at Mansa General Hospital, after he suffered a stab wound to his stomach on 2nd June is not in dispute. The appellant, has courteously accepted, through learned counsel that he caused the death of the deceased. Mrs. Bwalya has also acknowledged that the learned trial judge rightly considered the defence of provocation but submitted that she misapplied it.

5.2 The main issue arising in this appeal is whether the trial court rightly rejected the defence of provocation. In determining this issue, we shall also consider whether the trial judge properly ruled out the danger of false implication. Our determination of these

questions will finally resolve whether there is merit in the third ground of appeal.

- 5.3 The appellant insisted at the trial that PW1 was his wife, that he caught her and the deceased having sexual intercourse, that he was provoked and PW2 testified against him to protect her sister. On her part, PW1 refused that they were still married or that there was any intimacy between them or that she was caught having sex with the deceased.
- 5.4 To start with, there was evidence by PW1 to the effect that the appellant gave her a cassava field on 26th June 2011 where she went to stay with PW2 in a rented makeshift house. While the appellant has raised no issue concerning when he supposedly gave the cassava field to PW1, it could not have been given to her on 26th June 2011 because the incident in question occurred on 2nd June 2011.
- 5.5 We note that in cross-examination by Mr. Chavula, in what seems to have been a preliminary inquiry, PW1 mentioned 26th May 2011, as the date her husband (the appellant), gave her the cassava field. The trial judge did not resolve this apparent contradiction in the dates given by PW1. However, since the stabbing happened a week after the sisters moved to the cassava field to live in the makeshift house, we take the 26th of May 2011 to be the correct date.

- 5.6 As regards the relationship between the appellant and PW1 and the events leading up to the stabbing of the deceased, it is clear that the trial judge believed the evidence of PW1 and PW2 and rejected that of the appellant. The record shows that on 29th November 2011, the trial judge held the preliminary inquiry we have mentioned in the preceding paragraph when the defence counsel objected to PW1 testifying against the appellant on the ground that she was a spouse.
- 5.7 However, there is no ruling on the preliminary inquiry on the record. It is simply referred to in passing in the judgment where in concluding that the appellant was not married to PW1, the judge alluded to an earlier ruling she made to the effect that the appellant was not, at the time of the commission of the offence married to PW1 as he had not paid lobola or dowry.
- 5.8 According to the trial judge, PW2 confirmed that PW1 and the appellant were not married, but nowhere in her evidence on record did PW2 give such confirmation. As Mrs. Bwalya submitted in her oral arguments at the hearing of the appeal, in fact, PW2 agreed in cross-examination that the appellant was her brother-in-law and that he was married to her sister. At the end of cross-examination, PW2 said she [PW1] was not married to Pardon. Pardon was the deceased and not the appellant. The trial judge misdirected herself

and found confirmation of the absence of the marriage where there was none.

5.9 Apart from the evidence of PW1, there was no other evidence to confirm that the marriage between the appellant and PW1 was dissolved upon her leaving the matrimonial home. Her evidence shows that they had separated before and resumed their married life. If really the marriage had ended on 28th February 2011 and there was no relationship between them, there would have been no reason for the appellant to go to the field which was far away from the village around 20:00 hours unless he had truly gone there to see his wife.

5.10 We also find it improbable that the appellant could arrive at the makeshift house at that hour, find the deceased sitting outside, alone (since PW2 was inside) and without any explanation or reason kick and undress him of all his clothes without him even putting up a fight and thereafter enter the house and attack PW2 and drag the deceased to PW3's house. He even returned to the makeshift house to collect clothes and under ware as exhibits and took them to the police.

5.11 We are alive to the principle that a trial judge is entitled to believe the evidence of some witnesses and to disbelieve that of other witnesses and we are very slow to reverse findings of fact made by

a trial court. However, the court should give reasons for preferring the evidence of one witness to that of another. In this case, the trial judge recognised that PW2 had a possible interest to serve because she was a sister to PW1 whom the appellant claimed to be his wife and she properly warned herself against the danger of false implication.

5.12 Surprisingly, the learned trial judge did not apply a similar caution to the evidence of PW1 despite the appellant's claim that he caught her and the deceased in a compromising situation. The view we take is that since PW1 had an alleged intimate relationship with the deceased, both herself and PW2 should have been considered as suspect witnesses with a possible interest to serve.

5.13 Moreover, the trial judge found PW2 to be a credible witness who could not have fabricated incriminating evidence against the appellant after evaluating her demeanour. This was a serious misdirection on her part. In the case of **Wamundila v. The People**¹⁵ (applying **Phiri (E) v. The People**¹⁶), this court held that:

“Where there is no corroboration of the evidence of an accomplice or a witness with an interest of his own to serve, it is not safe to convict on that evidence unless there is some reason for accepting it other than a belief in the truth of the evidence, based simply on the demeanour of the witness and the plausibility of his evidence”.

5.14 The judge did not give any reason for accepting PW2's evidence other than a belief in the truth of her evidence, based simply on

her demeanour. Further, if the sisters were both suspect witnesses whose evidence required corroboration, then they could not corroborate each other so far as they were testifying about the same incident.

5.15 The trial judge found that the evidence of PW2 and PW3 corroborated each other to the effect that the appellant stabbed the deceased and that he did so at PW3's house. This corroboration relates only to the stabbing which the appellant had initially refused and where it happened. PW3 was not present at PW1 and PW2's house and did not witness the initial assault on the deceased or the stabbing, so she could not corroborate their evidence of what happened earlier.

5.16 In fact, PW2's evidence relates to more than the stabbing. She was the one who received the deceased, who she said, was looking for piece work and asked him to wait for PW1 who was taking a bath. She saw the appellant assault and undress the deceased before taking him to PW3's house and stabbing him from there and her evidence of where the stabbing occurred differed from that of PW1.

5.17 The trial judge accepted PW2's evidence in totality without giving reasons. She did not completely rule out the danger of fabrication and false implication. As for PW5, he confirmed that the appellant reported to the police that he stabbed someone he found with his

wife and handed in the knife and the deceased's clothes [PW1 collected her underwear from the appellant]. He also confirmed that there were some blood stains on the ground at PW3's house and that drops of blood went behind the house where the deceased was found lying.

5.18 To that extend, we agree with the trial judge that the presence of blood at PW3's house seemed to support PW2's evidence that the deceased was stabbed from there. The judge was right that if the stabbing happened inside PW1 and PW2's house, there would have been a blood trail from there up to PW3's house because the deceased suffered a serious injury to the stomach leading to his intestines protruding. It was never put to PW1 and PW2 in cross-examination that they may have cleaned off the blood before the police arrived at the crime scene the following day as argued by Mrs. Bwalya.

5.19 Even if it difficult for us to believe the appellant's evidence that the police charged the deceased with criminal trespass, we conclude, based on the weight of the evidence on record, that the appellant and PW1 were married at the material time, and that he did find PW1 and the deceased having sexual intercourse inside the house though it may seem strange that PW2 was sleeping in the same house.

5.20 Generally we are slow to reverse finding of fact made by a trial judge but in this case we are inclined to we set aside the findings of fact made by the trial judge that the appellant and PW1 were not married at the time of the commission of the offence, that there was no intimacy between them, that the appellant found the deceased sitting outside, and that the deceased did nothing wrong by sitting outside the makeshift house.

5.21 We turn now to the defence of provocation and if it was open to the appellant. It is trite 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 (**Nyendwa and Another v. The People**⁵). If the appellant killed 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 have reduced to manslaughter (**Liyumbi v The People**⁷). We also reiterate what we said in the case of **Makomela v The People**⁶, 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”.

5.22 In the present case, Mrs. Bwalya contends that an ordinary person of the appellant's community in finding his lover with another man in a sexual act, could have acted in the manner the appellant did. We are inclined to agree with counsel that a reasonable or ordinary person would be provoked upon sudden discovery of adultery or discovery of a spouse in a compromising situation and that this constitutes grave provocation. The question we ask is whether the appellant stabbed the deceased in the heat of passion.

5.23 The appellant's testimony on this issue was elaborate and we wish to restate it because of the position we have taken on this issue. The appellant arrived at the field around 20:00 hours. Before he reached the makeshift house, he heard three voices of people coming from inside. One of the voices was that of a man. He stopped and listened to what they were saying. They were talking about love issues. The man said he wanted to buy his wife lightening creams and that she had been abandoned by her husband by leaving her in the bush. They then talked about some plan and how far it had gone.

5.24 Next the man asked his wife why she could not divorce him so that they could get married. His wife responded that he would not agree and that she would leave him on her own. The man asked her why she could not just kill him. She said it would be a sin and they

would just soak the cassava and run away to Lusaka to her brother's place.

5.25 The conversation progressed to groundnuts they had roasted which they said had a lot of salt. There was silence and then the man told his wife to move closer. It became quite and then the appellant heard the sound of a mat and he suspected something was going on. At that point, he started thinking whether to go to the headman or to his neighbour but he thought he would find the man had already left. He decided to be brave and go in and catch them.

5.26 Later he opened the door and lit his torch. He saw PW2 sleeping near the door. She ran outside. Before he touched the lovers where they were sleeping, he said 'so this is what you do". He found the man on top of his wife. The wife pushed the man to the side and when she stood up she begged him not to beat her. He concluded that they were having sex because the man was on top of her and both were naked.

5.27 What followed was that the appellant wanted to hold his wife but he thought the man would run away so he left her and tried to hold the man. However, the man's body was slippery from sweat, causing him [the appellant] to fall down. He stood up and tried to hold the man. He saw that the man was holding a knife. He held

him on the hand when he saw the knife, thinking he might be stabbed. They struggled as he shouted for help. He did not know what happened, next. He just saw the man drop the knife and run away.

5.28 In cross examination the appellant admitted that he listened to the conversation for about 45 minutes. He said he did not go in immediately because he wanted to understand what they were saying and he wanted to catch them. He knew where the conversation was leading to but he did not intend to do anything immediately because he had nothing in his hands. He did not want to go in but when he heard the man asking his wife to move closer, that was when he went in because he knew that they were going to sin.

5.29 He also agreed that the whole time he was outside he was not annoyed because he had not seen them doing anything. He wanted proof first though he knew where it was leading to. In re-examination he said what provoked him was when he saw them lying down having sexual intercourse and that was when he decided to hold the man in order to know him.

5.30 We agree with Mrs. Bwalya that what would provoke one man might not provoke another. However, the above account by the appellant, does not, in our view, relate to a man acting in a heat of

passion, under sudden provocation upon finding his wife engaged intimately in a sexual act with another man. We are surprised, that the love banter that would have angered any ordinary person had no effect on the appellant even when he knew what was coming next. He did not intend to do anything immediately because he had nothing in his hands. Would we be wrong to think that he might have gone in search of a weapon and stumbled upon the knife and armed himself with it?

5.31 Anyhow, he was not angered even when they discussed the possibility of PW1 divorcing him, or killing him or running way to Lusaka, which again would have provoked any ordinary person in the position of the appellant. Rather than immediately rush into the house where the two lovers were, the appellant had to first contemplate whether he should go to the headman or to his neighbour but he thought he would find the man gone. Finally, he had to summon the courage to enter the house.

5.32 In our view, someone acting under grave provocation would not take 45 minutes, listening to the conversation and contemplating what to do next and would not lack courage to confront the wrongdoer. Even when he went in, his interest was to apprehend the man and to know his identity. In his words, the appellant did not admit that he stabbed the deceased in the heat of passion. He

said the stabbing happened by accident, at a point he did not even know as they struggled for the knife and the deceased was the one holding the knife and not him.

5.33 We are satisfied from the appellant's narration of the events that he did not act under sudden provocation or in the heat of passion and had full control of his emotions from the time he first heard the love chit-chat to the time he decided to enter the house and attempted to catch the man to know his identity. The appellant rationally picked the precise moment when to go inside.

5.34 Additionally, the appellant remained with the knife after the deceased ran away. PW1 and PW2 saw him holding the deceased by the arm and taking him to PW3's house which was about 50 to 150 metres away, with a field in between. PW3 heard the appellant shouting and saw him holding the deceased by the arm as he approached her house and when he reached where she was, he told her that he had found the deceased and PW1 having sex in the makeshift house.

5.35 It was never put to her in cross-examination that she told the appellant that the man had run behind the house or that she forced him to follow the man. PW3 admitted that the deceased was naked and at that point he was already injured since she heard him say he was injured and his intestines were protruding.

5.36 As we said earlier, the trial judge found that the presence of blood at PW3's house supported PW2's evidence that the deceased was stabbed from there. We are satisfied that the deceased was stabbed not from the makeshift house but from PW3's house mostly likely before the appellant reached where PW3 was.

5.37 Since we have found that the appellant did not act under the heat of passion brought about by sudden provocation, the stabbing of the deceased was premeditated. Furthermore, because the appellant was the one armed with the knife at that point and he was dragging the deceased to PW3's house he could not have acted in self-defence.

5.38 We reiterate what we said in the case of **Mvula v. The People**¹⁷ that provocation cannot be invoked when the accused's actions manifest premeditation or malice aforethought, meaning an intention to kill or cause grievous bodily harm. For the reasons we have given above, we conclude as did the learned trial judge, though for different reasons that, the appellant cannot benefit from the defence of provocation.

5.39 For the same reason, the alternative ground of appeal should fail. As we emphasised in the case of **Zimba v. The People**¹⁸, failed defence of provocation does not constitute extenuating circumstances unless the court acknowledges the presence of

provocation. The trial judge was on firm ground when she imposed the mandatory death penalty.

6.0 Conclusion

6.1 The three grounds of appeal having failed, we dismiss the appeal in its entirety.



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SUPREME COURT JUDGE



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