

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE and LUSAKA
(Criminal Jurisdiction)

Appeal No.140/2022

BETWEEN:

LEVITICUS TEMBO

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Ngulube and Muzenga, JJA

ON: 16th May 2023 and 21st June 2024

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

For the Respondent: N. Lubasi, State Advocate
National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Precious Longwe v. The People, CAZ Appeal No. 182/2017
2. Simutenda v. The People [1975] Z.R. 373
3. Kalaluka Musole v. The People [1963-1964] Z.R. and
NRLR 206 (Reprint)
4. Rodgers Kunda v. The People, SCZ Appeal No. 81 of 2017
5. Whiteson Simusokwe v. The People, SCZ Appeal No. 15
of 2002

Legislation referred to:

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

INTRODUCTION

- [1] The appellant appeared before the High Court (Makubalo, J.), charged with the offence of murder contrary to **Section 200 of the Penal Code.**
- [2] He denied the charge, and the matter proceeded to trial. At the of that trial, he was convicted for committing the offence and condemned to suffer capital punishment.
- [3] He has appealed against the sentence.

CASE BEFORE THE TRIAL JUDGE

- [4] On 22nd November 2020, Levison Tembo of Chigumane Village in Chipata, was roofing a house with his brother, Mwanji Zulu. After working on the roof, Levison Tembo and Mwanji Zulu took a break. Mwanji Zulu lay under a tree, while Levison Tembo retreated into a house.
- [5] While in the house, Levison Tembo heard some

chopping sounds. He also heard the appellant say they had finally settled their differences, that had been outstanding for a long time.

[6] When Levison Tembo came out of house, he found the appellant, who was holding a bloodied axe, standing next to Mwanji Zulu's lifeless body. He also noticed two cuts on Mwanji Zulu's face.

[7] In his defence, the appellant did not deny axing Mwanji Zulu. He said Mwanji Zulu attempted to strike him with the axe, before he disarmed and hacked him.

[8] He recounted being told by his daughter that one night, Mwanji Zulu spent a night in his former wife's bedroom. He also recounted how earlier that day, he found that his former wife had washed Mwanji Zulu's clothes. On being questioned, she attributed her association with Mwanji Zulu, to his inadequacies in bed.

[9] The appellant said he only sought to confront him on the allegations, but Mwanji Zulu attempted to attack him with an axe.

[10] A post-mortem on the body of Mwanji Zulu, found the

cause of his death to be the injuries he had suffered to his head.

GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

- [11] The sole ground of appeal is that, the trial Judge erred when she held that there were no extenuating circumstances on account of a failed defence of provocation, because no provocative act was proved.
- [12] Reference was made to the case of **Precious Longwe v. The People**¹, and it was submitted that even though the defence of provocation may have failed, the provocative act was proved.
- [13] According to counsel, the provocative act was the picking of the axe by Mwanji Zulu, and his attempt to strike the appellant with it. It was submitted that even if no one saw what happened, the appellant's story was plausible.

ARGUMENTS AGAINST THE APPEAL

- [14] In response to the sole ground of appeal, the cases of **Simutenda v. The People**² and **Kalaluka Musole v. The People**³, were referred to and it was submitted

that even if there is no obligation on an accused person to prove the defence of provocation, there must be credible evidence either from the appellant or prosecution witnesses, supporting the elements of the defence, before its availability can be considered.

[15] It was submitted that while the appellant claimed that Mwanji Zulu attempted to strike him with the axe, the evidence established that the axe, in fact, belonged to the appellant.

[16] It was also submitted that since the allegation that he was inadequate in bed was not made in the presence of Mwanji Zulu, it could not have been provocative to warrant him attacking Mwanji Zulu.

[17] Finally, the cases of **Precious Longwe v The People**¹ and **Rodgers Kunda v. The People**⁴, were referred to and it was submitted that where there is no evidence of any provocative act, extenuating circumstances on the basis of a failed defence of provocation, cannot arise.

CONSIDERATION OF THE APPEAL AND DECISION OF THE COURT

- [18] It is settled law that a failed defence of provocation, can amount to an extenuating circumstance. There is plethora of authorities to that effect, including the case of **Whiteson Simusokwe v. The People**⁵.
- [19] It was submitted that the provocative act was Mwanji Zulu's attempt to strike the appellant when he went to question him over the affair he was having with his former wife.
- [20] The trial Judge made a finding that the appellant was the owner of the axe that he used to hack Mwanji Zulu. That fact discredited the appellant's claim that he only went to house where the roofing was taking place, to question Mwanji Zulu, and that Mwanji Zulu attempted to strike him.
- [21] In addition, the appellant's statement, as he hacked Mwanji Zulu, that their differences had finally been settled, is indicative that the appellant had set out armed with an axe, to 'deal' with Mwanji Zulu.
- [22] In the circumstances, we find no basis for faulting

the trial Judge's rejection of the appellant's claim that Mwanji Zulu attempted to strike him with an axe; and her conclusion that, in fact, the appellant went there armed.

[23] An examination of the evidence before the trial Judge establishes that what upset the appellant was his discovery that his former wife had washed Mwanji Zulu's clothes, and being told that she was associating with him on account of his inadequacies in bed.

[24] As it turned out, about 5 years prior to his killing, Mwanji Zulu used to live with the appellant. They parted company following reports that Mwanji Zulu was having an affair with the appellant's wife. Those allegations also led to the appellant breaking up with his wife.

[25] The defence of provocation is set out in **Section 206 of the Penal Code**. The relevant parts of the provision read as follows:

(1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an

ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. For the purposes of this section, "an ordinary person" shall mean an ordinary person of the community to which the accused belongs. *(the underlining is ours and is for emphasis)*

[26] In this case, the annoying statements were not uttered by Mwanji Zulu but the appellant's former wife. This being the case, the defence of provocation, as is set out in **Section 206 of the Penal Code**, was not available to the appellant because the provocative statements did not come from the person he killed. In effect, there was no 'provocative act' as it is set out in **Section 206 of the Penal Code**.

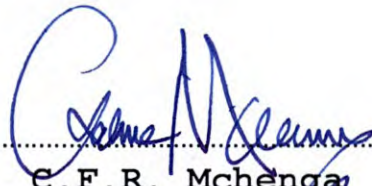
[27] In the absence of a provocative act, there cannot be

a failed defence of provocation, and extenuating circumstances on the basis of a failed defence of provocation.

[28] We find no merit in the sole ground of appeal, and we dismiss it.

VERDICT

[29] The sole ground of appeal having failed, this appeal is dismissed for want of merit. The sentence imposed by the trial Judge is upheld.



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E.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE



.....
K. Muzenga
COURT OF APPEAL JUDGE