

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

APPEAL No.181/2022

BETWEEN:

PUMULO SIMASIKU

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe, JJA

On 23rd August 2023 and 21st June 2024

For the Appellant: A. Chimimba-Banda, Legal Aid
Counsel, Legal Aid Board National

For the Respondent: G. Zimba, Deputy Chief 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. Nyambe Mubukwanu Liyumbi v. The People [1978] Z.R.

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2. The People v. Njovu [1968] Z.R.132

3. Dickson Sembauke and Another v. The People [1988]
Z.R. 144
4. Director of Public Prosecutions v. Lukwosha [1966]
Z.R. 14
5. Imusho v. The People [1972] Z.R. 77
6. Simutenda v. The People [1975] Z.R. 294
7. Precious Longwe v. The People, CAZ Appeal No.182 of
2017

Legislation referred to:

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

INTRODUCTION

- [1] The appellant appeared before the High Court (Maka, 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 end of the trial, he was found guilty of committing the offence and condemned to suffer capital punishment.
- [3] He has appealed against the conviction

CASE BEFORE THE TRIAL COURT

- [4] On 15th January 2018, around 23:00 hours,

Shadreck Chiyobeka, was at his makeshift store near Mutonyo Night Club, in Mazabuka's Zambia Compound. He was in the company of Likonge Kalimukwa.

[5] The appellant turned up and grabbed Likonge Kalimukwa, he reminded him of his misconduct sometime in the past, but did not disclose the details. A struggle ensued between the two and Shadreck Chiyobeka, saw the appellant stab Likonge Kalimukwa with an unidentified object.

[6] The appellant then tripped Likonge Kalimukwa, and when he fell to the ground, the appellant fled.

[7] The appellant's version of the events of that evening was different. He said as he walked to Mutonyo Night Club, he met Likonge Kalimukwa who asked him for some beer. When he refused to give him the beer, Likonge Kalimukwa slapped him.

[8] A scuffle ensued, during which Likonge Kalimukwa produced a knife. When the two fell to the ground, Likonge Kalimukwa injured himself with that knife.

The appellant said he fled from the scene because he feared being lynched by the mob.

[9] Following the scuffle, the police were notified and by the time they arrived, Likonge Kalimukwa had died. A post-mortem examination subsequently conducted on his body, found the cause of his death to be severe chest injuries. These were as a result of two deep stab wounds and a fractured rib.

[10] The trial Judge accepted Shadreck Chiyobeka's narration of the circumstances leading to Likonge Kalimukwa's death. She rejected the appellant's claim that Likonge Kalimukwa fell on a knife he produced, noting that he would not have suffered two stab wounds, had it been the case.

[11] She also found that that the appellant had *malice aforethought*. This was on the basis that he knew the probable consequences of the stabbing; that grievous harm or death, would ensue. She found that this was confirmed by the appellant's running away after the stabbing.

FOUNDATIONS OF APPEAL

[12] Two grounds have been advanced in support of the appeal. The first ground of appeal is that the charge of murder was not proved because *malice aforethought* was not established. The second ground of appeal is that the trial Judge erred when she did not consider the defences of self-defence and provocation.

CONSIDERATION OF THE APPEAL

[13] **Section 204 of the Penal Code**, defines *malice aforethought* in the following terms:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who

has committed or attempted to commit a felony.

Malice aforethought

- [14] In her submission, Mrs. Chimimba-Banda argued that *malice aforethought* was not established because Likonge Kalimukwa injured himself in the course of a fight, when he fell on a knife he had produced. She referred to the case of **Nyambe Mubukwanu Liyumbi v. The People**¹, and submitted that a person is guilty of the offence of manslaughter if he kills another in reaction to provocative conduct.
- [15] In response, Mr. Zimba referred to the cases of **The People v. Njovu**², **Dickson Sembauke and Another v. The People**³ and **Director of Public Prosecutions v. Lukwosha**⁴, and submitted that *malice aforethought* was proved by evidence that the appellant stabbed Likonge Kalimukwa, and that evidence established the intention to either cause death or grievous harm.
- [16] Before we consider the arguments in support of and against the conviction, it is necessary to mention that even though there was no ground of appeal against the sentence, both parties argued on the question

whether there were extenuating circumstances, at length. Since the presence or absence of extenuating circumstances, is an issue that hinges on the sentence, our expectation is that it should have been raised as a ground of appeal and not sneaked in, as has been the case.

[17] Notwithstanding, the assertion that Likonge Kalimukwa injured himself in the course of a fight, after he slapped the appellant, is not supported by the evidence. The trial Judge made a finding of fact that the appellant grabbed Likonge Kalimukwa and stabbed him, after which he fled. The line Mrs. Chimimba-Banda has taken in arguing this appeal points at her questioning this finding.

[18] In the case of **Imusho v. The People**⁵, it was held that, "An appellate court will not interfere with a finding of fact if there was reasonable ground for it, but such finding will be set aside if it was made on a view of the facts which could not reasonably be entertained".

[19] We have examined the evidence that was before the trial Judge and find that she was entitled to conclude that the appellant actually produced a knife and stabbed Likonge Kalimukwa, and that Likonge Kalimukwa did not fall on the knife. The post-mortem examination of Likonge Kalimukwa established that he suffered two stab wounds and as rightly found by the trial Judge, that would not have been the case had Likonge Kalimukwa fallen on the knife, as claimed by the appellant.

[20] In the premises, there is no basis on which we can set aside the finding that the appellant stabbed Likonge Kalimukwa as it is supported by the evidence that was before the trial Judge.

[21] Going by Shadreck Chiyobeka's version of the incident, which was accepted by the trial Judge, the appellant was not drawn into a 'fight' by Likonge Kalimukwa's conduct. The attack was unprovoked.

[22] We are satisfied that the trial Judge rightly came to

the conclusion that the appellant had *malice aforethought*, as it is set out in **Section 204(a) of the Penal Code**. This is on the basis that the appellant either intended to cause the death of, or to cause grievous harm, to Likonge Kalimukwa, when he stabbed him.

[23] The first ground of appeal therefore fails.

[24] Coming to the second ground of appeal, Mrs. Chimimba-Banda submitted that the trial Judge failed to consider the defences of provocation and self-defence, that the appellant advanced.

[25] In the case of **Simutenda v. The People**⁶, it was held, *inter alia*, that, "A court is not required to deal with every possible defence that may be open to an accused person unless there is some evidence to support the defence in question....."

[26] Having indicated, a moment ago, that the trial Judge's acceptance of Shadreck Chiyobeka's version of the incident, is unassailable, we find that there was no evidence before the trial Judge on which the

availability of the defences of provocation or self-defence, could have been considered.

[27] It follows, that the submissions of both Mrs. Chimimba-Banda and Mr. Zimba, on the availability of extenuating circumstances, are not grounded on any evidence. In the case of **Precious Longwe v. The People**⁷, we held that there are extenuating circumstances on a failed defence of provocation, where the retaliation is not proportionate to the provocation. We also held that there are extenuating circumstances on a failed defence of self-defence, where the force used is more than necessary to repel an attack.

[28] In this case, there was no provocative act, nor was there evidence of the appellant acting in self-defence. This being the case, the question of extenuating circumstances because of a failed defence of provocation or self-defence, does not arise.

[29] The second ground of appeal equally fails.

VERDICT

[30] Both grounds of appeal having failed, we find no merits in this appeal and we dismiss it. We uphold the appellant's conviction and the sentence imposed on him by the trial Judge.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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K. Muzenga
COURT OF APPEAL JUDGE



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Y. Chembe
COURT OF APPEAL JUDGE