

ZAMBIA / JUDGMENT

Jackson Mhango v The People (Appeal No 16/2023) [2024] ZMCA 34 (28 February 2024) [2024] ZMCA 34

COURT

Court of Appeal of Zambia

CASE / FILE NUMBER

Appeal No 16/2023

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IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO 16/2023 HOLDEN AT LUSAKA (Criminal Jurisdiction) BETWEEN JACKSON MHANGO 2 8 FEB 2024 ELLANT AND IS THE PEOPLE RESPONDENT CORUM: MCHENGA DJP, MUZENGA AND CHEMBE JJA on 16th January 2024 and 28th February 2024 For the Appellant Ms. J. L. Hamakale - Legal Aid Counsel For the Respondent Ms. C. Soko - Acting Chief Administrator

JUDGMENT

Chembe JA delivered the judgment of the Court. Cases referred to: 1 . Simutenda v The People (1975) ZR 294

2. Nyambe Mubukwanu Liyambi (1978) Z. R. 25

3. Banda v The People SCZ Appeal No 17 of 1973

4. Dorcas Kasenga v The People Appeal No 124 of 2018 5. The People v Lewis (1975) ZR 43

6. Mwiimbe v The People (1986) ZR 15. 1.0 INTRODUCTION

1. 1 This is an appeal against the judgement of Patel J, as she then was, dated 2 nd September 2021. The Appellant was convicted of one count of murder contrary to section 200 of the Penal Code and sentenced to death. 1.2 The particulars of offence were that the Appellant murdered Dick Mhango on 2 nd March 2019 at Kitwe. 1.3 The Appellant has appealed against the conviction and sentence. 2.0 EVIDENCE BEFORE THE TRIAL COURT 2.1 The evidence presented by the prosecution was that on 2 nd March 2019 around 22:00 hours, the Appellant went to the deceased's house and started assaulting the latter's girlfriend. 2.2 The deceased sought help to rescue his girlfriend from his neighbours. Francis Siame, a neighbor, with the help of the Appellant's wife managed to restrain the Appellant and the victim managed to escape. 2.3 Believing that the assault was over, the neighbor left. However, about 30 minutes later a commotion was heard in the deceased's house. When the neighbors rushed there, they found the deceased on the ground covered in blood. The deceased informed them that

he had been stabbed by the Appellant. 2.4 There was evidence, that the Appellant was seen struggling with the deceased before the latter collapsed to the floor. 2.5 The witnesses were able to identify the Appellant because there were lights at the neighbour's house. 2.6 The matter was reported to the police but by the time they got to the scene, the deceased had died.

2. 7 The postmortem examination report revealed that the deceased died due to profuse bleeding from stab wounds. 2.8 In his defence, the Appellant explained that he was upset when he found the deceased and his girlfriend Vanessa naked in bed at night. 2.9 He confronted them and when he slapped the woman, the deceased became upset and attacked him with a knife. During the straggle for the knife that ensued, they both fell. The Appellant managed to get away and ran to his friend's house. 2.10 The Appellant also testified that he had been in a relationship with Vanessa for about 4 years and had intended to marry her. He denied having stabbed the deceased. He subsequently handed himself to the police. 3.0 FINDINGS BY THE TRIAL JUDGE 3.1 The trial Judge found that there was no dispute that the deceased died on 2 nd March 2019 from knife wounds sustained during an assault. The only issue she needed to determine was the identity of the assailant. 3.2 The trial Judge noted that as none of the witness saw the deceased being stabbed, the prosecution's case rested on circumstantial evidence. 3.3 She accepted the prosecution's evidence that the Appellant assaulted the deceased's girlfriend whom he found lying in bed naked. She also found that the attack on PW2 was so violent and aggressive that it required several people to restrain the Appellant. 3.4 The Court below considered the statement by the deceased that he had been stabbed with a knife by Jack to be a dying declaration. There was also evidence which placed the Appellant at the scene in a struggle with the deceased whilst wielding a knife. She concluded that the only reasonable inference that could be drawn from the facts established was that it was Appellant who stabbed the deceased and caused his death. 4.0 GROUNDS OF APPEAL AND ARGUMENTS IN SUPPORT 4.1 Dissatisfied with the decision of the trial court, the Appellant lodged an appeal fronting the following grounds: Ground One The Learned trial Judge erred in law and in fact when she failed to consider the defence of provocation which was available to the Appellant. Ground Two The Learned trial Judge in the court below erred in law and fact when she failed to consider that there were extenuating circumstances in favour of the Appellant and sentenced him to death. Ground Three The Learned trial Judge erred in law and in fact when she convicted the Appellant for murder without considering self defence. 5.0 THE APPELLANT'S ARGUMENTS 5.1 In support of ground one, Counsel for the Appellant submitted that the Appellant was provoked when he found the deceased, who was his uncle, in bed with his long term girlfriend. As a result he stabbed him with a knife in a fit of jealousy.
5. 2 It was argued that the fact that he was calling the woman a prostitute as he beat her showed he had an intimate relationship with her. We were referred to the cases of *Simutenda v The People* 1 and *Nyambe Mubukwanu Liyambi* 2 on the elements of provocation. 5.3 Relying on the case of *Banda v The People* 3 , the Appellant submitted that finding one's girlfriend with in an intimate act with another man could amount to

provocation. It was argued that in the face of the evidence adduced the trial judge should have found the defence of provocation had been established by Appellant and the verdict should have been manslaughter. 5.4 In relation to the second ground, the Appellant submitted that if the trial court found that the defence of provocation was not available, it should have found that it amounted to extenuating circumstances warranting the reduction of sentence from life imprisonment. We were referred to the case of *Dorcas Kasenga v The People* 4 in support of this argument. 5.5 Regarding ground Three, the Appellant submitted that the evidence adduced showed that the deceased could have been stabbed in self defence as the two fought. It was argued that had the trial addressed her mind to the evidence, she would have found that self defence was available to the Appellant. In support of this submission we were referred to the cases of *The People v Lewis* 5 and *Mwiimbe v The People* 6. 5.6 We were urged to quash the conviction for murder and replace it with manslaughter. 6.0 RESPONDENT'S ARGUMENTS 6.1 The Respondent did not file any arguments in opposition. At the hearing, Counsel for the Respondent opted to make oral submissions on points of law. She conceded that the trial Judge erred in convicting the Appellant for murder in the face of evidence that showed that the defence of provocation was available to him. She maintained that facts established supported an inference that PW2 was the Appellant's girlfriend as he would otherwise have had no motive for assaulting her. 7.0 DECISION OF THE COURT 7.1 We have carefully considered the Judgment appealed against, the record of appeal and the arguments by both sides. The issue for determination is whether, on the facts established by the evidence at trial, the defences of provocation and self defence were available to the Appellant. 7.2 The evidence was that on the fateful night, the Appellant entered the deceased's bedroom and viciously assaulted PW2 who was in bed. The Appellant called PW2 a prostitute as he assaulted her. The evidence that PW1 and the Appellant's wife came to PW2's rescue was not disputed.

- 7.3 The evidence of PW 1 and PW2 was that the assault ended when PW2 ran out of the house and hid outside. It was also not disputed that about 30 minutes later, the Appellant was seen by PW3 struggling with the deceased who stated that he had been stabbed with a knife by the Appellant. PW3 went to call for help and when he returned to the scene he found the deceased lying in a pool of blood 7.4 The Appellant's version of events was that he lost his temper when he found his girlfriend PW2 sleeping with his uncle, the deceased. When he slapped her, the deceased grabbed a knife and tried to stab him. He tried to disarm the deceased and a struggle ensued. He managed to extricate himself and went to spend the rest of the night at his friend's house. 7.5 We note from the record of appeal that the Appellant denied having stabbed the deceased at all. His evidence seemed to suggest that the deceased accidentally stabbed himself. The question that we need to resolve is whether the defence of provocation or indeed self defence is available to a person who denies having committed the wrongful act. 7.6 Section 205 of the Penal Code which legislates the defence of provocation provides as follows: "When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion, hereinafter defined, and before there is time

for passion to cool, he is guilty of manslaughter only" (Emphasis ours)

7. 7 Clearly the above defence is only available to a person who has done an unlawful act which causes death . To the extent that the Appellant d enied having stabbed the deceased, the defence of provocation was not available to him, especially in the circumstances of this case. We the ref ore cannot fault the learned trial Judge for not finding that the defence of provocation had been established. The 1 st ground of appeal therefore fails. 7 .8 Regarding the trial court's failure to find that the failed defence of provocation amounted to extenuating circumstances, our view is that the defence of provocation was not available to the Appellant and could therefore not be said to have been a failed defence. 7 .9 In the case of Dorcas Kasenga V the People cited by Appellant, we rejected the argument that a defence of provocation which was not sustained could amount to extenuating circumstances. We held that: "For the defence of provocation to avail an accused person, there must be the act of provocation, loss of self-control both actual and reasonable and the retaliation proportionate to the provocation. The evidence led before the trial court revealed no provocation."
7. 10 The trial court having concluded that the defence of provocation was not available because there was no provocative act, could not proceed to find that there were extenuating circumstances on the basis of a failed defence of provocation. The second ground of appeal accordingly fails . 7 .11 In ground three, the Appellant argues the trial court ought to have found that self defence was available to him in view of his evidence that the deceased tried to stab. We note that the Appellant's evidence at trial was contrary to that of three prosecution witnesses who all testified that he was the aggressor.
7. 12 The evidence of PW 1 and PW2 was that the deceased was restrained from further assaulting PW2 by his wife and that the deceased left the room after the assault ended. If the Appellant's version of events was to be believed, the witnesses would have been present when the deceased is alleged to have brandished the knife. The evidence which was accepted by the trial court was that when the deceased was stab bed there were no witnesses . Further, the deceased did not confront the Appellant when he viciously attacked PW2. He sought help from PW1. Clearly the Appellant's version of events was an afterthought. 7.13 Further, as stated above the Appellant denied having stabbed the deceased. In order for Appellant to have availed himself self defence, he ought to have established that his life was threatened and he took an action which caused death to prevent grave danger to himself. (Mwimbe v The People refers.) We cannot fault the trial court's failure to find that the Appellant stabbed the deceased in self defence . The third ground of appeal equally fails. 7.14 In our view, the Appellant did not proffer a clear defence at trial as he oscillated between denial of committing the unlawful act to having been provoked or having acted in self defence. 8.0 CONCLUSION 8 . 1 We find no merit in the appeal and are satisfied that there was sufficient circumstantial evidence in the court below that could only allow an inference of guilt for the Appellant. We accordingly dismiss the appeal and uphold the decision of the trial court. DEPUTY COURT OF APPEAL JUDGE Y. CHEMBE COURT OF

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Prepared on 14 October 2026 · Esheria