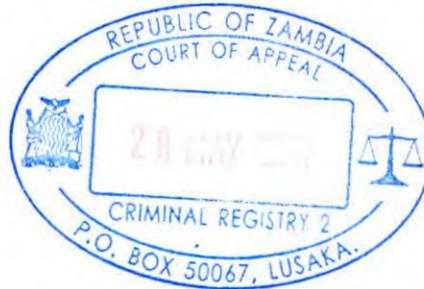


IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT KABWE  
(Criminal Jurisdiction)

APPEAL 151/2020

BETWEEN:

PENGA GUMBWE  
AND  
THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA

On 18<sup>th</sup> May 2021 and 28<sup>th</sup> May 2021

For the Appellant: L.T. Tindi, Legal Aid Counsel, Legal Aid Board

For the Respondent: M. Chilufya-Kabwela, Senior State Advocate,  
National Prosecutions Authority

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## J U D G M E N T

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Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Mwewa Murolo v The People [2004] Z.R. 207
2. Kambarange Mpundu Kaunda v The People S.C.Z  
Judgment No. 1 of 1992
3. Elias Kundiona v The People S.C.Z Judgment No. 49  
of 1993
4. Chabala v The People [1976] Z.R. 14
5. Kalebu Banda v The People [1977] Z.R. 169
6. Dorothy Mutale v The People [1997] Z.R. 51

7. Mbinga v The People SCZ Judgment No. 5 of 2011
8. The People v Kajilo Muzungu [2011] Z.R. Volume 1
9. Whiteson Simusokwe v The People S.C.Z Judgment No. 15 of 2002
10. Jack Chanda & Another v The People S.C.Z Judgment No. 29 of 2002
11. Litepo v The People SCZ Judgment No 20 of 2014
12. Mwango v The People S.C.Z Appeal No. 171 of 2015
13. Kanyanga v The People S.C.Z Appeal No. 145 of 2011
14. Director Of Public Prosecutions v Risbey [1977] Z.R. 28
15. Simutenda v The People [1975] Z.R. 294
16. Mbinga Nyambe v The People S.C.Z. Judgment No. 5 of 2011
17. Jose Antonio Golliadi v. the People SCZ Judgment No. 26 of 2017
18. Precious Longwe v The People CAZ Appeal 182/2017

**Legislation referred to:**

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

**1. INTRODUCTION**

- 1.1. This appeal emanates from the judgment of the High Court (Maka-Phiri J.), delivered in Livingstone, on 27<sup>th</sup> March 2020.

1.2. The appellant, appeared before that court, on an information containing one count of the offence of murder contrary to **section 200 of The Penal Code.**

The allegation being that on 25<sup>th</sup> December 2019, at Livingstone, he murdered Joseph Zulu.

1.3. He denied the charge, but was convicted at the end of a trial. He was then condemned to suffer capital punishment.

1.4. He has appealed against both the conviction and the sentence.

## **2. EVIDENCE BEFORE THE TRIAL COURT**

2.1. According to White Mundu, on 24<sup>th</sup> December 2019, in the night, he was drinking beer with Joseph Zulu, at a bar in Livingstone's Ngwenya Compound. He left his friend in the bar and went outside. Soon thereafter, his friend emerged, without a shirt and invited to go back inside the bar, to see some youngsters who wanted to attack him.

2.2. When they got inside the bar, Joseph Zulu pointed at the appellant and his friend, as being the

youngsters who wanted to attack him. He knew the appellant for about two to three years, as they lived together in the same compound. They related well and had at times, played pool together.

- 2.3. He asked the appellant and his friend why they wanted to attack their 'elder brother'. When they didn't respond, he advised them to leave. As they were leaving, the appellant, who was carrying a golf club, attempted to hit Joseph Zulu with it, but missed.
- 2.4. Joseph Zulu pushed the appellant against the grill door. With the help of the other customers who were in the bar, they restrained Joseph Zulu and took him out of the bar.
- 2.5. They went and stood at a corner, near another bar, waiting for someone to bring Joseph Zulu's T-shirt from the bar. The place was well lit by electric bulbs.
- 2.6. Ten minutes later, they saw the appellant and his friend approaching them. The appellant, who was

carrying a Knife, stabbed Joseph Zulu on the left side of his chest and fled. Joseph Zulu pulled out the knife and immediately fell to the ground. He was immediately rushed to Livingstone General Hospital, where he was pronounced dead.

2.7. In his view, the appellant was not drunk that evening.

2.8. Francis Njekwa, who was in the vicinity confirmed the attack. He said he found the appellant and Joseph Zulu fighting outside the bar. When they were separated, he also observed that the appellant was bleeding from the cut on his forehead.

2.9. The appellant left and returned after a while, armed with a knife. He stabbed Joseph Zulu and fled.

2.10. The appellant, was apprehended in Zimba, on 26<sup>th</sup> December 2019. At the time of his apprehension, he was in the company of Francis Njekwa, who was also apprehended.

2.11. A postmortem was conducted on the body of Joseph Zulu by DR. Taras. He found that he died because the

knife pierced his heart. The appellant's friend was released because the evidence did not sufficiently incriminate him.

**2.12.** The appellant did not deny being in the bar friend that night. However, his account of what happened, was different. He said while at the bar with 5 friends, he drunk a bottle of Bols. They decided to leave at about 21:00 hours. As they were leaving, Joseph Zulu appeared.

**2.13.** He asked Joseph Zulu for the K100.00 he owed him, but he was answered rudely. A fight ensued and they fought with fists. During the course of the fight, he fell and hit himself against a grill door. When the people separated them, he left and went to his mother's house.

**2.14.** It was also his evidence that during the course of the fight Joseph Zulu injured him.

**2.15.** He denied carrying a golf club at the time, or charging towards Joseph Zulu. He also denied

stabbing Joseph Zulu, but admitted knowing White Mundu.

2.16. The appellant claimed that he left Livingstone on 25<sup>th</sup> December 2019, in the company of Francis Njekwa, because his mother sent him to Zimba to collect chickens for Christmas from his sister.

### 3. TRIAL COURT'S FINDINGS OF FACT

3.1. The trial judge noted that the findings of the cause of death, as stated in the postmortem report, were consistent with the evidence of White Mundu and Francis Njekwa, that Joseph Zulu died after being stabbed in the chest.

3.2. As regards what transpired that night, she accepted White Mundu and Francis Njekwa's evidence as being credible. She found no reason why they could have falsely incriminated the appellant.

3.3. Having accepted their evidence, she found that it was the appellant who stabbed Joseph Zulu with a knife after the first fight had ended and caused his death. She found that he had *malice aforethought*

because he ought to have known that the act of stabbing Joseph Zulu in his chest, would cause his death or grievous bodily harm.

3.4. The trial judge also found that the defence of provocation was not available to the appellant because he denied having stabbed Joseph Zulu.

#### 4. GROUNDS OF APPEAL

4.1. The appellant has advanced two grounds in support of the appeal:

- (i) that the learned trial court erred in law and fact when it convicted the appellant for the offence of murder in the absence of evidence establishing malice aforethought; and
- (ii) that the trial court erred in law and in fact when it neglected to take into account provocation and intoxication as extenuating circumstances.

#### 5. APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1. In relation to the 1<sup>st</sup> ground of appeal, Mrs. Tindi submitted that *malice aforethought*, an essential ingredient of a charge of murder, was not proved.

She referred to the case of **Mwewa Muroho v The People**<sup>1</sup> and argued that it being the case, the appellant should not have been convicted on a charge of murder.

5.2. She also submitted that there were discrepancies in the evidence of White Mundu and Francis Njekwa, on the number of fights that took place between the appellant and Joseph Zulu. She submitted that the inconsistencies were because they had falsified their testimonies, to ensure the appellant's conviction.

5.3. Ms Tindi also submitted that White Mundu should have been treated as a witness with a possible interest to serve because he was deeply hurt by the death of Joseph Zulu. As regards, Francis Njekwa his testimony should also have been disregarded because he gave an involuntary statement to the police after being beaten. To strengthen her contention, she cited the cases of **Kambarange Mpundu Kaunda v The People**<sup>2</sup> and **Elias Kundiona v The People**<sup>3</sup>.

- 5.4. Additionally, Mrs Tindi submitted that the trial court misdirected itself when it did not accept the evidence of the appellant that Joseph Zulu provoked him. This claim would have been substantiated had the arresting officer availed the friends he was with on that material night.
- 5.5. The failure to interview them amounted to a dereliction of duty. She argued that in the circumstances, the court must draw an inference that they would have given evidence favourable to appellant. The cases of **Chabala v The People<sup>4</sup>**, **Kalebu Banda v The People<sup>5</sup>**, **Dorothy Mutale and Another v The People<sup>6</sup>** and **Mbinga v The People<sup>7</sup>**, where referred to in support of the proposition.
- 5.6. Finally, Mrs Tindi submitted that at the time the appellant stabbed Joseph Zulu, he had been provoked and under the influence of alcohol. Further, the stabbing was in the heat of the moment. That being the case, he should have not been convicted of the offence of murder because he had no *malice*

*aforethought*. She referred to the case of **The People v Kajilo Muzungu**<sup>8</sup> in support of the proposition.

- 5.7. Mrs Tindi prayed that we set aside the conviction for the offence of murder. In its place, we substitute it with a conviction for manslaughter and sentence the appellant accordingly.
- 5.8. In support of the 2<sup>nd</sup> ground of appeal, which was argued in the alternative to the 1<sup>st</sup>, Mrs Tindi submitted that in light of evidence that the appellant was provoked but his retaliation was disproportionate, the trial court ought to have found that the failed defence of provocation qualified as an extenuating circumstance.
- 5.9. She also submitted that, there was evidence that the appellant had consumed alcohol at the material time and that contributed to the manner in which he retaliated on that fateful night. She made reference to the cases of **Whiteson Simusokwe v The People**<sup>9</sup> and **Jack Chanda & Another v The People**<sup>10</sup>, in support of her argument.

5.10. In conclusion she urged this court to find that there were extenuating circumstances and sentence the appellant accordingly.

## 6. STATE' S RESPONSE

6.1. Mrs Chilufya-Kabwela indicated that she supported the conviction and the sentence imposed by the trial court.

6.2. She submitted that the trial judge was on firm ground when she found that the appellant caused the death of Joseph Zulu, with *malice aforethought*. She added that when stabbing Joseph Zulu, the appellant, knew or ought to have known that death or grievous harm would ensue. She referred the case of **Litepo v The People**<sup>11</sup>, in support of her argument.

6.3. Mrs. Chilufya-Kabwela also submitted that the trial court did not err when it accepted the evidence of White Mundu and Francis Njekwa; as there was no basis for classifying them as suspect witnesses.

6.4. In response to the 2<sup>nd</sup> ground of appeal, Mrs Chilufya-Kabwela submitted that the trial judge was

on firm ground when she found that the defences of provocation and intoxication were not available to the appellant. She pointed out that the appellant denied being provoked by the Joseph Zulu or being present when he was stabbed.

6.5. In addition, Mrs. Chilufya-Kabwela submitted that there is no evidence on record to indicate that the appellant was intoxicated to the extent that his mental faculties were affected, such that he did not know what he was doing. In support of her argument, she made reference to the cases of **James Mwango v The People**<sup>13</sup> and **Kanyanga v The People**<sup>14</sup>.

6.6. In conclusion, she urged this court to dismiss the appeal and uphold the conviction and sentence.

## **7. CONSIDERATION OF APPEAL AND DECISION OF THE COURT**

7.1. In determining this appeal, we have examined the evidence on record, the judgment appealed against, grounds of appeal and the respective arguments.

7.2. A number of arguments were advanced in support of the 1<sup>st</sup> ground of appeal, that is, the claim that

the charge was not proved; there we were inconsistencies in the testimony of the key witnesses; the key witnesses being suspect witnesses; there being a dereliction of duty during investigations; and the availability of the defences of provocation and intoxication.

**7.3.** We will first deal with the submission that there were inconsistencies in the testimony of White Mundu and Francis Njekwa on the number of fights that took place between the appellant and Joseph Zulu. We have examined the testimony of these witnesses and find that it was not the case.

**7.4.** Both witnesses make reference to two incidences, the fight that left the appellant injured and the fight that left Joseph Zulu stabbed. In our view the fact that they do not describe the incidents in the same amount of detail does not render them inconsistent. The two witnesses were not observing the events from the same position and so was their involvement, not the same.

- 7.5. Coming to the argument that White Mundu should have been treated as suspect because he may have been hurt by the death of Joseph Zulu and Francis Njekwa because he was beaten by the police, we will deal with the two witnesses separately.
- 7.6. In the case of **Director of Public Prosecutions v Risbey**<sup>12</sup>, the Supreme Court held that:
- 'But where the issue is one of credibility and inevitably reduces itself to a decision as to which of two conflicting stories the trial court accepts, an appellate court cannot substitute its own findings in this regard for those of the trial court.'
- 7.7. We have examined the evidence and find that the testimony of White Mundu was credible and there was no basis for classifying him as suspect. There was no evidence that White Mundu was hurt by the incident and as a result, gave coloured evidence of what happened that evening.
- 7.8. In the case of Francis Njekwa, the fact that he was detained in connected with the offence renders him a suspect witness. The effect being that a court cannot convict on his evidence alone unless in

certain circumstances, but that is not the case here. There is the evidence of White Mundu.

7.9. Having considered the circumstances in which the offence was committed, we are of the view that his evidence can stand on its own. However, that evidence received further support from the evidence of Francis Njekwa, because suspect as he may have been, it was still of corroborative value.

7.10. Consequently, we find that even though the trial judge did not acknowledge that Francis Njekwa was a suspect witness, properly directing herself, she would have still have found that it was corroborative.

7.11. We will now deal with the argument that there was a dereliction of duty when the police did not interview the persons who were in the company of the appellant during the incident. In the case of **Mbinga Nyambe v The People**<sup>13</sup>, the Supreme Court held that:

'It is not the duty of the Court nor of the prosecution to call any person(s) that an accused mentioned in his evidence in Court.'

7.12. However, in this case, there is evidence that when the appellant was arrested in Zimba, he was in the company of Francis Njekwa. Francis Njekwa was called as a witness. As regards the other persons who were present, it was open for the appellant to call them as witnesses, if it was his view that they could give favourable evidence.

7.13. Having failed or decided not to do so, we are at pains to understand as to how there can be a claim of dereliction of duty by the police or how any inference that is favourable to the appellant, should be drawn.

7.14. The next argument will deal with under the 1<sup>st</sup> ground of appeal is the availability of the defences of provocation and intoxication. In the case of **Simutenda v The People**<sup>14</sup> it was held that:

- (i) Evidence of drinking, even heavy drinking is not sufficient for intoxication to provide a defence under section 13 (4) of the Penal Code; the evidence as a whole,

including that of intoxication, must be such as to leave the court in doubt as to whether the accused actually had the necessary intent, namely in this case the intent to kill or to do grievous harm.

(ii) 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, i.e. "evidence fit to be left to a jury".

(iii) Provocation consists mainly of three elements - the act of provocation, the loss of self-control both actual and reasonable, and the retaliation proportionate to the provocation. These elements are not detached. Evidence of a provocative incident is not by itself evidence of provocation "fit to be left to a jury".

7.15. In this case, for the defence of intoxication and provocation to be available, evidence should have been placed before the trial judge pointing at the appellant stabbing Joseph Zulu while being intoxicated or being provoked. Also necessary was the state of his mind at the time. The only

evidence that was before the court was that he had been drinking and rudely talked to by Joseph Zulu.

**7.16.** What is missing is evidence that he stabbed Joseph because he was so intoxicated that he could not form the intention to commit the offence. Neither is there evidence that he lost self-control because he was provoked. Both types of evidence relate to the state of the appellant's mind.

**7.17.** The appellant having denied stabbing Joseph Zulu, it is our view that the trial judge rightly found that there was no evidence before her on which she could consider the availability of the two defences.

**7.18.** How could she consider whether he had lost self-control when he was stabbing Joseph Zulu when he denied stabbing him? While it is possible that he could not remember the stabbing because he was drunk, no evidence on the extent of drunkenness and the state of his mind at the time has been led.

7.19. In the circumstances, we find that there was no misdirection when the trial judge found there was no evidence before her to warrant consideration of whether the defence of provocation or intoxication were available.

7.20. The last issue we will consider under the first ground of appeal, is the argument that *malice aforethought* was not proved. *Malice aforethought* is defined by **Section 204 of The Penal Code** and it provides as follows;

"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) .....

(d) ....."

7.21. In light of **Section 204 (b) of The Penal Code**, it is our view that the trial judge was on firm ground when she found that the appellant ought to have known that the act of stabbing Joseph Zulu in his chest would cause his death or grievous harm. We therefore uphold her finding that, the appellant caused the death of Joseph Zulu with *malice aforethought*.

7.22. Having not accepted all the arguments in support of the 1<sup>st</sup> ground of appeal, it fails and we dismiss it.

7.23. With regard the 2<sup>nd</sup> ground of appeal, it is apparent from the evidence on record, that the defences of provocation and intoxication were not raised by the appellant.

7.24. In the case of **Precious Longwe v The People**<sup>18</sup>, we said the following, on when a failed defence of provocation, can be an extenuating circumstance:

**'For the purposes of extenuating circumstances, there is a failed defence, where there is an act of provocation and loss of self-control, but the retaliation is not proportionate to the provocation.**

Where the trial court finds that there was no provocation, there can be no extenuation as a result of a failed defence of provocation.'

7.25. The appellant claimed that Joseph Zulu answered him 'rudely'. He does not say the rude reply resulted in him losing self-control and hence the stabbing. As already indicated, he actually denied stabbing Joseph Zulu. In the circumstances, we find that there was no basis on which the trial judge would have considered extenuating circumstances on the basis of a failed defence of provocation.

7.26. The situation is the same as regards the claim that there was a failed defence of intoxication. In the case of **Jose Antonio Golliadi v. The People**<sup>17</sup>, Muyovwe, JS. stated that:

"We must emphasize that trial courts must be wary of finding drunkenness as an extenuating circumstance in every case where the offence is committed at a drinking place or where the accused claims he was drinking or was drunk. It is important to consider the peculiar facts instead of applying drunkenness as an extenuating circumstance in every single case which would lead to injustice. "

7.27. We had the opportunity of dealing with the same issue in the case of **Precious Longwe v The People**<sup>18</sup>.

We said the following:

'In our view, there is a failed defence of intoxication where the accused person was drinking and was so affected by the drinking that she did not know what she was doing or that it was wrong to do it, but was still in a position to form the intention to commit the offence.'

7.28. In this case, the only evidence on intoxication is that while at the bar he drunk a bottle of Bols and he could not appreciate what was happening. That is all.

7.29. In view of the decision in **Jose Antonio Golliadi v. The People**<sup>17</sup>, we equally find that there was no evidence before the trial court on which the failed defence of intoxication could be considered as an extenuating factor. The mere fact that he had been drinking and could not remember, was not good enough.

7.30. Both arguments in support of the 2<sup>nd</sup> ground of appeal having failed. This ground of appeal equally fails.

**8. VERDICT**

**8.1.** Both grounds of appeal having failed, we find that this appeal lacks merit and it is dismissed in its entirety.

**8.2.** The conviction of the appellant for the offence of murder and the sentence of death are upheld.

  
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**C. F. R. Mchenga**  
**DEPUTY JUDGE PRESIDENT**

  
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**B.M. Majula**  
**COURT OF APPEAL JUDGE**

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