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Selected Judgment No.
20/2012

IN THE SUPREME COURT FOR ZAMBIA
130/2011

SCZ APPEAL NO.

HOLDEN AT NDOLA
(Appellate Jurisdiction)

IN THE MATTER BETWEEN:

JOHN MUSONDA MWANAMWENGE

APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: CHIBESAKUNDA, PHIRI AND MUSONDA, JJJS.
On 21st March 2012 and 5th June 2012.

For the Appellant: Mr. Z. Muzenga - Acting Principal Legal Aid Counsel

For the Respondent: Ms. N. C. Mumba - Acting Senior State Advocate

J U D G M E N T

Musonda, JS, delivered the Judgment of the Court.

Cases Referred To:

- 1. Jack Chanda and Kennedy Chanda Vs The People (SCZ Judgment No. 29 of 2002).***

Legislation Referred To:

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Sections 200, 201 of the Penal Code Chapter 87 of the Laws of Zambia.

The Appellant was charged with one count of murder Contrary to Section 200 of the Penal Code. The particulars of the offence alleged that John Musonda Mwanamwenge, on the 26th of August, 2008 at Luwingu in the Luwingu District of the Northern Province in the Republic of Zambia, did murder one Ireen Mwaba. He was sentenced to death. He appealed against sentence only.

The case for the prosecution centred on the evidence of PW1, PW2 a child of tender years (7 years) and PW3.

PW1 was Alice Kasenge Kaloso, a 32 year old housewife who was the mother to the deceased. She testified that on 26th September 2008, the appellant who was her husband and the deceased child were staying at the camp. During the day, the appellant left the two of them and went to the village. He returned when it was dark. He asked whether they had eaten and

asked for food. She prepared the food which her husband ate. He then

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asked for the deceased and the deceased was taken to him. He slapped the deceased, held the deceased by the legs and started beating the deceased continuously. He later threw deceased in the rubbish pit. Thereafter he covered the child with a blanket before pouring cold water on the child. He thereafter went to sleep.

In the morning the following day he went to check on the child. When he found that one of the child's eyes were closed, while the other was open, he slapped the child. The appellant forced his wife to put the child's body on her back and they left for the village. After crossing the river, the appellant ran away. The wife took the child's body to the mortuary at Luwingu Hospital, before reporting to the police. She identified the body of her deceased daughter in the presence of a police officer for the postmortem examination. The deceased was in good health before the appellant beat her.

In cross-examination she stated that the appellant returned drunk. At one time the appellant believed the deceased was his biological child. Before he started beating the deceased, the

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appellant said he had received information that deceased was not his biological child. The appellant had discovered that the deceased was another man's child and that another man even went to collect the child and they had fought with the appellant over the child.

From the day of the fight to the day when he beat deceased the appellant was disturbed. When the appellant was beating the child she tried to rescue her, but the appellant pushed her. Before the fight the appellant was not a loving father to the deceased.

PW2 was Jenipher, a 7 year old school girl. She testified that she was at her grandmother's house. The appellant collected her. They reached the village and the appellant started drinking beer

until he became very drunk. After that they continued their journey to Kasonde. When they reached home, the appellant asked for nshima. Her mother (PW1) prepared nshima which they ate. After eating, the appellant asked for the deceased. The mother (PW1) said deceased was sleeping. The appellant insisted the deceased be woken up. When the child was taken to the appellant

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he gave her soup and nshima to eat. Later appellant asked the child whether it was her relish, when the deceased said no, appellant slapped her. Thereafter he started beating her. After that appellant took the child to the rubbish pit, covered it with a blanket and poured cold water on the child. After that appellant went in the house to sleep.

The child witness and her mother (PW1) spent the night outside. In the morning the appellant went to pick the child whom he found with one eye closed and the other open. The appellant started beating the deceased. Thereafter, he ordered her mother (PW1) to put the child on her back and they left. After

crossing the stream they met Bana Kombe and Bana Luwino, at that time the appellant was crying. The child identified the appellant as her father.

In cross-examination she stated that as they were going, the appellant stopped somewhere and started drinking and he was

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drunk. She was present when another man went to get the deceased. She did not know the name of that man. The appellant did not quarrel or fight the other man. The appellant was not happy the other man took the child.

PW3 was Detective Chief Inspector George Chibuye of Kasama Central Police Station. He testified that he received a report that the appellant had murdered his daughter aged 2 years by the name of Ireen Mwaba on 26th September 2008 around 18:00 hours at Lukonde Mwaba Village. They proceeded to the village and on their way met the mother (PW1) carrying the deceased on her back on her way to Luwingu Police Station to

report. They and PW1 took the dead body to the mortuary at Luwingu Hospital. They went with PW1 to Luwingu Police Station, where she was asked about the whereabouts of her husband. She told him he had run away.

A docket of murder was opened and they launched a manhunt for the appellant. On 29th September 2008, he received a call from

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a member of the community Crime Prevention Unit at Sande Village

that they had apprehended someone who was suspected to be a wanted person. They went to Sande Village and found the appellant. He interviewed the suspect at the Police Station in relation to the murder. He later made up his mind to arrest the appellant for murder. He warned and cautioned him in Bemba language, and he gave a free and voluntary reply. The witness kept in his custody a postmortem report which was tendered in evidence. The appellant was identified as the person he arrested.

The appellant in his defence testified that it was his father-in-law who caused the problem because he was playing with his wife. His father-in-law used to take his wife for nearly three days notwithstanding that there were no matrimonial problems in their house. That used to surprise him because they never differed with his wife. Each time his wife was taken, he used to follow and collect her from her parent's home. His wife used to tell him that it was not his pregnancy. He asked his wife if she was telling the truth. It was then that she told him that she had a relationship with her

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father, that is why her father was jealous. He told her to go to her father. Later, he heard that she was pregnant.

Some people used to say it was his pregnancy, but he used to refuse. After sometime he decided to take his father-in-law to the village headman, where his wife admitted that she had an affair with her father. The appellant was sorry for killing the deceased. He pleaded for leniency.

In cross-examination, he stated that when he returned he found his wife and step child. He did not know who was using him and how it happened. He did not know what was happening.

The learned trial Judge found that the appellant severely beat the deceased causing injuries that caused her death. The Doctor's findings following a postmortem examination were consistent with the evidence of PW1 and PW2.

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The evidence connecting the appellant to the death of the deceased was given by PW1 and PW2 eye witnesses. The appellant did not dispute causing the death, he merely pleaded for leniency.

Mr. Muzenga in arguing this appeal has taken a pragmatic approach. He does not challenge the conviction due to the overwhelming evidence against the appellant in the court below.

He therefore, appealed against sentence and filed one ground of appeal.

Mr. Muzenga in his ground of appeal argued that the learned trial Judge erred in law and in fact when he did not find extenuating circumstances when they were apparent on record. He went on to argue that the appellant was very drunk on the date of the alleged crime. The learned trial Judge's rejection of drunkenness as an extenuating circumstance was a misdirection. He cited our decision in the case of **Jack Chanda and Kennedy Chanda Vs The People**⁽¹⁾, where we held that:

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“Failed defence of provocation, evidence of witchcraft and evidence of drinking can amount to extenuating circumstances”

It was the essence of Mr. Muzenga's submission that in the circumstances of the case at hand, extenuating circumstances

existed, which ought to have persuaded the court to impose any other sentence other than death.

Ms. Mumba in response supported the learned trial Judge's finding that there were no extenuating circumstances. The appellant carefully planned the murder of the child who was asleep when he went back home. He insisted the child should be woken up, after which he terribly assaulted the child and took it to the rubbish pit where it spent a night. The following day when the child was found with one eye open he beat the child. Even if there was evidence of drinking, he continued the assault of the child in the morning. She went on to state that he had learnt the child was not his when his wife was pregnant. It would have been different if he learnt the very day that the child was not his. The outcome

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would perhaps have been different, if he assaulted the wife and not an innocent child.

Mr. Muzenga in reply, argued that the appellant did not have conclusive information at pregnancy time, that the child was not his. That a man came to his house and said the child was his. There was cumulative provocation under which the appellant was laboring. The appellant planned the murder and got some dutch courage. An ordinary person from the village could have reacted in a similar fashion in the circumstances.

We have considered the submissions by both counsel in depth. We shall first bring to the fore the elements to which we have been invited to apply the doctrine of extenuation:

(i) The suspicion that the pregnancy the appellant's wife was carrying was someone's had existed for more than two years, as the deceased child was two years old;

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(ii) The infidelity was between the wife of the appellant, her father and another man who claimed the child;

- (iii) The appellant directed that the child be woken up, which was done, gave her nshima, taunted her, by asking her whether it was her relish, and when she said no, he slapped her;***
- (iv) After beating the child, he took her to the rubbish pit, covered her with the blanket and***
- (v) poured cold water and left her to spend a night in the cold by the rubbish pit; and***
- (vi) Following morning, when obviously he had sobered, he found that one eye was open the other covered, he started beating her again, disappointed that she was still alive.***

We now turn to Section 201 (1) of the Penal Code which provides that any person convicted of murder shall be sentenced:

- (a) To death or***
- (b) Where there are extenuating circumstances, to any sentence other than death.***

Provided that paragraph (b) of this section shall not apply to murder committed in the course of aggravated robbery with a firearm under Section 294:

(a) An extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt;

(b) In deciding whether or not there are extenuating circumstances, the court shall consider the

(c) standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.

Black's Law Dictionary Eighth Edition by Bryan A Garner at page 260 defines extenuation as:

“Mitigating circumstance, a fact or situation that does not justify or excuse a wrongful act or offence but that reduces the degree of culpability and this may reduce the damages (in a civil case)

or the punishment (in a criminal case). A fact or situation

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that does not bear on the question of a defendant's guilt but that is considered by the court in imposing punishment and especially in lessening severity of a sentence"

We agree that evidence of drinking can amount to extenuating circumstances as we said in **Jack Chanda and Kennedy Chanda Vs The People supra.**

The appellant in this case continued to brutally assault the deceased child the following morning when he observed that one eye was open. He was not drunk at the time. In our view that negates drunkenness as an extenuating circumstance. There was a profound sadistic element in this case as the brutal assault was continued the following morning. The facts of this case ought to be distinguished.

For what we have said we find no extenuation. We therefore uphold the death sentence imposed by the learned trial Judge. The appeal against sentence is therefore dismissed.

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L.P. Chibesakunda
SUPREME COURT JUDGE

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G.S. Phiri
SUPREME COURT JUDGE

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P. Musonda
SUPREME COURT JUDGE