

**IN THE SUPREME COURT OF ZAMBIA
145/2011
HOLDEN AT KABWE**

SCZ Appeal No.

(Criminal Appellate Jurisdiction)

BETWEEN:

**KAHALE KANYANGA
APPELLANT**

AND

THE PEOPLE

RESPONDENT

**CORAM: CHIBESAKUNDA, MUYOVWE AND MUSONDA, JJS.
On 1st November 2011 and 10th October 2012**

***For the Appellant: Mr. K. Phiri - Senior Legal Aid Counsel
For the Respondent: Ms. R. N. Nkhuzwayo - Deputy Chief State
Advocate***

J U D G M E N T

Musonda, JS, delivered the Judgment of the Court.

Cases Referred To:

- 1. *Tembo V The People (1972) ZR 22.***
- 2. *Lubendae V The People (1983) ZR 54.***
- 3. *Whiteson Simusokwe V The People (2002) ZR 63.***
- 4. *Jack Chanda and Kennedy Chanda V The People ZR 124.***
- 5. *Wilson Masauso Zulu V Avondale Housing Project Limited (1982) 172.***

This was an appeal against conviction and sentence. The appellant was charged with three counts of murder Contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars of the first count were that Kahale Kanyanga on the 26th day of November 2000 at Kande Village in the Senanga District of the Western Province of the Republic of Zambia did murder Mushoba Wakina. The appellant was sentenced to the ultimate penalty upon conviction.

The particulars of the second count were that Kahale Kanyanga on the 26th day of November 2004 at Senanga in the Senanga District of the Western Province of the Republic Zambia, did murder one Bunonga Changano.

The particulars of the third count were that on 26th day of November 2004 at Senanga in the Senanga District of the Western Province of the Republic of Zambia, did murder one Kamashi Lumayi.

The evidence for the prosecution centred on six witnesses.

PW1 was Nomanga Muyawano, the wife of Kamashi Lumayi (deceased). She testified that on 26th November 2004 her husband left for a meeting at the community school. He instructed her to look after their visitor Chameya whom she followed to a nearby village. She found him drinking with Mushoba Wakina and Bunonga Changano. She joined them, while the appellant was quietly seated alone on the other side.

When they started drinking beer which Chameya bought, the appellant rose and shifted where Chameya was sitting, got the bottle of beer he was drinking and drunk all of it, after which the appellant put the bottle in front of Chameya. When Chameya asked who had drunk the beer, the appellant responded that, it was him and challenged Chameya to do whatever he wanted. The appellant stood up and kicked Chameya on the nose and he started bleeding. Chameya left the appellant and went to the PW1's house, but the appellant followed him and continued kicking him, until he ran into the bush to hide.

The appellant went back to the drinking place. Mushoba Wakina asked the appellant why he grabbed the beer without asking for it, the appellant got a knife from the right pocket of his trousers and cut her throat and she died instantly. When Bunonga Changano saw what had happened to her mother, she picked a stick and hit the appellant, who stabbed her in the back. The witness then left for the appellant's village to tell the people that the appellant had killed a lot of people. Namatama Kumutumwa was following her behind.

The appellant pursued them. The witness met her husband Kamashi Lumayi, who by-passed her. When the appellant saw her husband, he started stabbing him without even talking to him. The appellant stabbed her husband on the left side of the ribs, on the right side of the chest, in the neck where there were three stab wounds and on the cheek and he died instantly.

The witness told the court that at that juncture a man by the name of Munjanja came and tried to apprehend the appellant, but in the process the appellant also stabbed him in the groin, the

chest and on the right hand, but he managed to grab the knife from the appellant. She said that another man, Kahilu also came and helped Munjanja to tie the appellant. Later other people came who assisted in putting the three bodies in the shade, which were later taken on an ox-cart to Senanga. The witness had known the appellant for some years, he was living in a neighbouring village. She identified the knife and the appellant in court.

In cross-examination, she stated that her relationship with the appellant before the incident was good and she was surprised why he behaved the way he did. The beer the appellant drank was almost half the size of a small manzi bottle. The appellant had vowed that he did not care what would happen after he drank Chameya's beer.

In re-examination she said the appellant was not in a drunken state when he stabbed the three deceased persons.

PW2 was Namatama Kamutumwa. She testified that when she came from the river around 09:00 hours, she found PW1, Chameya, Mushoba Wakina and Bunonga Changano drinking beer in a Coca-Cola bottle which was half full. While standing about 5 metres from where they were drinking, she saw the appellant going to where the group was seated, got Chameya's beer and drank it. When Chameya asked the appellant why he drank his beer, the latter's response was that he did not care what was going to happen. At that point the appellant started beating Chameya and kicked him on the nose and he started bleeding until he ran away into the bush to hide. Later the appellant got hold of Mushoba Wakina dropped her down and cut her throat with a knife from his pocket. Bunonga Changano got a stick and hit the appellant who in turn stabbed her with a knife several times in the chest and she eventually fell down.

PW2, Nawanga Muyawano, Matanka Ndongo and Mangolwa started running away from the scene and met Kamashi Lumayi whom they advised not to go to the village, because the appellant had killed two people. The appellant met Kamashi Lumayi who he

stabbed several times and he fell down and died. Munjanja came and struggled to retrieve the knife from the appellant who stabbed him in the chest. Munjanja was later joined by Kahilu and they managed to tie the appellant's hands and the knife he was holding fell down. The ox-cart was arranged to take the three bodies to Senanga police station together with the appellant. The witness identified the knife and the accused. The appellant did not look drunk prior to and during the incident.

PW3 was Kahilu Kashuku. He testified that when he came home from the river between 09:00 hours and 11:00 hours on 26th November 2004 he met Nowanga who told him that the appellant had stabbed some people to death with a knife. He found Munjanja had already apprehended the appellant. He got some ropes which they used to tie him. The witness told the court that later an ox-cart was organized to take the three bodies to Senanga police station, where the appellant was detained. The witness testified that the appellant was his cousin and that he had been living with him since he was born. The witness identified the knife and the accused.

In cross-examination, the witness stated that he had lived with the appellant for a long time. Appellant used to drink, but he had never behaved in such a way. The appellant did not show any strange acts prior to the incident. Though the appellant had gone to drink on the material day, he did not appear drunk. The witness stated that in 1996, the appellant had a disease of the mind, at one time he wanted to kill a mad man and he was subsequently taken to Litambya hospital for treatment. The appellant looked frightened and appeared to panic when he was being tied by the witness and Munjanja.

In cross-examination the witness stated that he saw the appellant a day before the incident and he was normal. On the material day the appellant did not show any sign of a disease of the mind.

PW4 was Musole Kamashi, who identified her father's body Lumayi Kamashi before the post-mortem. She saw stab wounds on the chest, neck, cheek and on the side of the body.

PW5 Chakunona Kapoka identified the bodies of her mother Mushoba Wakina and her sister Bunonga Changano. Her mother Mushoba Wakina had her throat cut, while her sister Bunonge Changano had two wounds, one on the chest and the other on the stomach.

PW6 was Edgar Mufana, who was the arresting officer. He testified that on 27th November 2004, he was on duty at Senanga police station when he was handed over three dockets of murder cases and a home-made knife allegedly used to commit the acts. He arranged post-mortems which were conducted by Dr. Kayunga on the three bodies on 29th November 2004. PW4 identified the body of Kimashi Lumayi, PW1 identified the bodies of Mushoba Wakina and Bunonga Changano.

After he interviewed the appellant, he made up his mind to arrest him for murder. The witness produced the post-mortem reports and the knife. The witness had identified the appellant as accused in the court below. That was the prosecution case. After which the appellant chose to remain silent.

The defence in the court below was based on provocation, drunkenness and insanity. The case of **Tembo V The People**⁽¹⁾ where it was held that an argument which eventually resulted into a fight can amount to provocation sufficient to reduce murder to manslaughter, was cited in support of that defence. The learned trial Judge rejected that defence on the facts in these terms:

“In this case there is overwhelming evidence that it was the accused who provoked others. He is the one who intended to fight others. He provoked Chameya by drinking his beer without his consent. When Chameya queried him, he challenged him to do whatever he wanted and the accused went on to kick him on the nose until he ran away into the bush. The evidence shows that without being provoked, the accused attacked Mushoba Wakina by cutting her throat. By this act the accused provoked Bunonga Changano who tried to hit him with a stick, but he stabbed her several times until she died. Again, without being provoked, the accused stabbed Kamashi Lumayi to death when he met him”

When dealing with the defence of drunkenness, the learned trial Judge had this to say:

“Although the accused might have been drinking, the evidence of PW1, PW2 and PW3 was that he did not appear drunk”

The learned trial Judge cited our decision in **Lubendae V The People**⁽²⁾, where we said:

“Evidence of heavy drinking even to the extent of affecting co-ordination of reflexes is insufficient in itself to raise the question of intent unless the accused person’s capacities were affected to the extent that he may not have been able to form the necessary intent”

There was a defence of insanity which was raised in cross-examination by the learned defence counsel. The learned trial Judge observed:

“The evidence of PW5, the accused’s cousin who lived in the same village with him was that, apart from 1996 when the accused had a mental

disorder and taken to the hospital for treatment, he was very normal when he saw him the day before and on the material day. The evidence of PW5 was corroborated by the medical evidence following an order of this court made pursuant to Section 17 of the Criminal Procedure Code. The report dated 24th August 2006 read...it is my opinion that he was not laboring under any mental disorder at the material time...it is further my opinion that he is currently mentally well and that he is fit to make a plea, stand trial and follow proceedings”

The learned trial Judge concluded that the appellant had the necessary intent to cause death of the three deceased persons and convicted him of the three counts of murder and imposed the ultimate sentence.

On behalf of the appellant Mr. Phiri filed one ground of appeal. It was contended that the learned trial Judge erred in law and fact in failing to find extenuating factors to necessitate a sentence other than death. It was argued that it is a well founded principle of law that even if a murder charge has been proved, the

existence of extenuating circumstances can reduce the moral culpability to warrant a custodial sentence other than that of death. Our decision in **Whiteson Simusokwe V The People**⁽³⁾ was cited where the defence counsel alleges we said:

“Beer drinking can be an extenuating circumstance”

Mrs. Khuzwayo in her response to the sole ground filed by Mr. Phiri, submitted that there was no evidence of heavy drinking. The appellant drank half a bottle of coca-cola. Of the three people the appellant killed, one of them did not even provoke the appellant. There was, therefore, no extenuation.

Mr. Phiri replied that the defence was not saying he was very drunk, but that he was drinking.

We have considered the submissions by both counsels in depth. We note that the defences of provocation, drunkenness and insanity, which were raised before the trial court have been abandoned in this court. What has been advanced in fact is not

an appeal against conviction, but sentence. What has been canvassed is that another sentence other than death within the confines of Section 201 ought to have been imposed as the appellant was drinking. Subsection 2 of Section 201 is couched in these terms:

2 For the purpose of this Section -

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

(b) In deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.

We said in ***Jack Chanda and Kennedy Chanda V The People⁽⁴⁾***:

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

This was not said in the case of **Whiteson Simusokwe V The People supra** as submitted by Mr. Phiri. All what we said there was:

“A failed defence of provocation affords extenuation for a charge of murder”

In this case, the learned trial Judge made findings of fact that the appellant was not drunk, he was not insane and he provoked the three deceased persons. We agree with these findings of fact. We are satisfied that the findings in question were not perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make. This is what we said in **Wilson Zulu V Avondale Housing Project**⁽⁵⁾.

Having disposed of the defences raised in the court below, we wish now to address the sole ground filed in this appeal.

However, before we deal with the ground of appeal we wish to draw a distinction between drunkenness which negates the intent to commit murder and drunkenness which avails the accused charged with murder extenuation.

In **Lubendae V The People supra**, we stated the defence of intoxication as negating the necessary intent when there is:

- (i) Heavy drinking;***
- (ii) The accused person's capacities were affected to the extent that he may not have been able to form necessary intent.***

When drunkenness is being advanced to negate a necessary intent i.e. in murder, what the defence is saying is that due to heavy drinking, the accused or appellant had been incapacitated from forming the necessary intent, prescribed by Section 204 of the Penal Code which defines malice aforethought as:

- (a) An intention to cause 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 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***

When extenuation is being pleaded, the necessary intent has been established, but the defence is saying due to circumstances like an accusation of witchcraft, which is a stigma, the accused committed the murder, so that should diminish his culpability. The plea is therefore mitigatory against the ultimate sentence. In other jurisdictions, they call it 'diminished responsibility'.

We say this to draw a distinction between the defence of drunkenness to a criminal charge and a plea of extenuation which is only available in murder to mitigate the ultimate sentence.

In **Jack Chanda and Kennedy Chanda V The People supra**, what we meant was that each case must be treated on its peculiar facts. It does not necessarily follow that if the appellant had been drinking, then that amounts to extenuating circumstances. In **Jack Chanda and Kennedy Chanda**, the appellants had been drinking for five hours, there was a beer drinking party, their colleagues went to eat as they did not want to drink on empty stomachs. These are factors we took into account when we said the trial Judge ought to have found that, that there were extenuating circumstances.

In the instant appeal the brutal assault of Kamashi Limayi who was the deceased in the third count was precipitated by the deceased being provoked by the appellant by drinking his beer and challenged him to do whatever he wanted. When the deceased did not react, the appellant kicked him on the nose and

he started bleeding. The deceased left the appellant and went to PW1's house, but the appellant followed him and continued kicking him until he ran into the bush. When the appellant went back to the drinking place, Mushoba Wakina asked him why he had drunk beer without asking, he cut the throat of a defenceless woman, which murder was the subject of the first count. The daughter tried to defend her mother with a stick, he responded by stabbing her with a knife. This was a defenceless woman. There was cogent evidence that he had only drunk half a bottle of coca-cola of beer.

In our view, Section 201 should be read with ***Black's Law Dictionary Eighth Edition by Bryan A. Garner at P.260***, which defines extenuation as:

“Mitigating circumstance, means a fact or situation that does not justify or excuse a wrongful act or offence, but that reduces the culpability and this may reduce punishment. A fact or situation 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”

These were unprovoked murders, carried out with profound brutality on the three deceased persons. Could this conduct be said to be mitigatory?. We think not.

For the reasons we have given we find that there were no extenuating circumstances. The sole ground filed herein lacks merit. The outcome is that the whole appeal is dismissed since the only ground which was argued on appeal was against sentence.

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L. P. Chibesakunda
SUPREME COURT JUDGE

.....
E.N.C. Muyovwe
SUPREME COURT JUDGE

.....
P. Musonda
SUPREME COURT JUDGE

