IN THE COURT OF APPEAL **APPEAL NO.124/2018**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

DORCAS KASENGE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: CHISANGA JP, KONDOLO SC, MAJULA, JJAS

On 22nd January 2019 and 26th April 2019

For the Applicant: *Mrs. E. I. Banda, Senior Legal Aid Counsel*
For the Respondent: *Mrs. Sombo C. Kachaka, Senior State Advocate*

JUDGMENT

CHISANGA, JP delivered the Judgment of the Court

Cases referred to:

1. ***Kaunda vs The People (1992)***
2. ***Esther Mwiimbe vs The People (1986) ZR 15***
3. ***Chanda & Chanda vs The People SCZ Judgment No 29 of 2002***
4. ***Simusokwe vs The People SCZ Judgment No. 15 of 2002***
5. ***Nkhata & Four Others vs Attorney General (1966) ZR 124***
6. ***Mulenga and Another vs The People (2008) 2 ZR P2***
7. ***Liyumbi vs The People (1978) Z. R. 25***

The appellant, Dorcas Kasenge was charged with, and convicted for the offence of murder contrary to section 200 of the Penal Code, CAP 87 of the Laws of Zambia. She was alleged to have murdered Aubrey Chansa on 9th April 2017.

The evidence led in support of the charge came from three eye witnesses. These were Ruth Mwape, Kelvin Chansa and Sydney Chanda.

The incident occurred on the 9th April. The evidence led before the court by the eye witnesses was that the deceased and his wife the appellant, used to live in a room, whereas his elder brothers Sydney Chanda, and Kelvin occupied separate units on the same premises.

On the material night, the accused person found a plastic bag with clothes in it by the door of her quarters. She got the plastic bag and approached her brothers-in- law, Sydney and Kelvin, over the matter. Her husband, the deceased, was also present. She informed her brothers-in-law that she had found a plastic bag of clothes at the door of her home, and that she did not like them. It was suggested that the friend who had brought the clothes be called. The friend, who went by the name of Chileshe, was called, and she came. When asked concerning ownership of the clothes in the plastic bag, she admitted that they were hers. She explained that she was shifting to a place that was far, and that was why she had decided to give the clothes to her friend. She apologized if she had made a mistake by doing so, and offered to get the clothes back.

Although the deceased was against the suggestion that the clothes be retained by the appellant, the matter was discussed and resolved, and Chileshe did not retrieve the clothes from the appellant.

Thereafter, the deceased left for his home, but the appellant remained with Kelvin and Sydney. After a while, the deceased came back and told his wife to go and cook, as he was hungry. The appellant's response was that he should not be talking to her in that manner and that one day she was going to stab him with a knife. The deceased left.

After some time, the deceased returned and stood by the door side and asked the appellant whether or not she had heard what he had told her. According to Kelvin, the appellant got up at that juncture and stabbed him in the chest. Sydney confirmed that this is what occurred. Ruth Chansa equally testified that the appellant just got up and stabbed the deceased with a knife.

The appellant's evidence on the other hand was that after the issue of the clothes had been resolved and Chileshe had gone, she remained with Kelvin, but thereafter went outside. She got a knife and a tomato. The deceased insulted her and demanded that she goes to him. He went back into the house. She ignored this demand. He later came with a lot of strength and began chasing her. She run into her brother-in-law's quarters where she found her brother-in-law seated by the door. The appellant wanted to run into the bedroom, and that is when the deceased held her. He pulled her hair, turned her and held her neck. She vigorously tried to extricate herself from his grip, and did not know how the knife stabbed him.

In considering the evidence led on both sides, the learned trial judge stated that she would view the evidence of the prosecution witnesses with caution and

suspicion as they were closely related to the deceased person as guided in ***Kaunda vs The People (1992)***[1].

The learned trial judge stated that she had taken the demeanor of the witnesses into account. The witnesses were forthright in the manner in which they testified. She did not perceive any exaggerations or need to tell lies or fabricate a story against the accused person. She also noted that the witnesses withstood cross-examination. She found the explanation of the accused person to be an afterthought. She was of the view that the accused person seemed irritated by the deceased's insistence that she should go and cook for him.

It was her finding that the accused was possessed of the requisite malice aforethought in stabbing the deceased. She considered the evidence of the accused that the deceased was generally violent towards her and concluded that the accused was attempting to advance a defence of cumulative provocation. She referred to ***Esther Mwiimbe vs The People***[2], where the Supreme Court held inter alia as follows:

> *(i)* ***Evidence of cumulative provocation in the absence of immediate provocation cannot suffice to establish the three vital elements for the defence to stand i.e the act of provocation, the loss of self-control and the appropriate retaliation.***

Premised on this authority, the learned judge found that there was no immediate provocation warranting the reaction from the accused person. She held that the actions of the accused were deliberate and not in the heat of

passion upon sudden provocation. She found the accused guilty of murder and convicted her accordingly.

Dissatisfied with the judgment of the court, the convict appealed on two grounds as follows:

1. The learned trial judge misdirected herself in law and in fact when she rejected the defence of provocation on the facts of the case.

2. The learned trial judge misdirected herself in law and fact when she failed to analyse that there existed extenuating circumstances on the record to warrant a sentence other than death.

The points taken on behalf of the appellant by learned counsel on ground one are that the learned trial judge ought not to have rejected the defence of provocation, but should have considered the appellant's consistent assertion that the deceased was generally violent towards her, especially after consuming alcohol. It was learned counsel's argument that the court failed to analyse the inconsistencies in the evidence of the witnesses.

An example of this, according to learned counsel, was PW1's testimony that the deceased and accused used to live well, but she later backtracked in cross examination when she conceded that they used to fight often and would be separated by others. It was argued that PW3's evidence was in line with the appellant's testimony, and the court should have given more weight to the appellant's testimony.

Another argument advanced is that although PW3 stated that the deceased was not drunk, PW2, who had been at home testified that he was drunk. The court, the argument proceeds, should have postulated that it was possible as stated by the appellant that the deceased was drunk and became violent.

It was contended that only the appellant's story appeared to be credible because it was incredible that the appellant would just stab her husband from whom she had endured beatings to the point of being partially blinded just because he asked her to cook.

It was argued that the appellant's story satisfied the elements present in the ***Mwiimbe vs The People***[2] case. The trial court should have therefore convicted the appellant for the offence of manslaughter instead. We were urged to set aside the conviction for murder, and substitute it with one for manslaughter.

The points taken on ground two are that there in fact existed extenuating circumstances to warrant a sentence other than death. Reference was made to ***Chanda & Chanda vs The People***[3], where it was stated inter alia that:

> ***"A failed defence of provocation, evidence of witchcraft accusation and evidence of drinking can amount to extenuating circumstances."***

Equally drawn to our notice was ***Simusokwe vs The People***[4]. It was thereafter submitted that extenuating circumstances were revealed on the evidence to avail the appellant accordingly. We were urged to allow the appeal.

The respondent's arguments in opposition to the appeal are that there was no evidence that the appellant was provoked on the material date. The trial judge correctly rejected the defence of provocation. It was argued that the three prosecution witnesses were consistent. They also informed the court that they used to rescue the accused from beatings by the deceased, and would accommodate her. It was pointed out that the accused confirmed that she was in good terms with the witnesses, especially PW3. There was therefore no reason why they would not have told the court that the deceased provoked her on that day.

It was argued that the witnesses, who used to rescue the accused, could not have just watched the couple fight without separating them. It was contended that it was reasonable for the deceased to ask her to cook food for him. That could not have amounted to provocation. No reasonable member of the community would stand up and stab a husband all because he is asking for food. Learned counsel referred to the case of ***Mwiimbe vs The People***[2] cited by the appellant's advocate, and submitted that the learned judge was justified to discount the defence of provocation, as it was not available to the appellant. She urged the court to dismiss the first ground of appeal.

The arguments on ground two were that there were completely no extenuating circumstances in the instant case. The appellant denied being drunk. There was no provocation, nor belief in witchcraft. However, learned counsel

submitted that the court should consider whether the failed defence of cumulative provocation which the appellant had raised could avail her.

We have considered the evidence led in the court below, the judgment of the trial judge as well as the submissions advanced by the parties. The first ground of appeal assails the findings made by the trial court. It is an established principle that an appellate court only interferes with the findings of a trial court if its judgment meets the shortfalls articulated in the case of ***Nkhata & Four Others vs Attorney General***[5] as follows:

> ***"A trial judge sitting alone without a jury can only be reversed on fact when it is demonstrated to the appellate court that:***
>
> ***(a).....***
> ***(b).....***
> ***(c)....***
>
> ***(d) In so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where, those witnesses have on some collateral matter, deliberately given an untrue answer."***

Mrs. Banda invites us to find provocation in the evidence led before the trial court. To do this, we have to fault the trial judge's finding, and interpose our own. Our perusal of the evidence reveals that the three eye witnesses were consistent in their narration that the appellant got up and stabbed the deceased when he came to call her to cook for him.

It was suggested to PW3 in cross examination that the next time the deceased came, a struggle ensued, the deceased pulled the appellant's hair, and that she

accidently stabbed him in the process. This question was also put to PW2 and PW1. It was therefore not accurate for the trial judge to state that the defence was an afterthought. We need only refer to ***Mulenga and Another vs The People***[6] in that respect. The Supreme Court held that:

> ***".....During trial, parties have the opportunity to challenge evidence by cross examining witnesses. Cross examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed."***

Despite the foregoing observation, the trial court considered the demeanor of the witnesses in deciding to believe them. These witnesses maintained that the deceased did not fight with the appellant. The trial judge had the advantage of seeing the witnesses testify, while we are dealing with a cold record of the evidence. It is impossible in these circumstances for this court to interpose its views in the place of the trial judge's views. The learned trial judge rejected the suggestion that the appellant was provoked. We fail to conceive how insistence that the appellant goes to cook for the deceased could amount to provocation.

It will be remembered that for the defence of provocation to avail an accused person, there must be the act of provocation, the loss of self-control both actual and reasonable and the retaliation proportionate to the provocation. ***Liyumbi vs The People***[7] refers. The evidence led before the trial court revealed no provocation. The trial court held that the appellant seemed to have been irritated by the deceased's repeated requests that she cooks for him. No

ordinary wife would stab the husband on being requested to cook for him. As for cumulative provocation, the trial judge rightly rejected this defence, as it did not meet the elements of provocation. It is misplaced to argue that the elements of the *Mwimbe* case were met, as the *Mwimbe* case illustrates that the act of provocation must be such as to lead to sudden loss of self-control as a result of which the accused person causes the death of another in the heat of passion. Clearly these elements are absent in this case. Ground one of the appeal therefore fails.

We move to consider ground two of the appeal. A failed defence of provocation can afford extenuation to an accused person, as rightly argued by Mrs. Banda. Our considered view is that for this to occur, some elements of provocation should have been met. However, it should have failed due to disproportionate retaliation by the accused person. Here, the elements of provocation having not been met, it cannot be said extenuation arises. This ground equally fails. The appeal is thus dismissed. We uphold the conviction as well as the sentence.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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M. M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B. M. MAJULA
COURT OF APPEAL JUDGE