

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA

APPEAL 201/2020

(Criminal Jurisdiction)

BETWEEN:

TSHIABU QUIBILA BENOS

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Majula and Muzenga, JJA

On 24<sup>th</sup> June 2021 and 8<sup>th</sup> December 2022

For the Appellant: I.M. Kunda SC, George Kunda & Co., with  
H.M. Mweemba, Acting Director, Legal Aid  
Board

For the Respondent: C. Soko, Deputy Chief State Advocate,  
National Prosecution 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. The People v. Mudewa [1974] Z.R. 147
2. Charles Lukolongo and Others v. The People [1986] Z.R. 115
3. Esther Mwiimbe v. The People [1986] Z.R. 15
4. Ndumba v. The People [1975] Z.R. 93
5. John Mpande v. The People [1977] Z.R. 76
6. Mwale v. The People [1984] Z.R. 76
7. Davis Chiyengwa Mangoma v. The People, SCZ Appeal

- No. 217 of 2015
8. Walker v. R [1969] 53 Cr.App.R. 195
  9. Wilson Mwenya v. The People [1990-1992] Z.R. 24  
Malawo v. Bulk Carriers of Zambia Limited [1978]  
Z.R. 185
  10. Augustine Kapembwa v. Danny Maimbolwa and  
Attorney-General [1981] Z.R. 127
  11. Director of Public Prosecutions v. Risbey [1977]  
Z.R. 28
  12. Kenmuir v. Hattingh [1974] Z.R. 162
  13. Jack Chanda and Kennedy Chanda v. The People, SCZ  
Appeal No. 29 of 2002
  14. Simusokwe v. The People 200 ZR 63
  15. Jose Antonio Goliadi v. The People, SCZ Appeal  
No. 26 of 2017
  16. Maseka v. The People [1972] Z.R. 9
  17. Tembo v. The People [1972] Z.R. 220

**Legislation referred to:**

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

**Works referred to:**

1. Archbold Criminal Pleading, Evidence and Practice,  
Thomson Reuters (Legal) 2010,

**1. INTRODUCTION**

- 1.1. The appellant, appeared before the High Court  
(Chawatama, J.), on an information containing one  
count of the offence of murder contrary to **section**  
**200 of The Penal Code.**

1.2. The allegation was that between 29<sup>th</sup> January 2017 and 30<sup>th</sup> January 2017, she murdered Reeves Malambo.

1.3. She denied the charge and the matter proceeded to trial.

1.4. At the end of the trial, she was found guilty of committing the offence and convicted. She was then condemned to suffer capital punishment.

1.5. She has appealed against the conviction and in the alternative, against the sentence imposed on her.

## 2. CASE BEFORE THE TRIAL JUDGE

2.1. The evidence before the trial Judge was that on 29<sup>th</sup> January 2017, around midnight, the appellant drove into Lusaka's Hilltop Hospital. With her, was her brother, Brian and her boyfriend, Reeves Malambo.

2.2. Reeves was in need of medical help, because he had suffered a stab wound in the back.

2.3. The medical staff at the hospital, attempted an array of interventions to save his life, but all was in vain. Reeves died within a few minutes of reaching



the Hospital. To be precise, at 00:10 hours on 30<sup>th</sup> January 2017.

2.4. On 1<sup>st</sup> February 2017, Dr. Mucheleng'anga, a forensic pathologist, conducted a post-mortem examination on Reeves' body. He concluded that he died from the stab wound which caused him to bleed to death.

2.5. The fact that the appellant inflicted the injury that caused Reeves' death was not in dispute. However, the circumstances in which she stabbed him, has was contentious.

2.6. The sequence of events leading to the stabbing can be set out as follows; earlier on 29<sup>th</sup> January 2017, Reeves called the appellant to find out what she was cooking for the day.

2.7. He hang up on her, when she told him that she did not intend to cook and that in addition to getting some take away food, she was going to visit the hospital and her sister in law.



2.8. Around 14:00 hours, the appellant and Brian, left their home in Lusaka's Ibex Hill and drove to the Lusaka Trust Hospital. The appellant remained at the hospital, while Brian proceeded to church.

2.9. While she was at the hospital, Reeves, on several occasions, attempted to call or contact her, but she did not respond.

2.10. Around 16:00 hours, the appellant called a male acquaintance who picked her from Lusaka Trust Hospital and took her to her sister-in-law, in Rhodes-Park. Among the places, they visited, was a bakery in Jesmondine, where the appellant purchased some wine.

2.11. They returned to Rhodes-Park around 18:00 hours. At about that time, the appellant received messages from Reeves, accusing her of infidelity.

2.12. At about 19:00 hours, Reeves turned up at the appellant's house. The children and the appellant's maid, Tamara Machere, told him that she was not home. He left.

2.13. Reeves went to UTH where he picked his nephew Eugene Malambo. At about 20:15 hours, he made calls to the appellant and Brian, using his nephew's phone. She did not pick, neither did Brian.

2.14. He also told his nephew not to respond if any of the numbers he had called, called back. He dropped him at his home, and drove off.

2.15. Brian concluded his church engagement around 21:00 hours and headed to Rhodes Park. He picked the appellant around 21:30 hours and they headed home.

2.16. Around 22:00 hours, Reeves turned up at the appellant's house and asked for her. He was informed that she had not returned. He did not enter the house.

2.17. There is conflicting evidence on what followed next.

2.18. According to Tamara, he drove off, but Memory Benos, the appellant's niece, said he did not leave. He went back into his car, and sat it out.

- 2.19. At about the same time, Reeves called Eugene. He asked him if he had received any response from the numbers he had earlier called.
- 2.20. Eugene told him that around 21:54 hours, a man called, but using a different number. He also told him that when he received the call, he could hear men conversing in the background. The conversation ended with Reeves thanking his nephew for not telling the caller on who had called earlier on.
- 2.21. The appellant and Brian got home around 22:00 hrs. They found Reeves' car parked at their house.
- 2.22. It is not clear who opened the door to the house for them.
- 2.23. According to Tamara, she opened for them and immediately retired to bed. On the other hand, Memory said she opened the door because Tamara was asleep.
- 2.24. Brian went into the kitchen to make a cup of tea. While in there, Reeves accosted him, asking him why he had not picked his calls. He told him that it was because he had been in church.



- 2.25. In the meantime, soon after getting out of the car, the appellant headed for her bedroom. She unlocked the door and went to the toilet within the room. Before she could do anything, Reeves entered the bedroom. He also locked the door.
- 2.26. He asked her why she did not pick his calls. Before she could answer him, he punched her in the face and pushed her against the wall.
- 2.27. He accused her of infidelity and told her that she had been seen with other men at UNZA. He demanded that he inspect her genitals to rule out the possibility that she had sex with another man.
- 2.28. He threatened to cut her up and deform her. He also threatened to kill her. He pushed her against the walls and pulled her hair. He also strangled her.
- 2.29. Reeves then walked into the pantry, she could not run out of the bedroom because he had locked the door.

- 2.30. He came out of the pantry with a knife and slashed her on the stomach and wrist. He also twisted her arm. She told him that he was going to hurt her.
- 2.31. The knife fell out of his hands and she picked it. He charged towards her and grabbed her by the waist. She ended up on his shoulders and in the confusion she stabbed him in the back. He fell to the ground and told her that he was hurt.
- 2.32. Reeves then rushed to the door, where Brian was waiting.
- 2.33. Brian came to the bedroom after Sabrina Benos had told him that the appellant and Reeves were fighting.
- 2.34. Prior to that Sabrina had gone to the bedroom to meet her mother, soon after her return. She went to tell Brian about the fight soon after she heard the noise in the room and Reeves was also threatening to kill her mother.
- 2.35. Initially Brian ignored her, but when she came back the second time and said the same thing, Brian,

in the company of Memory went to the door to the bedroom. They both heard the appellant crying and telling Reeves that he was going to hurt her. Brian knocked, but there was no response.

2.36. Sabrina did not go back to the bedroom, she said she went to wake up Tamara.

2.37. When door was unlocked, Reeves rushed out and demanded that he taken to the hospital. They took him to the hospital.

2.38. However, Tamara's version of Reeves' exit from the house, was different.

2.39. She said she was asleep in the bedroom when she heard some noise. When she got to the dining room, she saw Brian pulling him out of the house. Behind him was the appellant who had a knife and was threatening to kill him on account of the frequent assaults she had suffered at his hand.

2.40. She said the appellant repeated the treat three times.



2.41. Both Tamara and Brian where detained by the police in connection with Reeves' death.

2.42. In the course of the appellant's trial, the prosecution produced a video recording of the scene reconstruction. In that video, the appellant demonstrated to the police what happened the night Reeves was stabbed.

2.43. The prosecution also called a police officer who interacted with the appellant soon after the stabbing. She told the trial Judge that she did not see any visible injuries on the appellant. Neither did she say she had been assaulted.

### 3. FINDINGS OF THE TRIAL JUDGE

3.1. The trial Judge considered the credibility of the testimonies of Tamara, Brian, Memory and Sabrina.

3.2. She found that the testimonies of Brian, Memory and Sabrina, were not credible because they were conflicting on material issues.

3.3. She accepted the Tamara's testimony after finding that she had no interest of her own, to serve.

- 3.4. She also considered the availability of the defences of intoxication, provocation and self-defence, to the appellant.
- 3.5. On the availability of the defence of intoxication, she found that it was not available.
- 3.6. It was her view that even if there was evidence that the appellant had been drinking, there was no evidence of how much she had drank, and whether her capacity to appreciate what was going on, was affected by the alcohol she had consumed.
- 3.7. As regards the defence of provocation, she found that the appellant's claim that she was strangled or slashed on the stomach, was not credible nor supported by the evidence. This was because the police officers who interacted with her soon after the incident, did not see any injuries, neither did she complain to them.
- 3.8. Having so concluded, the trial Judge found that the defence was not available because there was no

evidence that the appellant had been provoked into stabbing Reeves.

3.9. The trial Judge also found that the defence of self-defence was not available to the appellant. It was not available because she did not believe the appellant's claim that she had been attacked.

3.10. She noted that the appellant was the only person who knew where the knife was, and there was no evidence that she was in danger before she stabbed Reeves.

#### 4. GROUND OF APPEAL

4.1. Four grounds have been advanced in support of this appeal.

4.2. The first ground of appeal is that the appellant should have been acquitted of the charge of murder because the defence of self-defence, was available to her.

4.3. In the alternative, the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal are that appellant should have been convicted of the lesser offence of manslaughter, on account of



the defence of provocation being available to her or because the stabbing was during the course of a fight.

4.4. The 4<sup>th</sup> ground of appeal is also in the alternative to the other grounds of appeal. It is contended that if the evidence proved the charge of murder, the appellant should not have been condemned to suffer capital punishment because there were extenuating circumstances.

5. ARGUMENTS IN SUPPORT OF THE 1<sup>ST</sup>, 2<sup>ND</sup> and 3<sup>RD</sup> GROUNDS OF APPEAL

5.1. Since the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal are all anchored on the trial Judge's findings of what happened in the bedroom, just before the appellant stabbed Reeves, we are going to deal with them at the same time.

5.2. In support of the 1<sup>st</sup> ground of appeal, the case of **The People v Mudewa**<sup>1</sup> was referred to and it was submitted that given the situation that the appellant found herself in, the defence of self-defence, as is

set out in **Section 17 of The Penal Code**, was available to her.

5.3. Counsel pointed out that there was a fight in the bedroom after Reeves locked her in, beat her and slashed her stomach with a knife.

5.4. It was also argued that the video recording presented by the prosecution had parts missing, and on the authority of the case of **Charles Lukolongo and Others v. The People<sup>2</sup>**, it was submitted that it can be presumed that the missing parts did show that the appellant did suffer the injuries she talked about.

5.5. Counsel also referred to **Archbold Criminal Pleading, Evidence and Practice**, paragraph 19-42 and pointed out that, in fact, the defence of self-defence is available even to a person in fear of attack; a person does not need to wait until she is struck, before she can defend herself.

5.6. Coming to the 2<sup>nd</sup> ground of appeal, which is in the alternative to the 1<sup>st</sup> ground of appeal, it was

submitted that the evidence that was before the trial Judge, could have afforded the appellant the defence of provocation, as it is set out in **Section 205 of The Penal Code.**

5.7. The case of **Esther Mwiimbe v. The People**<sup>3</sup>, was referred to and it was argued that Reeves' habit of checking the appellant's genitals, amounted to cumulative provocation.

5.8. It was further argued that this cumulative provocation was followed by immediate provocation when Reeves accused the appellant of having slept with another man and proceeded to attack and assault her, that night.

5.9. It was pointed out that the appellant's evidence that there was a fight, was supported by that of Brian, Memory and Sabrina.

5.10. Counsel then referred to the case of **Ndumba v. The People**<sup>4</sup>, and submitted that since the appellant had the knife at hand, and she stabbed him in the



heat of the moment, the attack was proportionate to the provocation.

5.11. Coming to the 3<sup>rd</sup> ground of appeal, which is also in the alternative to the first two grounds, it was submitted that the evidence against the appellant, proved a lesser charge of manslaughter because Reeves was stabbed in the course of a fight.

5.12. The cases of **John Mpande v. The People**<sup>5</sup> and **Mwale v. The People**<sup>6</sup> were referred to in support of the proposition.

6. ARGUMENTS AGAINST THE 1<sup>ST</sup>, 2<sup>ND</sup> and 3<sup>RD</sup> GROUNDS OF APPEAL

6.1. In response to the 1<sup>st</sup> ground of appeal, it was argued that the defence of self-defence was not available to the appellant.

6.2. Counsel pointed out that Tamara heard the appellant threatening to stab Reeves and at that time, she was not in eminent danger. Consequently, the force that the appellant deployed, was not necessary.

- 6.3. The case of **Davis Chiyengwa Mangoma v The People**<sup>7</sup>, was referred to and it was submitted that since Tamara was not a suspect witness, the trial Judge was entitled to rely on her testimony on the circumstances in which the appellant stabbed Reeves.
- 6.4. Coming to the 2<sup>nd</sup> ground of appeal, it was submitted that the absence of injuries on the appellant, entitled the trial Judge to find that the retaliation to the alleged provocation, was not proportionate.
- 6.5. As regards the argument that there was cumulative provocation, it was submitted that the holding in the case of **Esther Mwiimbe v The People**<sup>3</sup>, was not applicable to this case because the appellant told the trial Judge that she had a normal relationship with Reeves.
- 6.6. In response to the 3<sup>rd</sup> ground of appeal, it was submitted that the evidence that was before the trial Judge established that the appellant acted with *malice aforethought*.

6.7. Counsel referred to the case of **Walker v. R<sup>8</sup>** and submitted that use of a knife after Reeves' "provocative" conduct, which can be best described as trivial, could not have afforded the appellant the defence of provocation.

6.8. In fact, it did prove that the appellant had *malice aforethought* as was correctly found by the trial Judge.

**7. COURTS CONSIDERATION OF THE 1<sup>ST</sup>, 2<sup>ND</sup> and 3<sup>RD</sup> GROUNDS OF APPEAL**

7.1. Before we deal with the issues raised in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, it is necessary that we review the trial Judge's findings on the credibility of the testimonies of Tamara, Brian, Memory and Sabrina.

7.2. We will first deal with the testimony of Tamara.

7.3. Tamara's evidence was that she woke up after hearing noise and when she got to the dining room, she saw Brian pulling Reeves out of the house. Behind



Reeves, was the appellant, who was carrying a knife, and threatening to kill him.

7.4. The trial Judge accepted this evidence after finding that she was a credible witness and that there was no possible motive for her to falsely implicate the appellant.

7.5. In the case of **Wilson Mwenya v The People**<sup>9</sup>, it was held that where a witness was detained in connection with the case that is before a court, that witness's testimony requires corroboration.

7.6. Since Tamara was detained in connection with Reeves's death, she was a suspect witness and the trial Judge should have treated her evidence with caution, and required it to be corroborated.

7.7. Coming to the testimonies of Brian, Memory and Sabrina, the trial Judge found that their evidence was not credible because it was contradictory in material aspects.

7.8. The trial Judge observed as follows:

**'The defence witnesses were not consistent with what they heard the deceased and**

accused say. DW2 (Brian) informed the court that the accused did not cry for help yet the accused and DW4 (Memory) and DW5 (Sabrina) said she did. DW2 (Brian) did not tell the court that he heard the accused say that the deceased was going to kill her. DW4 (Memory) heard the sound of things dropping. It was her testimony that later when she entered her mother's room shoes, coats and clothes were on the floor. The witnesses said the deceased and accused were both shouting, none of them saw them fighting. DW2 (Brian) would have informed the court if at all the deceased threatened the accused that he would kill her judging by the seriousness of what transpired that day. As to their credibility, DW5 (Sabrina) admitted taking a safe from the pantry in the master bedroom. It was later found under a tree, DW5 (Sabrina) according to DW2 (Brian) also took the knife used to stab the deceased as she was heading to her grandmother's house. The Pastor driving her and DW4 (Memory) to turn back to that she could put the knife in a place where it could be found as per instructions of DW2 (Brian) her uncle.'

(The names in italics are ours, and it is for clarity)

7.9. Commenting on the options available to an appellate court when dealing with the credibility of a witness, the Supreme Court, in the case of **Malawo v Bulk Carriers of Zambia Limited**<sup>10</sup>, pointed out that:

'Where questions of credibility are involved, an appellate court which has not had the advantage of seeing and hearing witnesses will not interfere with findings of fact made by the trial judge unless it is clearly shown that he has fallen into error.'

7.10. First of all, it is our view that in assessing whether Brian, Memory and Sabrina contradicted each other, there is need to consider whether they listened to what was going on in the appellant's bedroom, at the same time.

7.11. According to the evidence that was before the trial Judge, Sabrina is the first person to have heard what was going on. She was alone.

7.12. Sabrina's recollection was that when she first got to the bedroom, she heard thuds. She also heard

Reeves saying "you were fucking other men". She left to tell Brian what was going on.

7.13. He ignored her.

7.14. On her return, she heard her mother shouting for help. She said "help me, help me, he is going to kill me". She also heard Reeves saying "I am going to kill you today"

7.15. She then went back to Brian and told him what was going on. Thereafter, she went to report to Tamara.

7.16. When Brian went to the bedroom door, he was with Memory, they were together when they heard what was going on.

7.17. Brian told the trial Judge that when he approached the bedroom, he heard some thumping noise like a tussle between two people; it was like people fighting. The appellant and Reeves where shouting at each other.



- 7.18. Asked on the exact words, he said the appellant was crying out saying 'no sweetie you will hurt me stop what you are doing'
- 7.19. Reeves said "I know, you bitch, I was told, I know where you were, you were by UNZA'.
- 7.20. He also said the appellant did not ask for help.
- 7.21. In the case of Memory, she said when she got to the bedroom door she heard her mother saying 'sweetie you going to hurt me'. She also said her mother cried for help.
- 7.22. She also said she heard Reeves saying you were by UNZA, my friends told me.
- 7.23. In addition, she heard the walls being hit and things dropping.
- 7.24. An assessment of the material parts of the evidence that Brian, Memory and Sabrina gave, shows that Sabrina's narration of what happened, is different from that of Brian and Memory said.
- 7.25. However, Memory and Brian's recollection of what happened, is similar.

7.26. It is our view that had the trial Judge considered the fact that Sabrina was alone, and that Brian and Memory were together at the time they were listening to what was going on in the appellant's bedroom, she would not have concluded that their testimony was not credible because of being contradictory on material aspects.

7.27. In the case of **Augustine Kapembwa v. Danny Maimbolwa and Attorney-General<sup>11</sup>**, the Supreme Court held as follows:

"The appellate court would be slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses but in discounting such evidence the following principles should be followed:

That:

- (a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or
- (b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(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."

7.28. It is our view that the trial Judge erred when she found that the evidence of the witnesses was not credible because it was contradictory in a material way. The finding that their testimony was contradictory is not supported by the evidence that was before her.

7.29. Having established that Tamara's evidence required corroboration and that Brian, Memory and Sabrina's evidence was not contradictory, how should their evidence be treated?

7.30. In the case of the **Director of Public Prosecutions v. Risbey**<sup>12</sup>, the Supreme Court guided as follows:

"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"

7.31. Further, in the case of **Kenmuir v Hattingh**<sup>13</sup>, the Supreme Court held that:

- (i) An appeal from a decision of a judge sitting alone is by way of rehearing on the record and the appellate court can make the necessary findings of facts if the findings were conclusions based on facts which were common cause or on items of real evidence, then the appellate court is in as good a position as the trial court.
- (ii) Where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he has fallen into error.

7.32. Having found that the trial Judge erred when she found that the testimony of Brian, Memory and Sabrina was not credible because it was contradictory, their evidence must be considered against the other undisputed evidence that was before the trial Judge.



- 7.33. In the case of Tamara's evidence, it can only be relied on if it is corroborated, because her detention placed her in the category of a suspect witness.
- 7.34. Reverting to the appellant's defence of self-defence and provocation, they are both anchored on her claim that after Reeves threatened to kill her, he picked up the knife and slashed her on the wrist and stomach. Thereafter, she stabbed him either after apprehending that he would harm her or because his conduct was provocative.
- 7.35. This account of the events of that day, was rejected by the trial Judge because a police officer who interacted with the appellant soon after the incident, did not see the injuries on her wrist or on the stomach. Neither did she talk about them.
- 7.36. It was argued on behalf of the appellant, that had parts not been cut from the video recording, it would have confirmed the appellant's story of the injuries she suffered that night.

7.37. In the case of **Charles Lukolongo and Others v.**

**The People**<sup>2</sup>, it was held, *inter alia*, that:

"Where evidence available only to the police is not placed before the court, the court must presume that, had the evidence been produced, it would have been favourable to the accused. This presumption can only be displaced by strong evidence"

7.38. It is our view, that the evidence from the police officer who was with the appellant soon after the stabbing, was "strong evidence". It displaced the presumption that the video recording would have shown that the appellant was injured.

7.39. In the circumstances, the trial Judge was entitled to arrive at that the conclusion that the appellant did not have her wrist and stomach slashed before she stabbed Reeves with a knife.

7.40. In turn, she was entitled to conclude that the defences of self-defence or provocation, were not available to the appellant because she suffered no injuries at the hands of Reeves before the stabbing.

7.41. She was equally entitled to come to the conclusion that the appellant was not truthful on

what transpired in the bedroom immediately before she stabbed Reeves.

7.42. This being the case, she cannot be faulted for not accepting the claim that the Reeves was stabbed in the course of a fight. It is our view that she was entitled to come to that conclusion, given the appellant's untruthfulness on what transpired that night.

7.43. The circumstances in the case of **John Mpande v The People**<sup>5</sup>, that would render a killing in the course of a fight, did not arise in this case because the trial Judge did not find that there was a fight.

7.44. Consequently, we find no merit in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal. There was no evidence on which the trial Judge would have considered the availability of the defences of self-defence, provocation or found that Reeves was stabbed in the course of a fight.

7.45. As a result, we dismiss these three grounds of appeal.

## **8. ARGUMENTS FOR AND AGAINST THE 4<sup>th</sup> GROUND OF APPEAL**

8.1. In support of the 4<sup>th</sup> ground of appeal, it was argued that should we find that the charge of murder was proved, we can still find that there were extenuating circumstances.

8.2. Such a finding would warrant our interfering with the sentence imposed on the appellant.

8.3. The case of **Jack Chanda and Kennedy Chanda v The People<sup>14</sup>**, was referred to in support of the proposition.

8.4. In response to the 4<sup>th</sup> ground of appeal, the cases of **Simusokwe v. The People<sup>15</sup>** and **Jose Antonio Goliadi v. The People<sup>16</sup>** were referred to, and it was submitted that fact that the appellant had taken alcohol was not an extenuating circumstances.

## **9. COURTS CONSIDERATION OF THE 4<sup>TH</sup> GROUND OF APPEAL**

9.1. **Section 201(1)(b) of The Penal Code** provides that a person convicted of the offence of murder shall not suffer capital punishment, where there are extenuating circumstances.



- 9.2. **Section 201(2) of The Penal Code** provides that an extenuating circumstance is any fact associated with the offence which would diminish morally, the degree of the convicted person's blameworthiness.
- 9.3. In deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of the community to which the convicted person belongs.
- 9.4. We have indicated that on the evidence that was before her, the trial Judge cannot be faulted for rejecting the appellant's claim that she was slashed with a knife soon before she stabbed Reeves.
- 9.5. It is also our view that the trial Judge was entitled to come to the conclusion that the claim was not true.
- 9.6. But extenuating circumstances are not limited to failed defences of provocation, self-defence or intoxication. It is any fact that can reduce the level to which the offender is held responsible for

committing the offence, yet it does not absolve the offender from the commission of the offence.

9.7. According to the appellant, what preceded the fatal stabbing of Reeves, was his demand that he checks her genitals because he suspected her of infidelity.

9.8. In the case of **Maseka v The People**<sup>17</sup>, Baron, Judge President of the Court of Appeal, the forerunner of the current Supreme Court, advising on how a court should treat the evidence of an accused person, when some of it has been found not to be true, pointed out that:

"An accused who is shown to have told untruths in material respects is in no different position from any other witness; the weight to be attached to the remainder of his evidence is reduced, but it is not rendered worthless."

9.9. Further, in the case of **Tembo v The People**<sup>18</sup>, the Supreme Court opined as follows:

"The learned trial judge regarded the issue as simply one of credibility, and he appears - at the very least it must be said that the wording of the judgment could be so construed - to have rejected

the evidence of the appellant because of the falsehoods it disclosed. When considering the evidence of a witness, and particularly an accused person, whose proved to have lied in material respects it is essential to bear in mind that, unless the untruthful portions of the evidence go to the root of the whole story to such an extent that the remainder cannot stand alone, such remainder is entitled to due consideration. The weight of the remainder is of course affected by the fact that the witness has been shown to be capable of untruthfulness, but the remainder must still be considered to see whether it might reasonably be true; it cannot be rejected out of hand.

The learned judge did not evaluate the evidence from the point of view of whether there was a reasonable possibility that the evidence of the appellant as to the argument and fight might be substantially true. He made no reference to the inherent unlikelihood of Mr Ngoma's version, nor to the fact that his witness, who was accusing the appellant of having killed his friend, had a bias or interest adverse to the accused. Nor did he address himself to the fact that on the vital issue of provocation the prosecution case rested entirely on the evidence of a single witness. It is of course competent to convict on the evidence of a single witness so long as it is clear and satisfactory in every material respect, but we do not think it possible to say that the evidence of



Mr Ngoma in the present case meets this test. There were weighty reasons for considering whether, on a critical examination of the whole evidence, there was not a reasonable possibility that that of the appellant might be substantially true."

9.10. In this case, after rejecting the appellant's explanation of what happened immediately before she stabbed Reeves, the trial Judge did not consider whether the rest of her testimony could reasonably have been true.

9.11. In particular, the appellant's claim that Reeves demanded, but she resisted his demand that he inspects her genitals, because he suspected that she had been with another man.

9.12. There was evidence from Eugene that they followed the appellant to the hospital and that Reeves asked him to call Brian's number. There is also evidence from Tamara that Reeves went to the appellant's house on two occasions that evening and waited for her.

- 9.13. Further, there was evidence from Brian that he asked them where they had been when they arrived at home that night.
- 9.14. In addition, there is evidence from Brian, Memory and Sabrina that they heard the appellant pleading with Reeves not to hurt her.
- 9.15. In the circumstances, it is our view that had the trial Judge considered whether the appellant's claim that Reeves demanded that he inspect her genitals was true, she would have found that the claim could reasonably have been true.
- 9.16. The evidence we have just referred to, points at the fact that that evening, Reeves was agitated with the appellant's unavailability.
- 9.17. He made phone calls to her and followed her around town. He visited her house on more than two occasions. This was clearly the conduct of an agitated, if not angry man.
- 9.18. It cannot be said that there is no reason, whatsoever, why the appellant stabbed Reeves.

9.19. It is our view that it can be an extenuating circumstance for a woman who is resisting degrading treatment to inflict injuries in the course of that resistance, that turn out to be fatal.

9.20. It is understandable that a person in the appellant's position, would have used the force that she used to resist Reeves' intrusive and humiliating inspection.

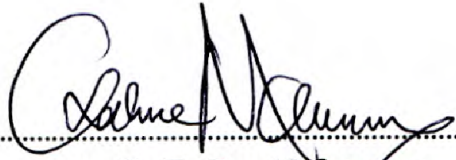
9.21. This being the case, we find merit in the 4<sup>th</sup> ground of appeal and we allow it.

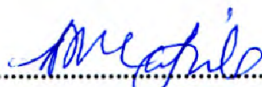
#### 10. VERDICT


10.1. The three grounds of appeal against the conviction having failed, we uphold the appellant's conviction for the offence of murder contrary to **Section 200 of The Penal Code.**

10.2. However, having found that there were extenuating circumstances, we set aside the sentence of death imposed on her. In its place, we impose a sentence of 20 years simple imprisonment.

10.3. The sentence shall run from the 30<sup>th</sup> of January 2017, the day the appellant was apprehended.

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

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

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