

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

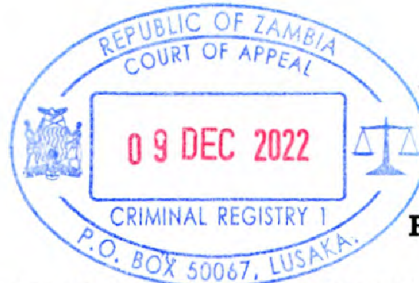
APPEAL NO. 05/2021

BETWEEN:

PETRUS SWART BOOY

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: MCHENGA DJP, KONDOLO SC AND BANDA-BOBO, JJA

On 20th October, 2021 and on 9th December, 2022

For the Appellant : Mr. G. Tembo of Messrs James and Doris LP

For the Respondent : Mr. B. Mwewa Snr. State Advocate- National
Prosecution Authority

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Peter Yotamu Haamenda v The People (1977) Z.R. 184**
2. **Regina v Larkin [1943] 29 CR APP R 18**
3. **Ndala Kasanga v The People (SCZ Judgment No. 12 of 2012)**
4. **The People v Pelete Banda (1977) Z.R. 294**
5. **Precious Longwe v The People CAZ Appeal No. 182/2017**
6. **R v Bird [1985] 1 WLR 816**

LEGISLATION REFERRED TO:

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

1. INTRODUCTION

- 1.1. The Appellant was convicted by W.S. Mweemba J on a charge of murder contrary to **section 200 of the Penal Code**. The Prosecution alleged that, on 25th March, 2018 at Sioma in Sioma District of the Western Province of the Republic of Zambia, the Appellant did murder one Bernard Kekelwa Kekelwa.

2. BACKGROUND

- 2.1. On the fateful day, Given Kaiko (PW1), Mwenda Sitwala, Mark Kalunkango and the Deceased were working at Maziba council check point when PW1 observed a truck arrive at around 16:00 hrs. The driver disembarked, inspected the truck and got back inside it.
- 2.2. Later around 20:00 hrs whilst PW1 and his colleagues were preparing supper, a gentleman by the name of Mate Mweenda informed them that their colleague was quarrelling with the truck driver. They rushed to the scene and found their colleague lying on the ground, face down and bleeding. When they tried to move him, they realised he was dead.
- 2.3. The group confronted the truck driver who asked them if they wanted to kill him. He opened the barrier jumped in his truck

and drove off. PW1 noted that the truck was inscribed with the name Potgieter Transport and had Namibian plates.

2.4. They immediately contacted and informed Senanga police what had happened. The police went to the scene and found the deceased oozing blood from a deep wound on the left side of his chest.

2.5. During cross examination, PW1 informed the lower Court that there was a ban on trucks moving after 21:00 hrs. He further stated that he did not check on the truck and did not charge the driver any money.

2.6. According to him, it was not unusual for trucks to park by the layby. Further, PW1 didn't see the truck driver attack the deceased. He reiterated that the accused fled because he thought people wanted to attack him which reaction was, in PW1's view, not normal.

2.7. Martin Mufwabi was called as PW2. His recollection of the events was prior to the attack. The deceased asked PW2 to escort him to the check point and when they got there, he asked PW2 to tell the driver of the truck parked at the check point to reverse a bit because he was blocking other traffic.

- 2.8. PW2 knocked on the truck door and the driver reacted by banging the door from inside the truck. PW2 thought he was angry and told the deceased to, perhaps, speak to the truck driver himself.
- 2.9. PW2 left the check point place and went to Nyendo's shop and about 10 minutes later, Nyendo called PW2 and others to go and see what had happened. They found the deceased on the ground facing downwards and oozing blood. The rest of his testimony was similar to PW1's.
- 2.10. In cross examination, he stated that only the deceased was wearing a uniform. He did not witness the attack.
- 2.11. PW3 was Nyendo Maswabi who testified that while at his shop, he went outside to answer the call of nature and he heard someone calling out to him to see how he 'had crushed PW3's friend'. He flashed a torch towards the gentleman and noticed that he was, what he described as, a short-brown-fattish- man.
- 2.12. He drew closer and shone his torch. He saw the deceased on the ground who turned out not to be a friend of his but a council police officer. He went back to the shop and told Mate and PW2 what he had seen. Immediately, Mate

informed the deceased's colleagues about what had transpired. The Appellant got into the truck and sped off. PW3 also stated that the deceased had a deep wound on the left side of his chest.

2.13. During cross examination, he insisted that he described the Appellant to the police but the statement was not produced in court.

2.14. The last prosecution witness was PW4, Inspector Christopher Chilushi who testified that after being informed of the incident at the check point, he mounted a road block in Senanga where he impounded the truck driven by the Appellant.

2.15. He testified that the deceased's body was taken to Senanga. He inspected the body thoroughly and observed a cut on the left side of the shoulder while the other parts of his body were injury free.

2.16. PW4 interviewed the Appellant who informed him that he was provoked by an intruder who knocked on the door of his truck. That he got out to face the person, and after a discussion, a fight erupted. The Appellant then produced a knife and so did the intruder (deceased).

- 2.17. During the fight, the Appellant managed to bring down the deceased and kicked him with his left foot and left him lying on the ground. Without delay, the Appellant fled the scene to avoid danger from members of the public. PW4 visited the scene of crime but a thorough search at the scene did not yield any knife.
- 2.18. When subjected to cross examination, PW4 informed the Court that the Appellant told him that he had parked his truck at the check point so that he could rest.
- 2.19. He stated that the injuries suffered by the deceased were caused by a sharp instrument but he did not recover a knife from the Appellant's utensils in the truck. PW4 denied the assertion that someone else could have stabbed the deceased for the simple reason that the Appellant informed him that he had fought with the deceased using a knife.
- 2.20. In his defence, the Appellant testified that whilst asleep in his truck, parked on the side of the road at the check point, someone knocked on his truck door and tried to open it. The Appellant told the person to go away but the person stayed.
- 2.21. The Appellant started the truck and the person ran and closed the boom across the road. This prompted the

Appellant to step out of his truck and when he did, he noticed that there were actually two people and the other one confronted him. There was a scuffle and they both fell to the ground. The Appellant kicked the man [deceased] on the ground on his face and a few seconds later, he saw a group of about 6 young men coming from a dark place.

2.22. It was his testimony that he drove away and after about 35km, he called his boss. He told the boss that he was driving to Senanga to report to the police that he had a fight. When he got to Senanga he saw the police and went straight to them. He was not only asked to get out of the truck but also asked where his gun was and he told them that he was not carrying a gun.

2.23. He informed them that he had been involved in a fight and explained that he had kicked someone and showed the police his swollen foot. According to him, they did not believe him and insisted that he gives them the gun and also asked him for his knife. He gave them a knife, which was amongst his kitchen utensils. They asked for another knife and he told them that was the only one he had. It was at that point

that the Police told him that the man he was fighting with had a stab wound.

2.24. The Appellant denied ever talking to PW3 that night and further stated that the people who came to his truck did not identify themselves. He felt threatened and the last time he experienced such a threat was when he was attacked in Livingstone by 8 people who wanted to steal diesel from his truck.

2.25. In cross examination, he admitted that the police recovered a knife from the truck. The Appellant insisted that he only kicked the deceased and never saw the deceased with a knife.

3. HIGH COURT DECISION

3.1. The trial Judge found, without a doubt, that a fight ensued between the Appellant and the deceased. He referred to the warn & caution statement stating that the Appellant admitted that he produced a knife during the fight. He also admitted to having beaten the deceased.

3.2. The trial Court found that the post-mortem report confirmed that death was caused by "penetrating chest trauma" using a sharp instrument such as a knife. Therefore, he concluded

that the deceased died from wounds which might have been caused by a sharp instrument.

3.3. Further the trial Judge found that PW4's evidence of recovering a knife from the truck corroborated the post-mortem Report.

3.4. The Judge also found that the Appellant, during cross examination, confirmed that he had a knife during the fight.

3.5. In concluding its findings, the trial Court held as follows:

- i) That the deceased died of wounds inflicted by the Appellant;
- ii) The Appellant did not show that he was in eminent danger from PW2 nor the deceased; and
- iii) The Appellant used excessive and unreasonable force.

3.6. According to the trial Judge, the fact that the Appellant admitted to fighting with the deceased removed this case from the realm of circumstantial evidence, and, the trial Court, having found that the provisions of **section 204** of the **Penal Code**, on malice aforethought had been satisfied, convicted the Appellant of murder without extenuating circumstances.

4. THE APPEAL

4.1. Disgruntled with the decision of the lower court, the Appellant launched an appeal in this Court advancing three(3) grounds as follows:

- 1. The learned trial Judge erred in law and in fact when he convicted the Appellant for murder without due regard to the evidence that the Appellant had no intention whatsoever to cause the death of the deceased.**
- 2. The learned trial Judge erred in law and in fact when he sentenced the Appellant to death without considering that there were extenuating circumstances as clearly shown from the failed defence.**
- 3. The learned trial Judge erred in law and in fact when he failed to consider evidence of the Appellant which is reasonably possible.**

4.2. The Parties filed their respective arguments which we shall briefly summarize in the next paragraph.

5. APPELLANT'S ARGUMENTS

- 5.1. Ground one attacked the trial Judge's finding that there was no imminent peril or danger to the Appellant as he crossed the road to confront the deceased. It was argued that PW2's evidence revealed that the deceased was not dressed in reflective clothing when he knocked on the Appellant's truck door. The Appellant, having been previously attacked in Livingstone, he was aware of a possible threat against him and his property.
- 5.2. It was submitted that by holding as it did, the trial Judge misdirected himself because the Deceased first knocked on the Appellant's door and it was only after the Appellant opened the door, that the fight ensued.
- 5.3. The Appellant also took issue with the finding of the lower Court that excessive force was used when it found that the Appellant had a knife during the fight. It was argued that this finding was not supported by any evidence on record. It was pointed out, in this regard that the burden of proof was always on the Prosecution to prove that the Appellant stabbed the deceased.

5.4. The Appellant's Counsel insinuated that the shop nearby sold beer and other breakable items and as such it was possible another item could have inflicted the wound on the deceased. Further, that it was common testimony that a crowd gathered around the scene and they could have adulterated the crime scene. It was therefore submitted that the failure by PW4 to interview the crowd and search the surrounding areas for any sharp object unlike the 2 knives amounted to dereliction of duty. The case of **Peter Yotamu Haamenda v The People**⁽¹⁾ was cited in aid.

5.5. The Appellant's contention in ground two was that the lower Court did not consider the extenuating circumstances in this case which were as follows:

- i) the Appellant was disturbed by PW2 and later the deceased which actions prompted the Appellant to disembark from his truck;
- ii) the time that the Appellant was confronted by the deceased was in the night at least after 20:00 hours as testified to by all the witnesses called and the witness statements on record;

- iii) the fact that theft of goods from vehicles in transit is becoming prevalent as attested to by PW4 and DW1;
- iv) the deceased and PW2 were not wearing reflective gear which would indicate that the deceased was an official from the Council; and
- v) the failed defence of self -defence of property which was probable.

5.6. The Appellant's main contention in ground three was that no knife was found at the scene to support the finding of the trial Judge that the post-mortem report corroborated PW4's evidence that he recovered a knife, contrary to PW4's explicit denials. It was therefore submitted that the knife was not produced because it was never found and had the lower Court properly evaluated the evidence before him, he would have come to the conclusion that the Appellant never had a knife during the altercation. We were urged to uphold the appeal.

6. RESPONDENT'S ARGUMENTS

6.1. The state responded in agreement to grounds one and two.

They alluded to the facts on the record as follows:

- i) The appellant was parked at a lay-by, by himself away from the checkpoint or the shops around;

- ii) The deceased went to the appellant's motor vehicle and tried to get an audience with him;
- iii) The deceased died from a stab wound but no knife was discovered on the appellant, his truck or at the scene
- iv) The deceased was not dressed in an official reflector as he approached the appellant's truck
- v) The deceased did not identify himself as a council officer when he knocked on the door of the appellant's motor vehicle; and
- vi) There was a quarrel or an altercation of some sort between the two parties.

6.2. With this, the State submitted that the mere infliction of a deadly wound even through the use of a deadly weapon cannot in itself be malice. The law derogates from the general principle set out in **section 204 of the Penal Code**, relied on by the Judge, which derogation include self defence, provocation, manslaughter and lawful use of force.

6.3. In the case before us, the State submitted that if we were to uphold the finding of the lower Court that the appellant did indeed stab the deceased, despite there being no weapon

found, we must find him guilty of not murder but manslaughter. The case of **Regina v Larkin** ⁽²⁾ was cited in aid.

6.4. The State held the view that the Appellant had no intention to interact with anyone around him and whilst his reaction to the deceased seems excessive, it was likely unintentional and probably taken in the heat of the moment.

6.5. The case of **Ndala Kasanga v The People** ⁽³⁾ was cited in which the Supreme Court noted that the force used by the Appellant, in that case, was excessive and provocation was properly rejected as a defence. It went further to state that the extenuating circumstances in that case justified the non-imposition of a mandatory capital sentence.

6.6. We were urged to substitute the murder conviction with that of manslaughter or at least murder with extenuating circumstances.

7. OUR DECISION

7.1. We have considered the record of appeal and the impugned Judgment and have duly noted the arguments filed by both Parties.

- 7.2. We shall begin by addressing grounds two and three. The Appellant contended that there was an imminent threat on the Appellant and that no excessive force was exerted, contrary to the findings of the lower Court. The main contention in ground three was that there was no knife found at the scene to support the finding of the trial Judge that PW4 recovered a knife contrary to PW4's explicit denials.
- 7.3. We must hasten to state that the findings of the lower Court were rather unexpected. The trial Court referred to the warn and caution statement stating that the Appellant admitted that he produced a knife during the fight and yet the said warn and caution statement was not produced in Court. Secondly, to bolster the finding that the Appellant used a knife during the fight, the trial Judge alluded to the Appellant's evidence, during cross examination, that he confirmed that he had a knife during the fight. This was factually incorrect. The Appellant only admitted to the police finding a knife in his truck.
- 7.4. We noted that PW4 testified that a thorough search, around the crime scene and the truck, with the view to recover the two knives [used in the fight] proved futile as they found none.

- 7.5. The State does not support the conviction because of the circumstances surrounding the fight that led to the deceased's demise. That, in the absence of a knife, intention was not present and the force exerted was done in the heat of passion. From our understanding, the State seems to be arguing that the Appellant was provoked and he lost his cool but his reaction may not have been proportionate to the provocation. They urged us to find him guilty of either manslaughter or murder with extenuating circumstances.
- 7.6. Gleaning from the Record, the Appellant did not plead provocation but his defence was more inclined to self-defence which defence the lower Court rejected, mainly because the trial Judge found that the Appellant was the aggressor. Even if the defence of provocation was pleaded, we would have found that there was no provocative act meaning the defence could not be invoked.
- 7.7. Our examination of the record reveals that the Appellant was minding his own business while sleeping in his truck when he heard a knock on his door. From his evidence, he stopped at the lay-by to rest but was agitated by the knocking on his door not only by PW2 but also by the deceased. In addition,

he had intimated to the lower Court that he had once been attacked and because of that, as we understand him, this formed the basis of his apprehension on the fateful night.

- 7.8. Seeing that he raised the defence of self-defence, it is not in dispute that what transpired that night caused the death of the deceased. This defence is laid down in **section 17 of the Penal Code** which states as follows:

“subject to any other provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person, if the means he uses and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack.”

- 7.9. In **The People v Pelete Banda** ⁽⁴⁾ it was held that the act of self-defence consists of an attack by an accused person, who, on reasonable grounds, believes, that they are in imminent danger of death or serious bodily harm. The force used should

be no more than is necessary to repel the threat. We relied on the above authority in the case of **Precious Longwe v The People**⁽⁵⁾. In that case we also referred to the case of **R v Bird**⁽⁶⁾ in which it was held that in determining whether it was necessary to use force or whether the force that was used was reasonable, the court will consider whether the accused person had the opportunity to retreat.

- 7.10. Reverting to the facts at hand, the Appellant, in his evidence (at page 69 of the record), stated that he went up to the deceased and asked him "*brother what do you want*" then the fight ensued. This piece of evidence gives credence to the sketch plan, P2. So what was he defending?
- 7.11. The trial Judge found that the Appellant was the aggressor because there was no imminent peril or danger. That the distance, between where the truck was parked and where the deceased's body lay, was about 16 metres.
- 7.12. In our view, it seems the Appellant was looking for a fight. He perceived the deceased as a threat based on his apprehension.
- 7.13. This alone cannot be the basis upon which a court can accept the defence of self-defence. His reaction was

excessive especially given the fact that, while they were engaged in this scuffle, the duo fell to the ground and the Appellant rose first. Instead of retreating, he decided to kick deceased, in the face, while the deceased was on the ground.

7.14. We hold the view that the trial Court's finding that he was the aggressor put asunder the defence of self-defence. He always had the opportunity to retreat but instead approached the deceased.

7.15. Further, the deceased was found with a wound on his body which, according to the post-mortem report, was caused by a sharp instrument. We agree that no knife was found at the scene and that there was no evidence that the knife was the sharp instrument used. The findings of the trial court in that regard only, are set aside.

7.16. Despite no knife having been recovered, the fact remains that the deceased's wound was inflicted by something sharp. The only fight that occurred that night was the one between the Appellant and the deceased and the deceased ended up dead with a stab wound. The only inference that can be drawn from this, is that the Appellant caused the injury that

led to the death of the deceased. We see no other possible inference.

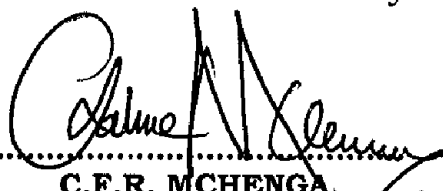
7.17. The defence of self-defence was not available to him and neither was that of provocation. In the face of the evidence on record, we arrive at the same conclusion as did the trial Judge that the Appellant, with malice aforethought as envisaged by section **204 of the Penal Code**, did cause the death of the deceased. Ground two and three are consequently dismissed.


7.18. Finding as we have, we do not see it necessary to deal with ground two for the reason that there were no extenuating circumstances available in this case to warrant a sentence other than death.

8. CONCLUSION

8.1. We find no merit in the appeal and it is accordingly dismissed.

The conviction and sentence meted out by the trial Judge is upheld.


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C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT


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M.M. KONDOLO SC.
COURT OF APPEAL JUDGE


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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE