

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA

Appeal No. 192/2022

(Criminal Jurisdiction)

BETWEEN:

**KELVIN KABASO**

**AND**

**THE PEOPLE**



Appellant

Respondent

**Coram: Mchenga DJP, Banda-Bobo and Sharpe-Phiri, JJA**  
**On 19 September 2023 and 10 October 2023**

For the Appellant: Mr. I. Yambwa, Senior Legal Aid Counsel, Legal Aid Board  
For the Respondent: Mrs. M.M Mweemba, State Advocate, National Prosecution Authority

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## J U D G M E N T

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**Sharpe-Phiri, JA, delivered the Judgment of the Court**

Legislation referred to:

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

Cases referred to:

1. *Jack Chanda and Others v the People* (2002) ZR. 124.
2. *Ester Mwiimbe v The People* (1986) ZR 15 (S.C)
3. *James Chibangu v The People* (1978) ZR 37 (S.C)
4. *Tshiabu Quibilla Benos v The People, Appeal 201 of 2020*

Other authorities referred to:

1. *Bryan A. Garner Black's Law Dictionary, 8<sup>th</sup> Edition, page 260*

## 1.0 INTRODUCTION

- 1.1 This is an appeal against a judgment of Sunkutu, J of the High Court at Ndola delivered on 21 December 2022.
- 1.2 Kelvin Kabaso and Febby Chabamba, both Constables in the Police Service were in a relationship and living together at Levy Chito Police Camp in Luanshya.
- 1.3 On 20 June 2017, Febby Chabamba ('the deceased') was tragically killed. Kelvin Kabaso ('the appellant') was charged with her murder pursuant to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**. He denied the charge and the matter proceeded to trial.

## 2.0 EVIDENCE IN THE HIGH COURT

- 2.1 The prosecution called 7 witnesses in support of their case. Their first witness, *Rodgers Mbindo*, PW1 a Chief Inspector in the Zambia Police Service testified that on 16 June 2017, he prepared a duty roster assigning the appellant to perform patrol duties at the second-class trading area in Luanshya. PW1 stated that patrols were necessitated by the fact that there had been several aggravated robberies in the area. PW1 identified Constable Kabaso as the accused person during the trial.

- 2.2 The second witness, PW2, was *Sergeant Kabosha Collins*, the officer-in-charge of firearms under the armory section at the Luanshya Central Police Station. He testified that on 19 June 2017, he had released an AK47 rifle to the appellant to perform duties assigned to him that week. Upon collection of the firearm, the appellant had entered his details in the Armory Register together with the particulars of the firearm that he had collected.
- 2.3 The following day, 20 June 2017 around 9:30 hours, he received information that a gunshot had been discharged in the Levy Chito Police Camp in Luanshya. He rushed to the scene, where he found a lot of people including Chief Inspector Musonda, who relayed to him what was alleged to have happened. PW2 proceeded into the house of the appellant where he found a gun lying on the floor in the sitting room. He picked up the gun and an empty cartridge and took them with him to the Luanshya Central Police Station.
- 2.4 At the station, PW2 checked the Armory Register Book against the description of the gun and confirmed that the firearm he had collected from the home of the appellant was the same one that had been withdrawn by the appellant the previous day. The weapon was an AK47 rifle, bearing the serial number PA1422.
- 2.5 PW2 confirmed that he also checked the Armory Register Book and established that the appellant had withdrawn five rounds of ammunition on 19 June 2017 and when he checked the firearm,

there were three rounds of live ammunition remaining in the magazine out of the five issued to the appellant.

- 2.6 PW2 confirmed that he kept the firearm, ammunition, and the empty cartridge in the Armory, which he was able to identify to the Court. He also identified the Register Books where the firearm and ammunition that the appellant had collected from the Armory were recorded.
- 2.7 In cross-examination, PW2 confirmed that he was not present at the time of the shooting. Also, that he had only managed to retrieve one empty cartridge from the scene of the crime. He stated that he did not tamper with the evidence when he removed the rounds of ammunition from the magazine. He confirmed that this was the standard procedure that the ammunition and the magazine were kept separate in the Armory.
- 2.8 The third witness, *Mercy Chibesa Sampa*, PW3 was the deceased's mother. She testified that she travelled to Luanshya from Mansa on 10 June 2017 to return her grandchild to her parents, the appellant and the deceased. She stayed with the deceased in Luanshya for a week and then moved to stay with her sister Agness Mulenga Phiri. On 18 June 2017, she received a call from the deceased notifying her that the appellant was drunk and had followed her to work. She told the deceased to ask him to leave and not to follow her to work.

2.9 Two days later, on 20 June 2017, she received a message from the deceased asking her to hurry and return to her house at the Levy Chito Police Camp. She went with her sister Agness Mulenga Phiri to the deceased's house, where they found the deceased seated on the verandah. When they spoke to her, she began to cry. She noticed that the deceased's eyes and her face were red. The deceased asked her to go into the house and tell the appellant to leave the house. She obliged and entered the sitting room. The appellant was in the bedroom. She called on the appellant to come out of the bedroom to talk to her in the lounge. He did not respond to her request.

2.10 The deceased came into the house and went into their bedroom. PW3 observed through the open door leading into the room, that when the deceased entered the room, the appellant got off the bed and grabbed her by her clothes and attempted to beat her. PW3 quickly entered the bedroom and stood in between the appellant and the deceased. PW3 told the appellant not to behave in that manner.

2.11 At that point, her sister Agness came into the house and requested the deceased to leave the house. The deceased obliged. The deceased told her (PW3) also to leave the house as the appellant had a firearm. Her sister immediately proceeded outside to the neighbours house and returned with a police officer. She saw the officer enter the house and heard him request the appellant to put down the firearm. They also heard the appellant respond

requesting the officer to leave his house or else he would shoot him. The officer immediately came out of the house and informed them that he was going to call his supervisor.

2.12 PW3 stated further that officer Lungu returned to the house and stood by the fence with them. At that point, the appellant had emerged from the house with the firearm. Officer Lungu asked the appellant to put the firearm down and retract. The appellant refused to comply and then pointed the gun at officer Lungu and threatened to shoot him. Officer Lungu left the yard when the gun was pointed at him but did not go far and returned to where they were standing.

2.13 PW3 stated that as she was standing with her sister Agness and her daughter Febby outside the house, she heard a gunshot. She thought the appellant had fired in the air, but then she saw the deceased fall. When she knelt to reach out to her daughter's hands, she observed that she was bleeding from the left side of her chest. Her daughter was rushed to Thomson Hospital in a taxi and when they reached the hospital, the nurse told them that her daughter had died and her body was taken into the mortuary. She went into the mortuary where she signed the papers. PW3 identified the appellant as someone who was well known to her as he had had a child with the deceased.

2.14 Under cross-examination, PW3 stated that the appellant was not drunk on the material day. She conceded that the relationship



between the appellant and the deceased was turbulent but that she was not aware of any infidelity.

2.15 PW4 was *Sergeant Patrick Lungu*, who testified that while at home on 20 June 2017, he received a call from Constable Lubungu that he was required at Constable Chabamba's house. He immediately went to her house where he found the deceased's aunt, whose phone he used to call Inspector Mbindu. As he entered the yard, after making the call, he saw the appellant standing on the verandah holding an AK47 rifle. The appellant pointed the gun at him and ordered him to leave the place. Constable Chabamba (the deceased) was standing behind him. She requested the appellant to give him the gun so that they solve their problems amicably. Shortly, thereafter he heard a gunshot which prompted him to flee from the scene to the neighbours house. He was able to identify the accused who was known to him for 7 years. He also identified the firearm serial number PA1422 which the accused had pointed at him.

2.16 Under cross-examination, PW4 confirmed that he was at the scene on the fateful day and that he had heard the gunshot and clearly seen who pulled the trigger. He reiterated that the appellant was a colleague of his and well known to him for many years. PW4 stated that not being a medical person, he was unable to confirm if the appellant was drunk on the material day.

2.17 The fifth witness, PW5 *Zabel Longolongo* was an aunt of the deceased. She testified that she had on 22 June 2017 identified the body of Febby Chabamba, the deceased to a doctor at the Roan General Hospital Mortuary who conducted a post mortem examination. During the examination of the body of the deceased, she had observed a wound on her left breast. She had last seen the deceased in January 2017 and she had been in good health.

2.18 *Superintendent Joseph Ngoni*, a Forensic Ballistic Expert in charge of the Northern Regional Officer was the sixth prosecution witness, PW6. He testified that on 27 June 2017, Detective Chief Inspector Luhifya, working under the Luanshya Police Headquarters, submitted 3 exhibits items to him, namely, one AK47 Rifle serial number PA1422, three rounds of ammunition, 7.62 millimeter caliber Russian shot ammunition and one spent exhibit cartridge case, also of 7.62 millimeter. The items were submitted to him for purposes of forensic ballistic examination and identification in connection with a murder case in Luanshya.

2.19 PW6 stated that upon receiving the items, he examined them in forensic and ballistic techniques. He made the observation that the firearm was an automatic Russian Kalashnikov Rifle of caliber 7.62 millimeter. It was in very good working condition and capable of loading and discharging live rounds of ammunition of the same caliber 7.62 millimeter. He further observed some fresh dark grey cartridge residue in the barrel of the rifle, which indicated that it



was fired not too long ago from when the firearm was submitted to his office.

2.20 PW6 further stated that he took a round of ammunition of the same caliber from their Armory stock and used it to test fire the rifle. This provided him with a test cartridge which he used for microscopic examination and comparison with the exhibit cartridge submitted with the firearm. From his examinations, he was able to tell that both the exhibit cartridge case and the test cartridge case were discharged from the same rifle. He was therefore able to conclude that the cartridge case submitted was discharged from the exhibit rifle. He stated that this was an assault rifle which was restricted to the Defence and Police Force for use on official operations within or outside Zambia. PW6 concluded by confirming that he had compiled a report on his investigations, which report he identified. He also identified the items, namely the rifle PA1422, cartridge and ammunition which he examined.

2.21 The last prosecution witness, PW7 was *Adrian Lubifya*, a retired Detective Chief Inspector in charge of homicide in Luanshya. He testified that he had received a report on 21 June 2017 of a case of murder in which the appellant was alleged to have shot his wife Constable Febby Chabamba of house number 138, Levy Chito Police Camp where they were staying. Investigations were instituted, postmortem examination conducted, office of the ballistics were directed to examine the firearm in their custody.

The postmortem examination conducted by Dr. Mubikayi of Roan General Hospital revealed that the deceased had been shot in her left breast and her heart was shattered.

2.22 Following the results of the examinations, he made up his mind to charge the accused for the offence of murder. PW7 identified the Postmortem Report which had been given to him. He also identified the appellant who he had worked with for about 4 years and the firearm which was allegedly used by the appellant in the commission of the crime.

2.23 Under cross-examination, PW7 confirmed that the information he received from his investigations was that the deceased was shot on account of a marital dispute between herself and the appellant.

### 3.0 **THE DEFENCE**

3.1 The appellant was put on his defence and he opted to give evidence on oath and not to call witnesses. In defence, he testified that on 20 June 2017, he collected an AK47 rifle from the Luanshya Police Station for an assignment he had been detailed to undertake in the second-class area at Dakiki Trading area. After collection of the gun, he went home to prepare for work. While at home preparing for work, he decided to check his wife, Febby Chabamba's phone, wherein he discovered a chat between his wife and her superior. In the chat, he saw nude pictures of his wife that she had sent to her superior. He said he tried to talk to his

wife about the contents on her phone, but she denied it and grabbed her phone away and deleted the chat. He stated that while they were arguing, he heard his mother-in-law's voice, and she was hurling insults and abusive language at him. He added that his wife also hurled insults at him, which caused him frustration.

3.2 It was further submitted by the appellant that he picked up his firearm with the intention of going to work, but his wife followed him and grabbed a hold of the gun. Then a struggle ensued between him and his wife, whereby he pushed her and as he did so, he pulled the trigger, and his wife was shot. He then approached his wife and discovered the blood on her. Soon thereafter, he went back into his house, feeling helpless and not knowing what to do, he attempted to take his own life by shooting himself. He was taken away and taken to the hospital.

3.3 The appellant stated that he had observed several neighbours and workmates at his house at the time. He explained that he had been provoked by his wife and her mother who hurled insults at him.

3.4 Under cross-examination, the appellant denied having had a fight with his wife on the fateful day. He conceded that he had been issued with an AK47 rifle serial number PA1422 for police operations and that he had pulled the trigger of that firearm and it was that firearm that killed the deceased. He also conceded that after being issued with the firearm, he ought to have proceeded to his place of operation and not to his home. He confirmed that

Sergeant Lungu had attempted to assist him, and the deceased resolve their marital issues.

#### 4.0 **TRIAL JUDGE'S FINDINGS**

4.1 Having taken all the evidence into account, the trial Judge made the following findings that Febby Chabamba, the deceased died on 20 June 2017; that her death was not natural, as she had succumbed to injuries sustained after being shot with a firearm at the residence of the appellant; that PW3, the mother of the deceased was an eye witness to the shooting of the deceased; that the deceased died from wounds that were inflicted by a bullet which was discharged from a firearm which was in the hands of the accused; that the appellant fired the shot which killed the deceased; that the appellant unlawfully caused the death of the deceased on 20 June 2017.

4.2 The trial Judge further stated that the appellant had a duty to substantiate the allegations in his defence such as the allegation of him being provoked by having had sight of nude photos on the phone of the deceased. The Judge found that the appellant had however failed to substantiate the same.

4.3 The trial Judge found that the prosecution had proved its case beyond reasonable doubt and accordingly found the appellant guilty of the offence of murder and convicted him accordingly.

Having found no extenuating circumstances in the case, the appellant was sentenced to death.

## 5.0 **FOUNDATIONS OF APPEAL**

5.1 The appellant advanced one ground of appeal, namely that the learned trial Court erred in law and fact when it sentenced the appellant to death in view of extenuating circumstances.

## 6.0 **ARGUMENTS IN SUPPORT OF THE GROUND OF APPEAL**

6.1 The appellant and the respondent filed their heads of argument on 30 August 2023 and 10 September 2023 respectively.

## 7.0 **DECISION OF THIS COURT**

7.1 In this case, the appellant was convicted of murder. **Section 201 of the Penal Code** provides that '*any person convicted of murder shall be sentenced to death, or (b) where there are extenuating circumstances to any sentence other than death.*' The trial Judge found no extenuating circumstances and sentenced the appellant to death in accordance with the provisions of **Section 201**.

7.2 The sole ground of appeal in this matter is that the trial Judge erred in sentencing the appellant to death in view of extenuating circumstances. The issue for consideration is whether the

evidence of the case reveals any extenuating circumstances to warrant a sentence other than death.

- 7.3 The appellant contends that the facts of this case reveal extenuating circumstances as there are elements of provocation and drunkenness.
- 7.4 Although counsel submitted on the issue of intoxication in the heads of argument, at the hearing, Counsel for the appellant conceded that the evidence of drunkenness was not clear on the record and that he would not insist that the lower Court should have considered a failed defence of intoxication. On reviewing the record, we have not come across any evidence that the appellant was drinking or intoxicated on the material day. The arguments on this aspect in the appellant's earlier submissions are therefore immaterial.
- 7.5 Turning to the aspect of provocation, the appellant drew our attention to the evidence of PW3 who testified that she had witnessed an altercation and a near fight between the appellant and the deceased, and that she had failed to calm the appellant down and to get him to leave his home peacefully. The appellant contended that PW3 had witnessed the tension between the appellant and the deceased escalate and culminate in the death of the deceased.



- 7.6 It was further submitted that the learned trial Judge did not consider the defence of drunkenness of the appellant although she considered provocation. Counsel argued that a failed defence of provocation, intoxication and self-defence can be extenuating circumstance as stated in the case of **Jack Chanda and Others v the People**<sup>1</sup>.
- 7.7 Counsel also submitted that the trial Judge ought to have found the failed defence of provocation as an extenuating circumstance to have warranted a sentence other than death. He urged the Court to allow the ground of appeal and quash the death sentence and impose a different sentence.
- 7.8 The respondent argued that the trial Judge was on firm ground in convicting and sentencing the appellant to death after considering the factors on record. It was contended that the sentence was not wrong in principle or so manifestly excessive as to induce a sense of shock or where there are any exceptional circumstances that would render it an injustice if the sentence was not reduced.
- 7.9 The respondent contended further that there were no extenuating circumstances in existence in this case, because the appellant belonged to a community in which he was expected to behave in a professional manner given the training he had undergone as an officer. That a reasonable and prudent person in his position as a police officer ought to have known or realized that death or grievous bodily harm was likely to result from his action.

7.10 On the question of provocation, the case of **Ester Mwiimbe v The People**<sup>2</sup> was referred to, where the Supreme Court held that, *‘in order to establish provocation one must show that there was an act of provocation, a loss of self-control and appropriate retaliation.* It was also submitted that even assuming that the appellant was provoked when he purportedly saw nude pictures of his wife being sent to his superior, the horrific retaliation of shooting the deceased with an AK47 Assault Rifle was not proportionate to the event. In this respect, the case of **James Chibangu v The People**<sup>3</sup> was cited in which the Court stated that, *‘it has never been the law that the man who completely loses temper on some trivial provocation and reacts with gross and savage violence which kills his victim can hope for a jury to find a verdict of manslaughter on grounds of provocation.’*

7.11 In describing an extenuating or mitigating circumstance, **Bryan A. Garner Black’s Law Dictionary, 8<sup>th</sup> Edition, page 260** referred to it as *‘a fact or situation that does not justify or excuse a wrongful act or offence but that reduces the degree of culpability and thus may reduce damages (in a civil case) or the punishment (in a criminal case).’*

7.12 **Section 201(2) of the Penal Code** also provides that an extenuating circumstance is any fact associated with the offence which would diminish morally, the degree of the convicted person’s blameworthiness.

7.13 In the case of **Tshiabu Quibilla Benos v The People**<sup>4</sup>, we stated that, *‘in deciding whether or not there are extenuating circumstances, the Court shall consider the standard of behavior of an ordinary person of the community to which the convicted person belongs.’*

7.14 We also said in the **Benos** case that *‘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.’*

7.15 The question therefore is whether from the evidence in the Court below, there are any facts which could reduce the level to which the appellant is held responsible for committing the offence. According to the appellant, what preceded the shooting was him seeing nude photos of his wife on her mobile phone which she had sent to her superior and which he said the deceased quickly deleted. The trial Judge stated that the appellant had failed to produce the nude photos he alleged had been on the deceased’s phone, and although the appellant insisted that the deceased had deleted the photos, it is a notoriety fact that items deleted from electronic devices can be retrieved.


7.16 The appellant also contended that the deceased and her mother, PW3 had hurled insults at him on the fateful day, but the trial Judge observed that the appellant did not indicate what words they had allegedly uttered to him and that this *“deprived the Court of the opportunity to form an opinion on whether, whatever was reportedly*


*said by PW3 and the deceased, was grossly insulting to the Appellant so as to arouse extreme rage in him...".* The Judge therefore found that the appellant had failed to prove that he was provoked into pulling the trigger on the deceased.

7.17 The evidence on record reveals that the deceased and the neighbours were pleading with the appellant to put the gun down. There were no insults being hurled at him at the time he pulled the trigger. Therefore, the appellant's contention of being provoked by insults is fallacious. On the question of provocation by nude photos, it is unclear if the appellant had seen nude photographs of his wife on her phone before he fatally shot and wounded her with an AK47. In any event, as the respondent rightly argued that even if the appellant had been provoked by seeing nude photos on his wife's phone, his behaviour was callous and not proportionate to the event or the standard of behavior of a trained police officer.

7.18 Having reviewed the evidence in this case, we consider this a sad case of gender-based violence committed by the appellant against his wife. Armed with a lethal weapon, the appellant threatened, shot, and fatally wounded the deceased in a cold-hearted and emotionless manner, in full view of her mother and the neighbours. This was despite his colleagues' efforts to assist. In an effort to combat gender-based violence and seek justice, we must hold perpetrators accountable for their actions and not exonerate ruthless and offensive behaviour.

7.19 We therefore concur with the trial Judge in finding that there are no extenuating circumstances in this case in favour of the appellant. In view of the foregoing, we uphold the conviction and sentence of the lower Court and dismiss this appeal accordingly.

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

  
**A.M. Banda-Bobo**  
**COURT OF APPEAL JUDGE**

  
**N.A. Sharpe-Phiri**  
**COURT OF APPEAL JUDGE**

