IN THE COURT OF APPEAL OF ZAMBIA **APP NO.191/2022**
HOLDEN AT LUSAKA
(Appellant Jurisdiction)

BETWEEN:

LUCY CHOLA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: ***Mchenga, DJP, Banda-Bobo and Sharpe-Phiri, JJA***
On the 19th day of September, 2023 and 14th November 2023.

For the Appellant: Mr. C. Siatwinda, Senior Legal Aid Counsel of Legal Aid Board

For the Respondent: Mr. C. Baku, Deputy Chief State Advocate – National Prosecutions Authority

JUDGMENT

BANDA-BOBO, JA, delivered the Judgment of the Court.

Cases referred to:

1. Ernest Mwaba and Four Others v. The People (1987) ZR 19 (SC).
2. R v. Lovesey (1969) 2ALL E.R. 1077
3. Regina v Menuh and Dade (1957) 2 W.A.L.R 348
4. Francis Mayaba v. The People (SCZ Judgment No. 5 of 1999)
4. Maketo and 7 Others v. The People (1979) ZR 23,
5. R v. Coney (1882) Q.B.D 534
6. Liyumbi v. The People (1978) ZR 25
7. Abedinegal Kapesh and Another v. The People SCZ Selected Judgment No. 35 of 2017
8. Mutambo and 5 Others v. The People
9. Rex v. Tabula Yenka 5/0 Kirya and Others (1943) 10 EACA 51

Legislation and Other Works referred to:

- The Penal Code, Cap 87

1.0. INTRODUCTION

1.1 This is an appeal against the judgment of Hon. Lady Justice Chembe, rendered on 14th October, 2022.

2.0. BACKGROUND

2.1. The brief background to the matter is that the Appellant, together with two juvenile offenders were arraigned on a charge of murder, the allegation being that they murdered one **Chola Kabaso**, on 17th September 2021 in Ndola, jointly and while acting together. They denied the charge.

3.0 EVIDENCE IN THE COURT BELOW

3.1 Briefly, the prosecution adduced its evidence through four witnesses. It was brought out, through the testimony of PW1 that the Appellant suspected the deceased to have stolen a mattress and a baby blanket, as the Appellant's mother had seen him take the items. That the Appellant confronted the deceased at his parents' house, but he denied the accusations.

3.2 According to PW1, the Appellant called her mother, who only

said she had seen the deceased pass by the house, and later discovered that the items were missing from the house. The mother's request to the Appellant to go back home as it was late, fell on deaf ears.

3.3 The Appellant kept calling for the deceased who was in the house to come out and eventually he did.

3.4 Ultimately, a struggle ensued between the Appellant and the deceased. Later, three boys armed with bamboo sticks came on the scene. It was then that the Appellant informed the juveniles that the deceased had stolen a mattress and baby blanket.

3.5 Upon hearing this, the trio set upon the helpless deceased and beat him up brutally and dragged him away. He was brought back only wearing his underwear. The Appellant was seen hitting him on the head. A search of the deceased's house or his parents' house did not yield any results.

3.6 He was then taken away to lead the Appellant to his friend, who it was alleged was keeping the stolen items. However, upon bringing him back to his parents' house the deceased was in a bad state and could hardly walk. He subsequently died from

his injuries. He had been found dressed only in his underwear and with head injuries.

3.7 The Appellant and the juveniles were arrested.

3.8 **PW2**'s evidence was in tandem with that of PW1. She told the court that even though it had been in the night, she was able to recognize the Appellant, who was pregnant at the time, as well as the juveniles, as she had lit a torch.

4.0 **PW3** was **Marshal Nkonde**, who conducted an identification parade in relation to the case. He told court that PW1 and PW2 positively identified the juvenile offender.

5.0 **PW4** was **Peter Chama**, the arresting officer who investigated the crime after receiving a report of a body of a male that was found lying facing upwards. He arrested the juvenile offenders after they had been identified during an identification parade and charged them with the subject offence. He tendered the post mortem report into evidence.

6.0 **PW5 was Anthony Sichilima**, an officer assigned to photograph an identification parade at Kansenshi Police Station. He identified the type of camera he used to take pictures. That three witnesses had identified two of the persons

in the parade on positions 4 and 9. He later compiled a photographic album which was later admitted in court. He went on to identify the two juvenile offenders as the ones who were identified at the parade.

6.1 The learned Judge found the accused and the juvenile offenders with a case to answer, and placed them on their defence.

6.2 The Appellant during her defence, agreed that she had gone to the deceased's house around 24:00 hours to demand for the mattress and blanket which items she suspected the deceased had stolen. That in the process an altercation arose between them. She shouted "thief" and a mob descended on the deceased and dragged him out.

6.3 That as she was pregnant, she walked away and stood at a distance, where she observed the deceased being beaten. She did not do anything and later she left and went to her house to sleep.

6.4 She denied assaulting the deceased and that her mother did not go to the deceased's house. She labelled all the prosecution witnesses as being untruthful.

6.5 Under cross examination, she testified that on the material day, the deceased had been drinking at her place. He refused to leave, and that he had an intention to steal the mattress. It was her response that she went to the market around 23:00 hours, where she chatted with people she found consuming alcohol.

6.6 She returned home around 24:00 hours and found that the deceased had broken into her house and stolen a baby blanket and a mattress. She told the court that she was certain it was the deceased who had stolen her things as he was the only one she had left at her house.

6.7 She went on to testify that she argued with the deceased at his house and the noise woke PW1 and PW2 up. She denied beating the deceased, claiming that it was a mob that descended on him after she shouted "thief". She told Court that she had known the deceased very well as he used to drink beer from her place.

6.8 Asked why she did not report him to the police, her response was it was night time. She only learnt of the death of the deceased the following morning around 05:00 hours when a young man led her to where the body of the deceased was lying.

7.0 For purposes of this appeal, we will not recount the evidence of **DW2** and **DW3** as they are not part of the appeal.

8.0 DECISION OF THE COURT BELOW

8.1 In coming to her decision, the learned Judge considered the issue of who bore the burden of proof and that such proof must be beyond reasonable doubt. She then considered the provisions of Section 200 of the Penal Code, Cap 87 for the offence of murder, and its elements.

8.2 The trial court found as a fact that the deceased met his death after being brutally assaulted. That there had been suspicion that he had stolen a mattress and a baby blanket. After analyzing the evidence, the trial court concluded that the death of the deceased was caused by an unlawful act, which fact had been proved beyond reasonable doubt.

8.3 Regarding the question whether it was the accused and the two juvenile offenders who caused the death, she relied on the evidence of PW1 and PW2, who gave direct evidence. In considering their evidence, the court was alive to the relationship the two had with the deceased. She therefore dealt with the principle of a witness with an interest to serve. She

ultimately formed the view that there was, on the totality of the evidence before her, no danger of false implication by the two witnesses. She accepted their evidence as credible.

8.4 On the issue of identification of the two juvenile offenders, the learned Judge again fell back on the evidence of PW1 and PW2. PW1 had known them prior to the night in question, while PW2 had seen them in the light from a torch she had switched on, on her phone. That both witnesses had testified that they had talked to the trio, and asked them why they were assaulting the deceased.

8.5 The learned Judge also found that the witnesses lived in the same yard as the deceased, and in close vicinity with the accused. She termed this as a case of recognition and not identification. That the identification was not that of strangers, but recognition of neighbors.

8.6 She concluded that the accused and juvenile offenders were properly identified as the people who caused the injuries from which the deceased died.

8.7 Regarding the Appellant's response that she could not take the deceased to the police because it was at night, the learned

Judge was of the view that this was an afterthought. This is because in her evidence, she had said she walked from the market at midnight, and to the deceased's house thereafter. She thus could not have been afraid of the dark.

8.8 As regards her assertion that when she shouted "thief" a mob gathered, the trial court was of the view that no mob gathered. That there were infact only a few people, in view of the time the attack took place. She considered her assertion an afterthought.

8.9 As regards the evidence of the two juvenile offenders, the learned Judge was of the view that their testimonies were bare denials. That they did not seriously challenge the prosecution's key witnesses.

8.10 The learned Judge went on to deal with the issue of common purpose. She delved into Section 22 of the Penal Code on this issue, and various cases that guide on this principle. She ultimately found that on the totality of the evidence, a common intention of the accused and juvenile offenders to prosecute an unlawful purpose, which was to viciously attack the deceased leading to his death had been drawn from their presence at the

scene of the offence, their actions in the beatings, and failing to dissociate themselves from the assault.

8.11 Finally, the learned Judge found that malice aforethought had been proved. That the accused and juvenile offenders ought to have known that continuously beating the deceased on the head would result in death; especially over a prolonged period. The learned Judge found that the prosecution had proved beyond reasonable doubt that the accused and the juvenile offenders unlawfully killed Chola Kabaso with malice aforethought. She convicted the Appellant and found the two juveniles guilty.

8.12 As regards sentence, she sentenced the Appellant to the ultimate penalty for murder, namely the death sentence.

9.0 THIS APPEAL

9.1 Dissatisfied with the verdict, the Appellant has appealed, citing two grounds with the second ground being in the alternative. The grounds were framed thus:-

(ii) The court below erred in both law and fact by finding that there was a common intention between the Appellant and the juvenile offenders to prosecute an unlawful purpose of

viciously attacking the deceased and thereby causing his death, or alternatively

(ii) The court below misdirected itself by convicting the Appellant of murder when the facts of this case support a conviction of manslaughter as there is evidence of provocation and there being no evidence that the Appellant delivered the fatal blow that caused the death of the deceased.

10.0 **ARGUMENTS**

10.1 Both parties filed heads of arguments on which they relied at the hearing.

10.2 In arguing ground one, Appellant's counsel contended that there was no common intention between the Appellant and the juvenile offenders to prosecute an unlawful purpose of viciously attacking the deceased, and thereby causing his death. That rather the common intention was between the juvenile offenders themselves and not with the Appellant.

10.3 To buttress, counsel relied on the evidence of PW1 appearing at page 1 – 4 of the record, in particular, page 3 lines 9 – 12. That the stated evidence revealed that:-

(i) The juvenile offenders (3 men) appeared on the scene, from nowhere, uninvited,

(ii) They had bamboo sticks in their hands;

(iii) They asked PW1 about the struggle with the deceased, and were told by her that the deceased had taken her mattress,

(iv) Upon being told, they started beating the deceased with bamboo sticks, mostly on his head.

10.4 Counsel argued that based on the above circumstances, the Appellant could not be said to have formed a common intention with the juvenile offenders. That if the Appellant had intended to injure the deceased, she would have done so prior to the arrival of the juvenile offenders, as she had ample opportunity to do so on more than one occasion.

10.5 In support, our attention was drawn to the law on Common purpose as espoused in the case of **Ernest Mwaba and Four Others v. The People**[1]. That in *casu,* there was no evidence to show that the juvenile offenders and the Appellant were joint offenders, nor that the

Appellant actively participated in the assault so as to make her a "*crimnis participes*".

10.6 As regards the approach to be taken on the issue of common intention, counsel relied on the case of **R v. Lovesey**[2], where Widgery, L J stated that:-

> **"Having reached this point, we are unable to substitute verdicts of manslaughter, since, if the common design to inflict grievous bodily harm is excluded, the jury might well have concluded that killing was the unauthorized act of one individual for which the co adventurers were not responsible at all"** and that of **Regina v Menuh and Dade**[3].

10.7 Counsel submitted that in the matter before us, there was no evidence connecting the Appellant with the ulterior motive of the juvenile offenders whose apparent design was to inflict grievous bodily harm on the deceased. That therefore the Appellant could not be held responsible for the action nor perpetrated by the juvenile offenders.

10.8 Ground two was argued in the alternative, the gist of which was that the Appellant ought not to have been convicted

of murder, but rather manslaughter, as there was evidence of provocation, and that there was no evidence that she was the one who delivered the fatal blow.

10.9 To buttress, our attention was drawn to the case of **Francis Mayaba v. The People**[4] a case almost on all fours with this one, where the Supreme Court quashed the conviction for murder and substituted it with a conviction for manslaughter, and held that:-

> **"the facts of this case did not support a conviction of murder because quite apart from the element of provocation and drunkenness negative intent to kill, this was a case of mob instant justice and there was no evidence to show that the Appellant or the juvenile offenders delivered the fatal blow that caused the death."**

10.10 It was submitted that in *casu*, the deceased was apprehended on suspicion that he had stolen from the Appellant. That the Appellant was later joined by three people, an assault occurred that occasioned the deceased bodily harm, but there is no evidence to show that the

Appellant delivered the fatal blow. That going by the **Mayaba case**[4], there was provocation which negated any intent to kill. That thus the conviction must be for manslaughter and not murder.

10.11 It was submitted that the conviction was unsafe and unsatisfactory. It was prayed that the appeal be allowed on the first ground and the conviction be quashed and the Appellant be acquitted.

10.12 In the alternative, that the conviction for murder be quashed and it be substituted with a conviction for manslaughter.

10.13 In responding to ground one of the appeal, learned counsel indicated their support for the conviction and sentence by the trial court. Regarding the assertion that there was no common purpose between the Appellant and the juvenile offenders, counsel pointed to page 69 record of appeal, for the evidence showing common purpose. That both PW1 and PW2 testified as to what transpired that night, where they asked the juvenile offenders why they were beating the deceased. That their evidence was at par with that

given by the Appellant in her defence. That she placed herself at the scene together with the juvenile offenders; who she claimed were a mob that inflicted injury on the deceased after she shouted "thief".

10.14 Counsel submitted that the trial court treated the evidence of PW1 with caution because he was a cousin to the deceased.

10.15 Counsel adverted to the court's review of PW1 and PW2's evidence as appear at page 69 record of appeal, lines 1 to 14. That in view of that evidence, it is untenable to state that there was no common purpose between the Appellant and juvenile offenders. Further, that the evidence showed that:-

(a) The Appellant was seen by PW1 beating the deceased on the head;

(b) She physically confronted the deceased by grabbing him and engaging in a physical tussle;

(c) She shouted thief, going by her own evidence; and

(d) She did not disassociate herself from the assault which was being inflicted on the deceased.

10.16 It was counsel's assertion that where a person is present at the scene of a crime without personally participating in its commission, he may nevertheless be found guilty of aiding and abetting, which offence carries the same penalty as the actual offence whose commission was aided and abetted. That however, the same can only be the case if the provisions of Section 21 and 22 of the Penal Code Cap 87 of the Laws of Zambia are satisfied. Counsel contended that these provisions received judicial interpretation in the cases of **Maketo and 7 Others v. The People**[5] and **R v. Coney**[6].

10.17 It was contended that in *casu,* the Appellant grabbed the deceased, struggled with him, and was in the process, joined by the juvenile offenders who she told that the deceased had stolen her blanket and mattress.

10.18 Counsel submitted that she did not stop them from assaulting the deceased with bamboo sticks so as to disassociate herself from the assault. That infact she took part in the assault.

10.19 That if she had wanted to, she could have stopped them as she was the aggrieved party. This is despite the fact that she was so aggrieved, that she walked out in an ungodly hour alone in pursuit of the deceased.

10.20 Counsel submitted that the Appellant infact took part in assaulting the deceased and encouraged the juvenile offenders to equally assault the deceased leading to his death. Thus the court was on firm ground when she concluded at page 77 of the record of appeal, lines 13 to 19 that they were all crime participants.

10.21 Based on the above, we were urged to dismiss this ground of appeal.

10.22 As regards the second ground that was argued in the alternative, it was submitted that there was no provocation. That the evidence showed that the deceased was very cooperative. That the three elements for the defence of provocation to succeed were not available. To buttress this, we were referred to the case of **Liyumbi v. The People**[7] where the Supreme Court set out the elements to prove provocation, namely:-

(i) Act of provocation,

(ii) The loss of self-control, and

(iii) both actual and reasonable retaliation proportionate to the provocation.

10.23 It was argued that from the evidence, the Appellants' actions were not done in the heat of passion upon a sudden provocation. That she had woken the deceased up late at night, accusing him of stealing her mattress and blanket on mere suspicion. That she had failed to listen to her mother who advised her to leave the scene. The evidence showed that she went to the deceased's house twice in the same night.

10.24 That even if she was to argue that she was provoked, the retaliation was disproportionate. She thus could not claim provocation. We were urged to dismiss this ground for want of merit, and uphold both the conviction and sentence.

11.0 **HEARING**

11.1 At the hearing, both counsel relied on their heads of argument.

12.0 **ANALYSIS AND DECISION**

12.1 We have carefully considered the record, the judgment of the lower court and the submissions by counsel through their heads of argument.

12.2 In ground one, the issue to resolve is whether the Appellant herein, pursued a common purpose with the juvenile offenders to launch a vicious attack on the deceased, leading to his death.

12.3 Counsel for the Appellant, in submitting on this ground, referred to the evidence on record to persuade us to find that there was no common purpose between the Appellant and the juvenile offenders. It was further contended that there is no evidence as to the role played by the Appellant in assaulting the deceased, other than the initial struggle she had with him prior to the arrival of the juvenile offenders on the scene.

12.4 The Respondent on the other hand strenuously argued otherwise, contending that her own evidence and indeed that of PW1 and PW2 was in *pari material,* to the extent

that she had been on the scene and that she was seen hitting the deceased on the head.

12.5 In dealing with the issue of a common intention/purpose, the Judge in the lower court considered Section 22 of the Penal Code which is couched thus:-

> **"when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, each of them is deemed to have committed the offence."**

12.6 The Supreme Court had occasion to pronounce itself on the cited provision in the case of **Abedinegal Kapesh and Another v. The People[8],** when they stated at page J24 that:-

> **"Regarding the contention that the Appellants were part only of the mob that assaulted the deceased and not a single witness conclusively pointed to their actual role in assaulting the deceased, we are not in any doubt whatsoever that the two Appellants were engaged in a joint**

unlawful enterprise with others within the intendment of Section 22 of the Penal Code, Cap 87 of the Laws of Zambia ... The question is whether on the evidence before the trial court, the two Appellants could fairly be said to have had a common purpose with others in the assaulting party."

12.7 Useful guidance is perhaps to be drawn from the judgment of Charles J, of the Court of Appeal in **Mutambo and 5 Others v. The People**[9] where he stated that:-

"the formation of a common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join in the prosecution of a purpose which is common to him, and the others, and each does so with the intention of participating in the prosecution with the other or others." (underline ours for emphasis only)

12.8 The case of **Rex v. Tabula Yenka 5/0 Kirya and Others**[10], relied upon by the Judge in the court below provides clear definition of common purpose, where it states that:-

"To constitute a common intention to prosecute an unlawful purpose, ... it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault."

12.9 It is evident from the cited authorities that to form a common purpose, the perpetrators do not have to agree to prosecute a common purpose. It is sufficient that they were on the scene. Further, their common intention may be inferred from their action, or the omission of any of them to disassociate himself from the attack.

12.10 We agree with counsel for the Respondent that the argument that there was no common intention between the Appellant and the juvenile offenders is untenable.

12.11 At page 14 of the Record of appeal, lines 21 – 25, PW2 was asked who she had seen beating the deceased, and her response was that it was the two juveniles and the woman in the dock (Appellant). At page 15 of the record, lines 20, the same witness

was asked why she failed to come out and save the deceased. She responded that they had tried, but Lucy, Appellant herein, did not want to hear them.

12.12 In her own evidence, the Appellant placed herself on the scene. She testified that when she shouted "thief" people came and started dragging the accused. That at that time, and seeing that she was pregnant, she went to stand at some distance. That people started dragging and beating him. She then left and went to sleep.

14.13 It is clear, and as rightly submitted by counsel for the Appellant, that she placed herself on the scene. The Appellant was joined by the juvenile offenders after telling them that the deceased had stolen her items. As they assaulted him, she did not stop them, thus failed to disassociate herself from the assault.

14.14 She actually took part in assaulting the deceased. She had the opportunity to stop the juvenile offenders from assaulting the deceased, but chose to let them do the job for her, and to only later claim that she did not participate in the assault. In the circumstances of this case, we cannot fault the trial Judge for

concluding that they were all "crime participants". We find no merit in this ground. It fails.

14.15 Ground two was argued in the alternative.

14.16 In view of what we have found in ground one, we find there is no basis on which we can find fault with the lower Judge's holding. There is no evidence that the Appellant acted in the heat of passion such as to avail herself the protection of provocation. In any case, this was not a defence that was raised before the lower court, and it certainly cannot be available to the Appellant at this stage.

14.17 We find no merit in this appeal. The conviction of the lower court was safe and we uphold it accordingly.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE

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N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE