

IN THE SUPREME COURT FOR ZAMBIA SCZ APPEAL NOS. 101 & 102/2000

HOLDEN AT NDOLA

(CRIMINAL JURISDICTION)

B E T W E E N:

LUKA CHIWAYA

APPELLANTS

AGAYI KAMUTUMBE

AND

THE PEOPLE

RESPONDENT

**CORAM: SAKALA, ACTING DCJ, CHIBESAKUNDA JS, MAMBILIMA,
ACTING JS**

On 5th December, 2000

For the Appellants – Mrs. J C KAUMBA, Acting Principal State Advocate

For the Respondent – Mr. D.B. MUPETA, Senior State Advocate.

JUDGMENT

MAMBILIMA, AJS, delivered the judgment of the court.

The two Appellants before us were convicted of one count of murder contrary to Section 200 of the Penal Code. They were both sentenced to death. The particulars of the offence which they were facing before the lower court are that on 19th March, 1999 they murdered Lazarus CHUPA KANYOKA. They have appealed to this court against the death sentence

only. The facts which were established before the lower court were that the two Appellants murdered the deceased at a burial of a person called NDONGA on suspicion that the deceased had caused the death of the said NDONGA through witchcraft.

Counsel for the Appellant has submitted to us that for the purpose of sentencing under Section 201 (1) (b) of the Penal Code, the Judge was in error by failing to regard that witchcraft was an extenuating factor. She submitted that the court ought to have considered that the two Appellants were simple villagers who held a strong belief in witchcraft. This in turn reduced the morality of the severity of the sentence. She has appealed to us to exercise our discretion to find that there were extenuating circumstances which ought to reduce the sentence from death by hanging. Counsel also submitted that the second Appellant is a T.B. patient who is currently on treatment and that he was operated on at Kabwe General Hospital before he was found with T.B. She submitted that a long custodial sentence will affect his health.

We have considered the submissions by the Counsel for the Appellants. We agree that a genuine belief in witchcraft is an extenuating factor which should be taken into account when sentencing an accused

found guilty of murder. By failing to do so, the Court below misdirected itself. On the submission that the second Appellant is a T.B. patient, who underwent an operation, we note that no medical report has been furnished to us to enable us assess the severity of the condition of the Appellant. In the exercise of our discretion and having accepted that a genuine belief in witchcraft is an extenuating factor, we set aside the sentence of death which was imposed on both Appellants by the Court below. Taking into account the brutal cruelty that the deceased was subjected to, which is evident on record, notably that the deceased was brutally assaulted, made to eat soil and that a coffin was placed on his laps for a long time before he died, we find it expedient in the circumstances of this case to impose a sentence of twenty (20) years imprisonment with hard labour in respect of each Appellant with effect from the date of arrest.

With regard to the submission that the 2nd Appellant is a T.B. patient, we can only appeal to the prison authorities that if his illness is in the infectious stage, they must make appropriate arrangements to keep him separate from others.

To this extent, the appeal against sentence succeeds.




E. L. SAKALA

ACTING DEPUTY CHIEF JUSTICE

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L. P. CHIBESAKUNDA

SUPREME COURT JUDGE



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I. C. MAMBILIMA

ACTING SUPREME COURT JUDGE