

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

APPEAL NO.19/2022

BETWEEN:

FRANCIS DAKA



APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Hamaundu, Kaoma and Chisanga, JJS
On 7th June, 2022 and 13th June, 2022

For the appellant : Ms Z. Ponde, Legal Aid Counsel

For the State : Mr S. Simwaka, Senior State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. Mbomena Moola v The People (2000) ZR 148
2. Jack Chanda and Kennedy Chanda v The People (2000) ZR 124
3. John Lubozha v The People, Appeal No. 485 of 2013
4. Steak Chibale v The People, Appeal No. 62 of 2013
5. Abedinego Kapeshi and Another v the People SCZ Selected Judgment No.35 of 2017

1.0 Introduction

1.1 The appellant appeals against conviction.

1.2 In October, 2014, the appellant appeared before the High Court (presided by Chali, J), sitting at Chipata on a charge of murder. It was alleged that on the 9th February of that year he had murdered Jackson Zulu (the deceased).

2.0 The facts

2.1 The Prosecution's case

2.1.1 The trial court heard that, on that day, the deceased was last seen by his son Elias Zulu (PW1) around 16:00 hours, heading for his field within Petauke District; He was wearing his rain coat, and was carrying an axe on his shoulder.

2.1.2 At about 18:00 hours, a relative of the deceased named Stanley Mwale (PW2) found him lying down on a path, with severe injuries on his head. The deceased died of his injuries on the same spot, not long thereafter.

2.1.3 The appellant was apprehended some twelve days

later, on suspicion of his involvement in the killing of the deceased. During his detention, he was later driven to the scene, in the company of civilian witnesses who were relatives to the deceased; namely, PW1 and PW2.

2.1.4 At the scene, the appellant is said to have demonstrated how he had attacked the deceased. But the evidence of real value that came out of that expedition is this: the appellant told the police that, after he hacked the deceased with the latter's own axe, he separated the blade from the axe-handle and threw it in some bushes, about 100 metres from the scene; then he took the blade to a shelter in his field, about 150 metres from the scene, and hid it there; finally, he buried the rain coat in the ground near the shelter.

2.1.5 While still at the scene, the appellant pointed at the bushes in which he had thrown the handle. A search of that bush revealed the handle. The appellant then took the police to the shelter in which he had hidden

the blade. Indeed it was found. The appellant also pointed to a spot on the ground. When the place was dug, the rain coat was found.

- 2.1.6 The court also heard from PW1, PW2 and the arresting officer (PW3) that on the way back from the scene, the motor vehicle stopped at the village in order to leave the two civilian witnesses. There, the appellant told his nephew that he had been hired by a woman named Catherine Sakala to kill the deceased; and that the payment for that assignment would be in the form of two heads of cattle. He instructed his nephew to collect the animals from Catherine Sakala.

2.2 *The case for the defence*

- 2.2.1 The appellant did not deny that the deceased's injuries were inflicted by him. His explanation, however, was this: On the material day the deceased came to his field and started clearing it, saying that, in so doing, he wanted to extend his son's field.

- 2.2.2 The appellant took strong exception to this move, and a

quarrel ensued. It was during that quarrel that the deceased said that he would kill the appellant by means of witchcraft, the same way he had killed the appellant's father.

2.2.3 At this point, the deceased took off his rain coat and proceeded to demarcate the appellant's field. The appellant tried to stop the deceased, but the latter threw his axe at him. The axe missed its target, and a fight started between the deceased and the appellant. During the fight, the appellant hit the deceased with the handle of the axe.

2.2.4 Then the deceased left the appellant's field, saying that he was going to report the assault to members of the neighbourhood watch. However, the deceased lost strength and collapsed along the way.

2.2.5 In panic, the appellant threw the handle of the axe in some bushes, hid its blade in the shelter and buried the rain coat. Then he left for his home to tell his wife and sister about the incident.

3.0 The argument for the defence

3.1 The defence argued the case on two issues, namely

- (i) That the appellant was provoked by the deceased's conduct, which led to the fight; and,
- (ii) That the deceased, a renowned wizard, had threatened to kill the appellant by means of witchcraft; and that, consequently, the appellant had killed the deceased under those circumstances.

4.0 The judge's findings and decision

4.1 The judge found as a fact that the appellant, contrary to his version of the fight, brutally assaulted the deceased multiple times. The judge also was of the view that the nature and extent of the injuries could not have enabled the deceased to walk about 150 metres from the appellant's field. Consequently, the judge found that the appellant attacked the deceased right on the spot on which he was found lying.

4.2 The judge also found as a fact that the appellant had

indeed uttered words to his nephew that he had killed the deceased upon being hired by Catherine Sakala for a reward of two heads of cattle.

- 4.3 The trial judge rejected the defence of provocation for two reasons; first, on the ground that the assault exceeded reasonable retaliation, especially that the deceased was an old, lame person; and, secondly, on the ground that, the judge having found as a fact that the appellant had uttered the words that he had been hired by one Catherine Sakala to kill the deceased, the defence of provocation was discounted by that finding.
- 4.4 The argument on the alleged threats by the deceased to kill the appellant by means of witchcraft was dismissed by the judge on the ground that belief in witchcraft did not afford the appellant a complete defence, but only served as an extenuating circumstance.
- 4.5 However, when the time came to pass sentence, after conviction, the defence again advanced the two issues and submitted that they ought to at least afford the appellant extenuation for the murder.

4.6 The judge again dismissed these two arguments, and held that there could not have been any extenuating circumstance because of the words that the appellant had uttered to his nephew.

5.7 The appellant was therefore sentenced to death.

5.0 The Appeal

5.1 This appeal, however, is against sentence only; and the sole ground advanced by the appellant is that the trial judge neglected to take into account belief in witchcraft as an extenuating circumstance when meting out the sentence.

5.1.2 The appellant's argument

5.1.2.1 On behalf of the appellant, Ms Ponde pointed out, in her arguments, that there was a lot of evidence that brought out the issue of witchcraft. She submitted that both PW1 and PW2, relatives of the deceased, confirmed in their testimony that the deceased was widely believed to have killed many people in the village by means of witchcraft.

5.1.2.2 She pointed out further that even the appellant's testimony showed that, not only did the deceased reveal to the appellant that he had killed the latter's father by witchcraft, but that he also threatened to kill the appellant in the same manner.

5.1.2.3 Ms. Ponde argued that, in the circumstances, the trial judge should have heeded the counsel to be found in our decisions in the following cases: (i) **Mbomena Moola v The People**⁽¹⁾ (ii) **Jack Chanda and Kennedy Chanda v The People**⁽²⁾ and (iii) **John Lubozha v The People**⁽³⁾ which hold that belief in witchcraft provides extenuation for murder; and that the judge should have found the same in this case.

5.1.3 *The Prosecution's argument*

5.1.3.4 The prosecution have argued, on the authority of our decision in the case of **Steak Chibale v The People**⁽⁴⁾, that in determining whether or not extenuating circumstances exist, the peculiar facts of each case must be considered.

5.1.3.5 Mr. Simwaka pointed out that, in this case, the

unsolicited revelation of the appellant to his nephew that he had been hired by Catherine Sakala to kill the deceased negated his assertion that he killed the latter for fear of being bewitched by him.

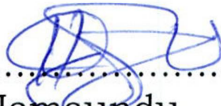
6.0 Our Decision


- 6.1 Indeed, in the cases that counsel for the appellant has cited above, we have said that belief in witchcraft will provide extenuation to a murder. In subsequent cases, however, such as **Abedinego Kapesi and Another v The People**⁽⁵⁾ we have qualified our earlier decisions; and have set out the strict circumstances in which belief in witchcraft will provide extenuation to a murder.
- 6.2 But, in this case, it is not correct to say that the trial judge overlooked the evidence of witchcraft, because he actually considered it on two occasions; at the defence stage and at the mitigation stage.
- 6.3 At mitigation stage, the judge rejected that proposition on

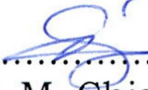
the ground that he had made a finding of fact that the reason that the appellant had killed the deceased was because he had been hired by Catherine Sakala.

6.4 We cannot fault the judge's rejection of the proposition because indeed his finding of fact that the appellant killed the deceased for a reward of two heads of cattle negated the mitigation that was being advanced by the appellant. Hence, we agree with the prosecution's argument that the trial judge was on firm ground when he sentenced the appellant to death.

6.3 We, therefore, find no merit in this appeal. We dismiss it.


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E. M. Hamaundu
SUPREME COURT JUDGE


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R. M. C. Kaoma
SUPREME COURT JUDGE


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F. M. Chisanga
SUPREME COURT JUDGE