File Copy

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.05/2023**
HOLDEN AT KABWE
(CRIMINAL JURISDICTION)

BETWEEN:

FRANCIS SAKALA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kabuka and Chisanga, JJS
On 4th April, 2023 and 13th April, 2023

For the appellant: Mr B. Banda, Senior Legal Aid Counsel
For the State: Mrs Y Banda, State Advocate

JUDGMENT

HAMAUNDU, JS delivered the Judgment of the Court

Case referred to:
1. Esther Mwiimbe v The People (1986) ZR 15
2. Nguila v The Queen (1963-1964) ZR (Reprint) 17

1.0 INTRODUCTION

1.1 The appellant's appeal is against his conviction by the High Court (presided by Siavwapa, J, as he then was) for the offence of murder.

2.0 THE FACTS

2.1 It is not in dispute that on 27th February, 2013 at a hammer mill situated in a market in Chisamba, the appellant picked up a quarrel with the deceased. According to PW4, who witnessed the beginning of the quarrel, the appellant said that the deceased had been threatening to kill him. PW4 then removed both the appellant and the deceased out of the milling room. Later, PW4 heard commotion outside. When he looked through the door, he saw the deceased lying on the ground, while the appellant was kicking him. PW4 went to restrain them.

2.2 According to PW1, who witnessed the beginning of the fight, or assault, the appellant started beating the deceased without any quarrel. He said that the appellant beat the deceased with fists to the ribs, and that at the

time when PW4 went to restrain them, the deceased had fallen to the ground.

2.3 After that altercation, the deceased was never able to stand or walk. He was later found to have sustained a fracture of the femur, and this led to his death.

3.0 THE HIGH COURT'S DECISION

3.1 At the trial, the appellant told the court, in an unsworn statement, that during their argument the deceased head-butted him and that the appellant then pushed the deceased in order to avoid a physical confrontation: this is what caused the deceased to fall down.

3.2 The learned trial judge considered briefly whether the appellant's explanation raised the defences of provocation, or self defence. The judge weighed the appellant's explanation against the statements of PW1 and PW4; he then chose to accept the testimony of the two witnesses instead of that of the appellant. On the strength of the testimony of PW1 and PW4, the learned judge pointed out that neither witness saw the alleged head-butting by the

deceased. In fact, the judge observed that, according to the testimony of PW4, it was the appellant who exhibited aggression towards the deceased as soon as he saw him in the milling room. On those grounds, the learned judge found that neither the defence of provocation nor that of self defence could be sustained.

3.3 The appellant was then convicted and sentenced to death.

4.0 THE APPEAL AND DECISION OF THIS COURT

4.1 The appeal is on only one ground. It reads:

> **"The honourable trial court erred in law and fact not to consider the evidence which suggested that there was provocation and retaliation to the threats suffered by the appellant at the instance of the victim"**

4.2 In the arguments in support, Mr Banda, Legal Aid Counsel for the appellant, has raised an issue that the trial court did not consider whether or not PW1 and PW4 were witnesses with an interest to serve. We must immediately dismiss that argument because; first, there is no ground of appeal that has been advanced on that issue. Secondly, a reading of the judgment of the trial court clearly shows

that at no time was there any issue that the two witnesses might have, in one way or another, had any reason to give false testimony against the appellant.

4.3 Coming to the arguments on the ground of appeal that has been advanced, Mr Banda's submission is that the judgment and its analysis does not bring out the reason why PW1 and PW4's pieces of evidence were preferred to that of the appellant's unsworn evidence; which was to the effect that the deceased had threatened to kill him, and that on that particular day the deceased even head-butted him, causing him to react by pushing the deceased. It is counsel's submission that both the defence of self-defence and that of cumulative provocation may well have been availed to the appellant. Mr Banda relies on the case of **Esther Mwiimbe v The People**[1] for that argument. He further submits that two witnesses, PW3 and PW4, corroborated the appellant's unsworn statement when they said that the appellant told them that the deceased had been threatening to kill him.

4.4 With those submissions, Mr Banda urges us to allow this appeal.

4.5 The general response to the appellant's submissions by Mrs Y. Banda, the learned State Advocate, is that, if at all the provocation is said to be from the alleged threats of being killed, the same had happened some time back; so that on the fateful day the appellant was not acting in the heat of passion. As for the plea of self-defence, counsel submits that there was no evidence to show that the appellant was in imminent danger of being killed or sustaining grievous bodily harm. Consequently, counsel urges us to dismiss the appeal.

4.6 We will start with the appellant's claim that PW3 and PW4 corroborated his unsworn statement when they said that the appellant told them that the deceased had been threatening to kill him. While the judgment shows that the trial court accepted that the appellant had issues with the deceased over the latter's alleged threats to kill him, the acceptance was only an acknowledgement of the reason which the appellant used for attacking the deceased. The

trial court did not make any finding of fact that indeed the deceased had threatened to kill the appellant. As for PW3 and PW4, they merely told the court what the appellant, on the day of the assault, had given as the reason for attacking the deceased. They cannot therefore be said to have corroborated his allegation that the deceased was threatening to kill him.

4.7 Now, the appellant would like us to accept that the previous alleged death threats, together with the alleged head-butting on the material day culminated into the appellant losing his self-control. We think that the plea fails because the explanation by the appellant that he was head-butted by the deceased was not accepted by the trial court. Of-course, the appellant questions why the court preferred the statement of PW1 and PW4 over his. The reason in our view is simply that his unsworn statement which carried less weight, was pitted against the sworn testimony of PW1 and PW4, which carried a greater weight: Our courts have always followed the following words of

Conroy, C.J, in the case of **Nguila v The Queen**[2] where he referred to an unsworn statement in the following terms:

> **"The Court may attach what weight it chooses to the contents of such statement. The balance of opinion seems to be that an unsworn statement is evidence in the case, but is of less weight than sworn testimony, which can be tested by cross-examination".**

Therefore, we do not accept the appellant's argument that the trial judge erred in discounting his statement.

4.8 We, accordingly find no merit in this appeal. We dismiss it.

.....
E. M. Hamaundu
SUPREME COURT JUDGE

.....
J. K. Kabuka
SUPREME COURT JUDGE

.....
F. M. Chisanga
SUPREME COURT JUDGE