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Abedinego Kapeshi and Another v The People SCZ Selected Judgment No. 35 Of 2017

Gift Sangende¹

Facts

In 2017, the appellants, being dissatisfied with the judgment of the Kabwe High Court appealed to the Supreme Court. They contended among other things, that the trial court erred in law to convict the appellants of murder. They further stated that the court erred in law to sentence the appellants to life imprisonment, as the sentence was excessive.

On or about the 30th October, 2011, at Kasempa in the North-Western Province of Zambia, two appellants were indicted on two counts of the murder of the two deceased persons contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The appellants jointly and whilst acting together with others unknown, murdered the two deceased persons in separate but related incidents on suspicion that the two bewitched Kabinga. This was during the traditional funeral ceremony of '*kikondo*' where it is believed that the coffin itself directed them to the people that killed Kabinga. The second appellant, Best Kanyakula, together with others, prepared some concoction or African charm, called *mumone* in Kaonde, which included mealie meal powder. Relatives of the late Kabinga then smeared the medicine on the coffin in which lay the body of the late Kabinga. They thereafter hit the coffin with a stick and directed the late Kabinga or his spirit to tell them who had killed him.

Thereafter, the coffin, while being carried by pallbearers, hit Munanga's house, damaging the door in the process. They then came out and went to where Munanga was and hit him. A mob of mourners thereupon descended on him, severely assaulting him with stones and bricks. The beating continued and he was later burnt to death. The mob was later led to Edson Masonde's house, which was about 75 meters away from Munanga's house. Upon seeing the pallbearers, the coffin and the mob, Masonde tried to run away but the mob caught up with him, assaulted him severely with stones and sticks until he too was dead.

On 12th November, 2012, the High court stated that the facts revealed a belief in witchcraft and the Supreme Court has elucidated in many cases like *Mola v The People*², that belief in

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² (2000) SCZ Judgment No. 35

witchcraft by many communities in Zambia is very prevalent and is held to be an extenuating circumstance. Thus the two accused persons were found guilty of murder with extenuating circumstances and were convicted to life imprisonment

Holding

The Supreme Court set aside the sentence of life imprisonment imposed on the appellants and in its place, imposed the death sentence on both appellants. It took the view that consideration of every belief in witchcraft as an extenuating circumstance threatens the whole purpose of extenuation in the sentencing philosophy of the courts. For a belief in witchcraft to be treated as an extenuating circumstance, it ought to go further than merely someone's subjective thought process. There has to be a verifiable set of circumstances that motivate such a belief. Thus, the Supreme Court held that a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor to an accused person facing a charge of murder. There is absolute need to protect victims of witchcraft accusations from improvable allegations leading invariably to multiple violations of their rights, and in some cases death.

Significance

This case is of great significance because not only does it promote the rule of law but it also protects individual human rights. The precedent that was set prior to this decision was that a belief in witchcraft, though unreasonable, was prevalent in our community and that such a belief is an extenuating factor.³ This implies that it did not matter whether the belief in witchcraft was unreasonable or not for as long as it was prevalent in the community of the accused, the courts admitted it as an extenuating circumstance in murder cases. The law that legislated this position is Act No. 3 of 1990 of the Penal Code Chapter 87 of the Laws of Zambia, that amended Section 201(2) to include subsection (b) which provides that “[i]n deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs.” The interpretation of this is that if the belief in witchcraft is prevalent in a class of the community of the accused, then the courts shall consider the belief in deciding whether or not it amounts to an extenuating circumstance. This position was upheld in a

³ Mbomena Moola V. The People, (2000) Zr 148

plethora of cases such as *Chishimba v The People*,⁴ *Nelson Bwalya v The People*,⁵ and *Chanda and Chisanga v The People*.⁶

In *Chishimba v The People*, the deceased, who was suspected to be a witchcraft practitioner was called out of his house by the appellant and severely beaten. He died from the severe injuries he sustained from the beating. The Supreme Court imposed a sentence of 10 years in lieu of death. Similarly, in *Nelson Bwalya v The People*, the appellant killed the deceased believing him to have killed his wife. When sentencing, the High Court observed that although the witnesses alluded to the appellant's belief in witchcraft, the appellant in his evidence repudiated that belief, stating that he did not believe that the accused killed his wife using witchcraft. The High Court was satisfied that there were no extenuating circumstances to persuade it to pass a different sentence other than the death sentence. On appeal, the Supreme Court held that extenuating circumstances existed. The reasoning behind the appellate court's holding was that there was ample evidence that the appellant believed that the deceased killed his wife through witchcraft. It was also stated that whether the accused had remained silent in his defence or not, the trial court should have addressed its mind to the issue of whether there were extenuating circumstances on the evidence adduced. The Supreme Court further reasoned that even though the trial judge dismissed the evidence of the appellant in his defence, he remained with the evidence of the prosecution, which clearly established extenuating circumstances. Thus this factor should have been taken into account when sentencing the appellant.

Likewise, in *Chanda and Chisanga v The People*, the appellants were convicted of the offence of murdering Peter Mwila by beating him to death, suspecting him to be a wizard and causing the death of their relative. On appeal, it was argued that the learned trial Judge misdirected himself in law and in fact in his failure to find extenuating circumstances so as to impose any other sentence than the mandatory death penalty on the facts of this case. Thus the Supreme Court set aside the death sentence and in its place, sentenced each appellant to 20 years imprisonment with hard labour with effect from the date of arrest.

⁴ (1999) Appeal No. 17

⁵ (2010) SCZ Judgment No. 29

⁶(2011) Appeal No. 104,105

One thing that is worth noting from the above cases and many other cases of the same nature, is the brutal, barbaric and diabolic action taken by the accused and others unknown, in consequence of their belief in witchcraft. For instance those accused of witchcraft have been ostracized by their families and communities, subjected to life threatening assaults, dehumanized, have had their property destroyed and in extreme cases, brutally murdered⁷. Surprisingly and despite committing such immoral, barbaric, diabolic and brutal acts, the Supreme Court still found the belief in witchcraft as an extenuating circumstance.

This position had the potential of encouraging and perpetuating criminality and injustice. For instance, the consequences of these beliefs negatively affect the enjoyment of the fundamental human rights of the purported witches as protected under international, regional, and national human rights law such as the right to life, the right to be free from torture, the right to non-discrimination, the right to respect the views of the elderly accused of witchcraft, the right to protection of property, and the right to personal liberty. The Constitution of Zambia in Article 1 provides that, “the Constitution is the supreme law of the Republic of Zambia and any customary practice that is inconsistent with its provisions is void to the extent of its inconsistency.”⁸ Thus the practice or even the belief in witchcraft is rendered illegal by this provision because its consequences, as pointed out above, violates several human rights provided in the Constitution.

Furthermore, the belief and practice of witchcraft is also inconsistent with the repugnant clauses as provided for in the Local Court and Subordinate Court Acts respectively.⁹ The Local Court Acts provides that a local court shall administer the African Customary Law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.¹⁰ In the similar vein, the Subordinate Court Act provides that the Subordinate Court shall not be deprived of the right to observe and to enforce the observance of, or shall not deprive any person of the benefit of, any African Customary Law, if such African Customary Law is not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia.¹¹ Hence, in *Tabitha Chiduka v Chidano*, in

⁷Adedinego Kapeshe and kanyakula v The people (2017) SCZ Judgement No.35,1237

⁸ Chapter 1 of the laws of Zambia, Act No.2 of 2016

⁹ Chapter 29 of the laws of Zambia and Chapter 28 of the laws of Zambia

¹⁰ Chapter 29 of the laws of Zambia s12

¹¹ Chapter 28 of the laws of Zambia s16

endeavouring to interpret the meaning of the words “repugnant to natural justice and morality,” the Court held that “they should only apply to customs as inherently impress us with some abhorrence or are obviously immoral in their incidence.”¹² Whereas African Customary Law refers to customs and practices generally accepted by the people to whom it applies, the belief in witchcraft flies in the teeth of this definition because it is prevalent in the Zambian communities and is generally accepted by the people to whom it applies. Therefore, the repugnant clauses render the belief illegal in the sense that it is incompatible with the provisions of the written law and are repugnant to natural justice, and morality.

Additionally, this belief in witchcraft is positively inconsistent with the spirit of the Witchcraft Act.¹³ The Act states in its preamble that, its purpose is to provide penalties for the practice of witchcraft and to provide for matters incidental to or connected to the same. The main aim of this is to deter people from practicing witchcraft by placing a fine or a prison term on a person who professes to practice witchcraft, causing fear in others. The Act clearly criminalises the act of naming or imputing witchcraft,¹⁴ the activities of witchdoctors and witch finders,¹⁵ a situation where a person professes knowledge of witchcraft¹⁶ and employing or soliciting any person to name or indicate another person as being a witch.¹⁷

Thus, the advent of the *Abedinego Kapeshi*¹⁸ case created a departure from the Supreme Court’s previous decisions in which the Court held that a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor to an accused person facing a charge of murder. This holding was inspired *inter alia* by Article 125(3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 which provides that “The Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence.”

The Court, in the *Abedinego Kapeshi* case, was of the view that the framers of our Constitution, in the fullness of their wisdom, were no doubt alive to the fact that strict adherence to previous judicial decisions could, in some cases, undermine justice, asphyxiate the development of jurisprudence and perpetrate injustice. Therefore, the decision by the Supreme Court, of

¹² (1992) High court of Nigeria S.R. 55, 56

¹³ Chapter 90 of the laws of Zambia s 3

¹⁴ Chapter 90 of the laws of Zambia s 3

¹⁵ *Ibid*, s 4

¹⁶ *Ibid*, s 5

¹⁷ *Ibid*, s 7

¹⁸ Reference?

shifting from the set precedent, has potential to deter perpetrators of violence taking the law into their hands by persecuting the purported witches, an outcome that promotes the rule of law because no one is above the law.

The decision of the Supreme Court in *Abedinego Kapeshi* also promotes the protection of individual human rights because those witchcraft accusations that were made from improvable allegations, leading invariably to multiple violations of the victims' rights, and in some cases death, have been alleviated by this new position. For instance it was stated in the case of *Aaron Ngosa v The People*¹⁹ that since the *Abedinego Kapeshi* judgment, the prosecuting counsel had noticed a decline in cases of murder involving witchcraft.

Suffice to say, the departure from the set precedent in *Abedinego Kapeshi* was also right and inevitable because the belief in witchcraft is no longer as prevalent in the Zambian communities today as was in the past.²⁰ This is due to the fact that urbanization has now spread across the country and that the number of educated Zambians is increasing exponentially. Education is empowering the people and providing them with knowledge and skills required to contest false allegations of witchcraft by reporting them to the relevant authorities rather than taking the law into their own hands.

This case accorded the Supreme Court a great opportunity to discuss the belief in witchcraft and the offending conduct premised on that belief, as well as the multiple violations that are coupled with the same belief. Remarkably, the Court moved away from its precedent that was set prior to this decision that a belief in witchcraft, though unreasonable, was prevalent in our community and that such a belief is an extenuating factor. Thus, the Supreme Court in this case held that a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor to an accused person facing a charge of murder. This departure was done in the interest of justice and development of jurisprudence.

¹⁹ (2018) Appeal No. 30, 31, 32

²⁰Mukula Katapa , Interview with Judge Dr.P. Musonda, (Retired Supreme Court Judge of Zambia) University of Zambia, March 16th 2015.