

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA**

**(Criminal Jurisdiction)**

BETWEEN:

**OHINGA LUMAMBA**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**Coram : Phiri, Wanki and Malila, JJS**

On 3<sup>rd</sup> February, 2015 and ....., 2020

**For the Appellant: Mr. S. Sikota, SC of Messrs Central Chambers**

**For the Respondent: Mr. C. Bako Deputy Chief State Advocate.**

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**JUDGMENT**

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**PHIRI, JS, delivered the Judgment of the Court.**

**CASES REFERRED TO:**

1. **Kemous Sialuzi Vs The People (2006) ZR 81**
2. **Dorothy Mutale and Richard Phiri Vs The People (1997) ZR 51**
3. **The People Vs Njovu (1968) ZR 132**
4. **Lubendae-v-The People (1983) ZR 54**

**LEGISLATION REFERRED TO:**

1. **The Penal Code, Chapter 87 of the Laws of Zambia; Section 200**

2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia; Section 304, Section 307**
3. **The Narcotic drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia; Section 24, Section 28 (1) (a)(b)(c) (2)(3)**

We sat with Mr. Justice M. E. Wanki to hear this appeal. He has since retired. This is the majority judgment. This is an appeal against the judgment of Mr. Justice C. Chanda.

The Appellant, an employee of Drug Enforcement Commission (DEC), was tried and convicted of the murder of Geoffrey Mumba (hereinafter called "the Deceased") who was a suspect for an offence under the **Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia**. The offence was alleged to have occurred on the 8<sup>th</sup> July, 2013 at Kasama. The Appellant was given the capital punishment.

According to the evidence of 5 witnesses as appears in the record of the appeal, the Appellant was in a group of four (4) Drug Enforcement Commission (DEC) officers on a night mission between 03:00 and 04:00 hours to apprehend the deceased at his residence. When the four officers arrived, they identified themselves and ordered the deceased to unlock his door. The deceased refused to open for them. Consequently, in order to gain access, the Appellant, who was armed



with an M56 rifle, brought the door down by use of the bayonet fixed to the rifle. The appellant and his team gained access to the house. According to the appellant, the deceased grabbed the gun and a struggle ensued.

In the process, a gunshot was heard resulting in the deceased being fatally shot. The shooting was witnessed by three other DEC operatives (PW2; PW3 and PW4). PW3 and PW4 were at the door to the house. The Appellant claimed that the deceased struggled for the gun from the front end of it and it accidentally discharged. After the shooting, the Appellant did not make a prompt report. He picked the discharged empty cartridge from the scene and disposed of it. His defence was that the shooting was accidental. He also claimed that the deceased was armed with an axe.

At the conclusion of the trial, the learned trial Judge concluded that the deceased was attacked by the Appellant and not the other way round. The learned trial Judge also concluded that the deceased was not armed with an axe when the Appellant gained access to him as the scene of crime officers who visited the scene (PW1 and PW6) did not find any axe. The learned trial Judge also dismissed the Appellant's claim that the crime scene had been contaminated by

other people because the room remained as the DEC officers left it and the deceased's body was not moved and it had remained in the same position as described by the witnesses who were at the scene of the shooting. The learned trial Judge held that it was the Appellant who tried to contaminate the crime scene when he searched for the empty cartridge and disposed it off in a bid to destroy the evidence against him. Having found that the cumulative conduct of the appellant at the crime scene was not consistent with the alleged accidental shooting, the learned trial Judge found him guilty as charged and convicted him. He was sentenced to suffer the mandatory death penalty.

In the appeal before us, the Appellant canvassed five (5) grounds.

These were:

- 1. The trial Judge erred both in law and in fact by holding that the death was caused with malice aforethought.**
- 2. The trial Judge erred both in law and fact by not taking into consideration that the death of the deceased was caused in the execution of a lawful arrest or operation.**



3. The trial Judge erred both in law and fact by making assumptions of his own, ignoring the evidence adduced by the Prosecution witnesses.
4. The trial Judge erred in law and fact in dismissing the defence of accident without evaluating the evidence surrounding the shooting.
5. The trial Judge erred in both law and fact in holding that the Prosecution had proved the charge of murder beyond reasonable doubt in view of the nature and quality of evidence adduced.

On behalf of the Appellant, Mr. Sikota S.C, combined grounds 1 and 2 and submitted that there could be a number of reasons that would counter the learned trial Judge's finding that the appellant had malice aforethought. In support of this proposition Mr. Sikota cited the case of ***The People v Njovu*** <sup>(3)</sup> in which it was held as follows:

***"to establish malice aforethought, the Prosecution must prove either that the accused had actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone."***

It was argued that the Appellant's supervisor at DEC (PW5) had sanctioned the operation to apprehend the deceased on 7<sup>th</sup> July, 2013 as he was reported to be selling Cannabis in Luyeye Village. It was further argued that before the operation was embarked on, it was apparent that the DEC officers knew that the deceased was a violent person because the DEC officers were assembled at 04:00 hours and the Appellant carried an M56 rifle, while PW3 and PW4 carried a torch and a pair of handcuffs respectively. Our attention was drawn to PW3's evidence on the record where he stated that they knocked and introduced themselves as to who they were. The deceased refused to open the door because, according to his response, there was nothing of interest they were looking for and threatened to injure each other. After the door was opened the deceased started struggling with the Appellant. The four (4) of them entered whilst in that struggle. He heard a gunshot and saw the deceased lying in a pool of blood.

According to Mr. Sikota, Malice aforethought requires the intention to kill, but the evidence showed that the trial court overlooked some points by failing to appreciate the fact that the operation was lawful



and sanctioned by PW5 to carry the gun, torches and handcuffs; implying that the intention was to apprehend the deceased and not to kill him.

In support of ground 3, Mr. Sikota assailed the trial court's finding that there was malice aforethought because the mere fact that the Appellant had knowledge of the capabilities of a gun should not have led to the conclusion that he had malice aforethought when such a conclusion was unfounded at law. On the cocking of the firearm in readiness to fire even before an attack was anticipated, it was argued that the record shows that the deceased uttered threats to the officers, and in lawful operations it was normal for a gun to be cocked in readiness for the unknown. It was also noted that the trial court's conclusion that the Appellant was overzealous by preparing the gun in order to emerge victorious was unsupported as the evidence suggested otherwise.

Mr. Sikota disagreed with the trial court's conclusion based on the case of ***Kenious Sialuzi-v-The People***<sup>(1)</sup> in which it was held that:

***“the use of a gun on a defenceless and unarmed person under any circumstances cannot be said to be reasonable as it is uncalled for and without justification.”***

According to Mr. Sikota, the trial court should have considered the aspects of proportionality in terms of the use of force. This requires that the Appellant should have first warned the deceased; which was done when the officers identified themselves after knocking on the door. It was further submitted that after the deceased uttered the threats to the officers, cocking of the gun was the standard procedure in readiness for either firing warning shots, or shooting to incapacitate or indeed shooting to kill. According to Mr. Sikota, the crucial point was that all these test measures could not be done without cocking of the gun. It was stated that the Appellant had no time to do either of the lawful acts permitted by law as the deceased grabbed the barrel of the gun upon entry and a struggle ensued leading to the accidental shooting.

Our attention was brought to part of the record where PW6's evidence is recorded as follows:

***“on the body of the deceased he observed a wound on the top of his left armpit where the bullet had entered through and came out on the right shoulder.”***



According to Mr. Sikota PW6's evidence is consistent with the Appellant's defence that the deceased had grabbed the barrel of the gun in a bid to dispossess the Appellant leading to the shooting.

In support of ground 4 and 5, Mr. Sikota assailed the trial court for dismissing the defence of accident on the basis that the court failed to evaluate the evidence received; and that it was an error for the court to conclude that the Prosecution's case was proved beyond reasonable doubt, considering the nature and quality of evidence received. It was further submitted that since the case rested on the drawing of inferences, there were two or more inferences from which the court should have adopted the one which is more favourable to the Appellant as pronounced in the case of ***Dorothy Mutale and Richard Phiri-v-The People*** <sup>(2)</sup>. It was argued that the trial court should not have drawn the only inference that the Appellant caused the death of the deceased with malice aforethought. We were urged to uphold the appeal.

Mr. Bako, on behalf of the Respondent, counter argued grounds 1 and 2 by submitting that the trial court was on firm ground when it held that the killing was with malice aforethought, based on the totality of the evidence that showed that the Appellant intentionally

shot at the deceased, knowing that the shooting would likely cause death or grievous harm.

Mr. Bako submitted that the deceased was not armed with an axe as alleged by the Appellant and the shooting could not have been accidental as shown by the conduct of the Appellant when he picked and disposed of the empty cartridge in a quest to conceal his actions. It was further submitted that the deceased was shot at in the absence of any attack, imminent danger or struggle from the deceased as the evidence adduced by PW3 and PW4 was not conclusive about the struggle for the gun between the Appellant and the deceased; as these two witnesses stood at a distance from where they could not clearly observe the events.

Mr. Bako argued that the trial court's conclusion was derived from the evidence given by PW3 and PW4 who were in the company of the Appellant at the material time, and the evidence from the two scenes of crime officers who visited the scene of crime; particularly that those officers were not cross examined.

Responding to ground 3, Mr. Bako submitted that the trial court was on firm ground when it found that the conduct of the Appellant when he prepared the firearm in readiness to shoot before an attack was



anticipated, showed that the Appellant was overzealous in the use of the firearm in order to emerge victorious over the deceased's threats instead of effecting an arrest. Mr. Bako argued that given that the Appellant was executing a lawful duty at the deceased's house, even if the learned trial Judge had addressed his mind to the provisions of the **Narcotic Drugs and Psychotropic Substances Act, Chapter 96 of the Laws of Zambia**, regarding the use of firearms by DEC officers, the court would still have come to the same conclusion; namely, that the firearm was discharged without observing the mandatory guidelines; which guidelines highlight the crucial parameters that must be considered when ascertaining whether a firearm has been used appropriately; ie. when there is reasonable ground to believe that he or any other person is in danger of grievous harm and that he cannot otherwise effect an arrest; that the firearm can only be used under instruction of a superior officer or team leader; and that the firearm must be used to disable and not to kill.

Mr. Bako submitted that in the instant case, the Appellant did not have the necessary instruction of his superior officer and instead of disabling the deceased, he shot him in the chest through the left armpit, lacerating his heart as shown in the exhibited post-mortem

report. The deceased died instantly and on the spot. Mr. Bako submitted that the conduct of the Appellant fell below the guidelines given under **Section 28 (1)(a)(b)(c) (2) and (3) of Chapter 96**. It was further argued that even if the trial Judge did not specifically address the guidelines under Chapter 96, he was within the purview of the Statutory guidelines based on the case of ***Kenious Sialuzi-v-The People*** which was cited and relied upon in the judgment.

It was further submitted that the learned trial Judge was on firm ground to hold that the Appellant ought to have known that a gun used in the manner it was could kill the deceased.

In respect of ground 4 and 5, Mr. Bako submitted that the learned trial Judge was on firm ground when he dismissed the defence of accident and held that the Prosecution proved their case beyond all reasonable doubt. And Mr. Bako dismissed the suggestion that there were extenuating circumstances in the deceased's killing because the Appellant was in a lawful operation at the time of the shooting.

We have considered the grounds of appeal and the submissions made by both sides. We have also examined the record of the appeal and the judgment of the court below.



In our view, grounds 1, 2, 3 and 5 are related as they assail, the quality of the prosecution's evidence that was adduced before the trial court; and the trial court's perceived failure to properly assess and evaluate that evidence before reaching the conclusions which it did. The second issue that falls to be determined in this appeal is the defence of accident which the Appellant initially raised at his trial based on his evidence of a struggle with the deceased, and in the arguments in support of the fourth (4<sup>th</sup>) ground of appeal before us. With regard to ground 1, 2, 3 and 5, we note that there was direct evidence from two eye witnesses, PW3 and PW4 who were assigned to apprehend the deceased in an authorized mission with the Appellant and PW2 their driver. Although the group's team leader did not testify, the two eye witnesses were standing at the deceased's door with the Appellant when they identified themselves. Thereafter, the Appellant who was the only member of the team who carried a firearm, cocked his rifle to load the bullet in the chamber, and fixed the bayonet which he used to unhinge the door until it was forced open. According to the eye witnesses, the Appellant led them into the deceased's house and shortly thereafter, they heard the fatal gunshot.

The two eye witnesses remained by the door side and neither of them conclusively witnessed the struggle between the Appellant and the deceased prior to the shooting as claimed by the Appellant.

In addition to the eye witness accounts, medical evidence showed that the deceased's death was caused by a bullet wound penetrating his chest through the left armpit, the left lung and his heart. There was further direct evidence from PW3 and PW4 as well as evidence from the Appellant himself that soon after the shooting, the Appellant retrieved the empty bullet cartridge from the scene and boarded the motor vehicle which departed, and that along the way the Appellant threw away the empty cartridge some 3 kilometres from the scene. The cartridge was never recovered by the Police after a search led by the Appellant. There was further evidence that the shooting and all subsequent events were not reported to either the Police or to DEC authorities. The learned trial Judge analyzed all this evidence with particular emphasis on the Appellant's conduct both before and after the shooting incident and came to the conclusion that the Appellant intentionally prepared the gun to shoot the deceased by cocking it before confronting the deceased, knowing that the deceased was likely to get killed or to suffer grievous harm.



The learned trial judge also considered the position of the penetrating bullet wound into the deceased's chest and concluded that the shot was intended to kill.

In our considered view, the learned trial Judge was on firm ground. We do not agree with the assertion that because the Appellant was on an authorized mission, then the trial court should have found that he had diminished responsibility. Diminished responsibility is a technicality that has to do with mental capacity. This aspect was not raised by the Appellant. From the evidence on record, what was authorized was the apprehension of the deceased and not his killing. Moreover, the position of the bullet wound through the chest is conclusive evidence that the shooting was intended to kill. In our view therefore, the threshold set out in the case of **The People-v-Njovu**<sup>(3)</sup> was met and the learned trial Judge was on firm ground to conclude that the killing was with malice aforethought. It is obvious that, had the Appellant not released the safety catch and cocked the rifle, this case could not have arisen at all. By cocking the rifle before confronting the deceased who was unarmed, it is evident that the Appellant either intended to kill or cause grievous harm, or foresaw human death or grievous harm as a likely result. In light of the direct

evidence on record, we find no merit in grounds 1, 2, 3 and 5 of the appeal.

Regarding the defence of accident or accidental shooting resulting in death, it is trite law that, in any offence for which a particular mental element is required, it is a defence that, although the accused did the acts which would be criminal if done with intent, they were done by accident. **Section 9(1) of the Penal Code, Chapter 87 of the Laws of Zambia** provides, inter alia, as follows:

**“9(1) ... a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident.”**

In the case of **Lubendae-v-The People** <sup>(4)</sup>, this court did consider the meaning of the word accident in the context of Section 9(1) of the Penal Code, and held as follows:

**(ii) An event occurs by accident if it is a consequence which is in fact unintended, unforeseen or such that a person of ordinary prudence would not have taken precautions to prevent its occurrence and on a charge of murder, accident is no defence if the accused intended to kill, foresaw death as a likely result of his act or if a reasonably prudent person in his position would have realized that death was a likely result of such act.”**

In the present case, there was direct evidence from the two eye witnesses that they saw the Appellant cock his rifle and fix its bayonet before breaking into the deceased's house to confront him.



The rifle was forensically examined and found to be in a normal and sound mechanical condition and capable of firing. It also had a safety catch which prevented it from accidental firing. Therefore, we agree with the learned trial Judge that at that stage, when the Appellant cocked the rifle, he intended to open fire at the deceased who was unarmed and confined in a room. We do not find merit in ground 5 of the appeal. The net result is that we dismiss the entire appeal.



G.S. Phiri

**SUPREME COURT JUDGE**

M. Malila

**SUPREME COURT JUDGE**