

IN THE SUPREME COURT FOR ZAMBIA

Appeal No. 33/2016

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

CARLOS NKANDU

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Phiri, Muyovwe and Chinyama, JJS

On 6th June, 2016 and 13th June, 2017.

For the Appellant: Ms. E.I. Banda, Senior Legal Aid Counsel

For the Respondent: Mrs. M. M. Bah-Matandala, Deputy Chief
State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **The People vs. Lewis (1975) Z.R. 43**
2. **Esther Mwiimbe vs. The People (1986) Z.R. 15**
3. **R vs. Julien 2 All E R 856**
4. **Simutenda vs. The People (1975) Z.R. 294**
5. **Wilson Masauso Zulu vs. Avondale Housing Project (1982) Z.R. 172**
6. **Lubendae vs. The People (1983) Z.R. 54**
7. **Saluwema vs. The People (1965) Z.R. 4**

The appellant was convicted of one count of murder and another count of aggravated robbery by the Livingstone High Court and sentenced to the mandatory death sentence.

The facts of this case are that the deceased was a taxi driver of his own vehicle a Toyota Fielder gray in colour registration No. ALX 529. On the morning of the 9th July, 2015 the deceased was seen by his brother Shebby Mushabati Liso (PW4) between 07:00 hours and 08:00 hours in town. The same morning between 09:00 hours and 10:00 hours the deceased was seen by Ezon Musokotwane (PW1) driving his taxi in Senkobo area heading in the direction of Musokotwane Palace with the appellant in the front seat. PW1 who was driving in the opposite direction bypassed the taxi as it sped on. PW1 proceeded to the shops within Senkobo area where he bought diesel for his vehicle. As he drove home to Musokotwane Palace, he saw the taxi he had earlier seen driving in the opposite direction, this time, there was only one person, the appellant. About a kilometre after bypassing the taxi, he found the deceased who was still alive, lying on the road in a pool of blood. PW1 saw PW2 who was herding some animals about 200 metres away. He inquired from him as to whether he knew what had transpired and

he informed him that he had heard two gunshots and heard a vehicle driving away. PW1 then pursued the taxi and he called PW6 on his mobile phone to inform the police what had happened and gave them the description of the vehicle. On reaching Livingstone Road, he inquired from people in the area if they had seen the taxi and they advised him that it had driven towards Zimba. Again, he called PW6 to inform him of the route the taxi had taken. PW6 alerted other police officers and those manning the check point at Simwami in Zimba area.

As PW5 and other officers were manning the check point at Simwami the taxi was headed their way with the appellant at the wheel. As it turned out the appellant was not wearing a PSV uniform and he had no driving licence. The vehicle was impounded and he was informed that he was being charged with an offence of driving without a licence. The appellant pleaded that he be allowed to go to Zimba to organise funds to pay for the offence but the officer refused. The appellant requested for the keys so that he could remove some belongings and while PW5 was on the phone alerting police officers on the presence of the appellant, he slipped away. They tried to search for him to no avail. The police searched

the vehicle and found a firearm in the front seat and two empty cartridges and one round of live ammunition. The appellant was later apprehended in the bush by other officers who had travelled from Livingstone. On his person was found the car keys for the taxi which had a tag written "Kelvin" on it.

Later, PW1 led police officers to the scene where the body was picked and conveyed to Livingstone General Hospital mortuary. According to PW4 the brother to the deceased and PW6, the deceased was shot at the back of his head.

With regard to the firearm which was found in the taxi, it was established through the evidence of PW3 that the appellant bought the firearm from him but ownership had not changed. The appellant was later charged with the subject offences which he denied.

The appellant's defence was that he was a business partner with the deceased. The two were engaged in the business of selling game meat and he said he provided K10,000 in May, 2015 to start the business and they expected to make K54,000 from the business. According to the appellant, the deceased owed him

money from the business and he only gave him K5,000 on 4th June, 2015. On the fateful day, they drove together to Senkobo area where a quarrel ensued between them and they fought and the deceased hit him with an iron bar and then the deceased got his firearm from the car. The deceased fired one shot in the air and reloaded his firearm and as the appellant attempted to disarm the deceased he was accidentally shot. The appellant in fear put the gun back in the taxi and sped off from the scene in the deceased's taxi with the intention of reporting the matter to the police at Zimba. Before reaching Zimba, the appellant found a check point mounted by PW5 and did not report the matter to him because PW5 was a RTSA officer. The appellant stated that he informed PW5 that he was going to Zimba police to report the incident leading to the shooting of the deceased and PW5 allowed him to go on foot. He explained that he was apprehended by PW6 on his way to Zimba police and he was taken to PW5 at the check point and PW5 identified him as the one who had left the taxi at the check point. He was charged with aggravated robbery and murder of the deceased.

In his judgment, the learned trial judge found that the appellant admitted having been found in possession of the vehicle and its keys which belonged to the deceased after the deceased was shot dead. The learned trial judge held the view that there was no doubt that the deceased died from a gunshot fired from the shotgun which was found in the possession of the appellant. The learned trial judge rejected the defence by the appellant that the gun accidentally fired during the scuffle or that he acted in self defence because the deceased was shot from behind and the learned trial judge found the appellant to be an untruthful witness who had lied on the material evidence. The learned trial judge found that there was malice aforethought in the murder of the deceased as the appellant shot dead the deceased in order to steal his vehicle. The appellant was convicted in both counts and was sentenced to the mandatory death sentence.

On behalf of the appellant, Ms. Banda has advanced one ground of appeal namely that the learned trial judge misdirected himself in law and in fact when he rejected the appellant's explanation and defence as it could reasonably be true.

Mrs. Banda relied on her filed heads of argument.

She argued that the learned trial judge fell in error when he believed the evidence of PW4 and PW6 that the deceased was shot from the back contrary to the findings of the pathologist. That the post-mortem report states that:

"the body of a man showing large inlet shotgun wound on the right side of the head. Right ear partially burnt."

According to Counsel, the finding by the pathologist supports the appellant's story that the deceased was shot during the struggle and fight between him and the deceased. She buttressed her argument by relying on Section 17 of the Penal Code which provides that:

"Subject to any provisions of this Code or any other law for the time being in force, a person shall not be criminally responsible for the use of force in repelling an unlawful attack upon his person or property, or the person or property of any other person, if the means he uses, and the degree of force he employs in doing so are no more than is necessary in the circumstances to repel the unlawful attack."

Counsel's argument is that the appellant should have been acquitted of murder as the defence of self-defence was available to him or in the alternative he should have been convicted of the lesser

charge of manslaughter. Further, in support of her argument that the appellant acted in self defence Counsel relied on the cases of **The People vs. Lewis**;¹ **Esther Mwiimbe vs. The People**² and **R vs. Julien**³ in which this court pronounced itself on the defence of self defence. Counsel specifically referred to what the court stated in **R vs. Julien**³ that:

"It is not as we understand it, the law that a person threatened must take to his heels, and run in the dramatic way suggested by counsel for the appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporize and to disengage and perhaps to make some physical withdraw; and to the extent that is necessary as a feature of the justification of self-defence. It is true, in our opinion whether the charge is a homicide charge or something less serious."

Counsel argued that the defence of self defence is available to the appellant who was brutally attacked by the deceased for simply asking him for the money he owed him; that it was reasonable for the appellant to conclude that he was in imminent danger, and feared for his life from the gun that the deceased brandished during the attack and he was left with no choice but to act fast to repel the attack.

Counsel also contended that the defence of provocation was available to the appellant. Relying on the case of **Simutenda vs. The People**⁴ which brings out the three elements for the defence of provocation, that is, the act of provocation, loss of self-control both actual and reasonable and the retaliation to the provocation which must be reasonable, Counsel argued that from the facts of this case any reasonable person would have lost his self-control and reacted in the same manner as the appellant. That the appellant was first assaulted, threatened to be shot at and that is when he reached for the gun to protect himself.

Counsel submitted that the appellant admitted that he caused the death of the deceased but his explanation was that he did not intend to kill the deceased and, therefore, he should have been convicted of manslaughter for lack of malice aforethought. Alternatively, he should have been found guilty of murder with extenuating circumstances on account of the deceased's aggression which amounted to provocation and also in the light of evidence of a struggle. These were the arguments for the appellant.

Mrs. Bah Matandala, on behalf of the State, submitted that she supported the conviction. It was submitted that the trial court was right both in rejecting the appellant's story and in concluding that the deceased was shot from the back. In other words, the shooting did not happen face to face: it was not accidental, there was malice and it was intentional. She pointed out that after the shooting the appellant abandoned the person whom he claimed was his friend and business partner and drove away with his car. She argued that this dispelled the argument that the shooting was an accident thereby lending support to the finding by the lower court that the killing was intentional. She submitted that the trial court took into account the evidence of witnesses in totality and gave reasons why it believed the prosecution evidence against that of the appellant. Relying on the case of **Wilson Masauso Zulu vs. Avondale Housing Project**⁵ she submitted that the lower court had opportunity to hear the witnesses and observe their demeanour and, therefore, could not be faulted. Further, the evidence of PW1, PW4 and PW10 was consistent with the postmortem report. She contended that the shooting did not happen as a result of a struggle between the appellant and the deceased but that the appellant

intended to rob the deceased of his vehicle. That the appellant did not report the incident to the first police officer he met, showing that his demeanour was not that of a friend or business partner. Therefore, the defence of accidental shooting, self-defence and provocation are not available to the appellant. She concluded that the findings of the lower court should be upheld and the appeal should be dismissed.

In reply, Ms. Banda, Counsel for the appellant, argued that there is nothing on the record to show that the appellant had malice; that his explanation from the beginning was consistent that he did not shoot the deceased from behind. She strongly urged us to consider the fact that the appellant's story was highly probable and that his reaction to the incident should have been looked at subjectively.

We have considered the evidence before the lower court, the judgment of the lower court and the submissions by learned Counsel for the parties.

In this matter, the appellant placed himself at the scene and does not dispute that he was the one who was last seen with the

deceased when he was still alive. It is not in dispute that the firearm used in the commission of the subject offences belonged to the appellant which he bought from PW3.

In the sole ground of appeal, we have been invited to determine whether the appellant's explanation on the events of the fateful day could reasonably be true and whether the defences of accident, self-defence and provocation were available to the appellant. The finding by the learned trial judge that the deceased was shot from behind or the back is a critical issue in this appeal.

The portion of the learned trial judge's judgment in contention is as follows:

"The explanation by the accused has been found to be untrue, because the witnesses who viewed the body of the deceased that is his brother who was PW4 and Inspector Mwamba PW6 testified that the deceased was shot at the back of his head..... The truth is that the accused shot the deceased from behind.

There was no eye witnesses to the killing of the deceased, the only person who was there with the deceased is the accused alone."

From the above passage, we note that the learned trial judge's conclusion that the deceased was shot from behind was deduced from the evidence of PW4 the brother to the deceased and Inspector

Mwamba PW6 who after observing the injuries on the deceased's body concluded that he was shot from behind. Ms. Banda has attacked this finding by the learned trial judge on the basis that the postmortem report shows that the body of the deceased had '*a large inlet shotgun wound on the right side of the head*'. Counsel for the appellant's argument is that in the face of the observations in the postmortem report, can the finding by the learned trial judge that the deceased was shot from behind stand? We must say that we find great force in Ms. Banda's argument on this point. This is a case where the learned trial judge rightly concluded that there was no eye witness to the incident. We take the view that the best evidence on this issue should have been from an eye witness and this is lacking in this case. For the learned trial judge to find that the deceased was shot from behind on the basis of evidence of witnesses who viewed the deceased's body and in the absence of eye witness evidence is a misdirection. It appears to us that the learned trial judge had at the back of his mind the discounted evidence of PW1 who claimed that he saw the appellant shoot the deceased as the deceased walked towards his car. In the circumstances, we are compelled to reverse this finding of fact by the learned trial judge

following our earlier decisions in a plethora of cases including **Zulu vs. Avondale Housing Project**⁵ where we stated that as an appellate court we will only reverse findings of fact made by a trial court if we are satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts.

Although we have reversed the finding that the deceased was shot from the back, we still have to consider whether the appellant's explanation could reasonably be true? It has been established that there was no eye witness to the shooting of the deceased.

Be that as it may, the evidence of the prosecution deserves consideration as much as that of the appellant. The starting point is that the deceased was seen by PW1 in the company of the appellant on the fateful morning driving towards Musokotwane Palace. Again, the appellant was seen by PW1 driving towards the main road. PW1 then found the deceased lying in a pool of blood by the road side though still alive. We find it necessary to re-produce part of the appellant's evidence as he explained that the deceased

was shot by accident during the struggle. This is what the appellant had to say in his evidence in chief:

- A. At the vehicle My Lord Kelvin told me that Mr. Nkandu why are you so fast over issues of money.**
- A. Then Kelvin said that he did not have any money with him and suggested that we go to Nsinde where someone owed him money.**
- Q. Where is Nsinde?**
- A. It is found near Musokotwane village,**
- A. He then told me that we start off, then I asked him about his friend Mulemwa and he said he was of no use.**
- A. So we started off with Kelvin just two of us.**
- Q. Who was driving?**
- A. It was Kelvin My Lord.**
- A. My Lord while in the vehicle Kelvin said that we should just stop this business which was even illegal because it was not good that we should be following each other like we are prostitutes.**
- A. My Lord we then picked up a quarrel and then I told him off that the animals which I invested in the business were not illegal but it was his business of bush meat that was illegal. So I told him to just give me the K5,000 which I invested My Lord.**
- A. My Lord then Kelvin stopped the vehicle and ordered me to drop off My Lord. I refused to get out and then Kelvin got out of the vehicle and came to the side where I was sitted and told me to get out.**
- A. My Lord I told him that I could not get out of the vehicle and instead he should take me where he found me. That is when he punched me on the side of my forehead.**

- A. My Lord I then asked him what big thing I had done to him. Then he got a rod and beat me on my right thigh and I sustained a deep cut.**
- Q. Where did he get the rod from?**
- A. It was under his seat.**
- Q. What has remained on the area where he beat you?**
- A. There was a wound My Lord**
- Q. Are you able to show us the scar?**
- A. Yes My Lord**
- Q. Proceed and show the court the scar?**
- A. *Witness removes the trousers and points to a scar on his right thigh.***
- Q. How did you feel after he beat you?**
- A. My Lord I became weak though I managed to struggle and we held each other.
My lord because I was getting weaker and weaker he managed to drop me down three times, My Lord when I stood up, my friend rushed to the driver's seat where he pulled the fire arm.**

From the above passage, the appellant gave the impression that he was seriously injured by the deceased even before the struggle ensued and that the deceased was the aggressor. The appellant painted a picture of a fierce fight in which he sustained a deep cut on the thigh, was thrown to the ground three times and was weak. His own description gives the impression that the whole episode left him unkempt such that the next person who saw him like PW5 would have noticed that something was amiss: he should have had some dust on his clothes; the deep cut on the thigh must have bled and one would expect that the appellant was in

excruciating pain from the bashing on the head and the deep cut on the thigh. However, there is no such evidence from the witnesses that dealt with the appellant immediately after the incident and the appellant in his evidence did not allude to the fact that he bled from the injury on his thigh. Instead, the appellant said he walked fast from the road after PW5 allegedly allowed him to proceed to Zimba to go and get money. When he saw the private vehicle in which PW6 was, he ran to the middle of the road to stop the vehicle. It was at this stage that PW6 arrested the appellant for the subject offences. Our conclusion, is that the appellant's story that he was assaulted by the deceased is unbelievable and the lower court was on *terra firma* when it rejected his story.

Getting back to the issue of the struggle between the appellant and the deceased which according to the appellant led to the accidental shooting of the deceased, the appellant said the deceased reached for his (the appellant's) firearm in the vehicle which he eventually turned on him and as they struggled for the firearm, it went off accidentally. The appellant's story is that he then rushed off to go and report the matter at Zimba Police which he believed is nearer to Livingstone. In her submissions, Mrs. Bah-Matandala

expressed shock at the conduct of the appellant who fled in the deceased's vehicle leaving the deceased whom he referred to as his best friend and business partner to die on the road. We agree with Mrs. Bah-Matandala's submission and this is reinforced by the evidence of PW4 who stated that the appellant was a total stranger. In fact the appellant confirmed this in his evidence as he conceded that he did not know the family or the residence of the deceased. Further, if at all the appellant was in the game meat business with the deceased, this would have been raised during cross-examination of the prosecution witnesses. It follows that the appellant's claim that the deceased was his business partner was a total fabrication and clearly the journey to Senkobo was a planned trip by the appellant who intended to pounce on an unsuspecting taxi driver in order to kill and steal his vehicle. As we pointed out to Ms. Banda during the hearing, a reasonable person, a best friend and a business partner would have alerted PW1 about the shooting incident which was a matter of life and death, while he himself rushed to report the matter to the police. If anything, a reasonable person would have stopped PW1 for help. But alas, this was not what the appellant did. He claimed he was rushing to report the

incident to the police but when he reached the first check point manned by PW5 he did not report the matter to him claiming that it was because PW5 was a RTSA officer. The deceased's taxi which he was driving was impounded as the appellant was not wearing a PSV uniform and had no driving licence. Instead of seeking for help and reporting the incident, the appellant requested to go to Zimba to raise money for the offence of driving without a licence. As we alluded to earlier, the appellant's account of a struggle between him and the deceased is nothing but a creation of his own imagination in his quest to escape his barbaric act of killing the deceased in cold blood in order to steal his taxi. This finding leads us to the conclusion that the appellant cannot hide behind the defence of accident as explained in the case of **Lubendae vs. The People**⁶. In **Lubendae vs. The People**⁶ we held that:

- (ii) **An event occurs by accident if it is a consequence which is in fact unintended, unforeseen or such that 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 realised that death was likely resort of such act.**
- (iii) **The defence of provocation is available only when the deceased was the provoker. (emphasis ours)**

In the same vein, the defence of provocation is not available to the appellant as he was the provoker who lured the deceased to an isolated area to kill him and rob him of his vehicle.

Ms. Banda also raised the defence of self-defence. We have dissected the appellant's story and we find, as the lower court did that the defence was not available to the appellant.

Lastly, in the case of **Saluwema vs. The People**⁷ we held:

If the accused's case is 'reasonably possible' although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof.

The facts of this case reveal, as we have stated in this judgment, that the appellant's story was not reasonably possible and neither was it probable. Having considered the prosecution evidence as well as that of the appellant we find that the prosecution proved its case beyond reasonable doubt.

From the totality of the evidence, what emerges is the fact that the appellant shot the deceased in cold blood and robbed him of his vehicle and left him for dead.

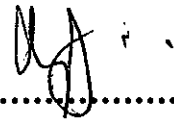
We find no merit in this appeal and we dismiss it accordingly.



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G.S. PHIRI
SUPREME COURT JUDGE



.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE



.....
J. CHINYAMA
SUPREME COURT JUDGE