IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE

Appeal No. 181/2020

(Criminal Jurisdiction)

BETWEEN:

PATRICK CHEWE **APPELLANT**

VS

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga, JJA
On 19th May 2021 and 28th May 2021

For the Appellant : *Mrs. L. Z. Musonda, Legal Aid Counsel - Legal Aid Board.*

For the Respondent : *Mrs. M. Chilufya, Senior State Advocate - National Prosecution Authority.*

J U D G M E N T

MAJULA, JA delivered the Judgment of the Court.

Cases referred to:

1. *The People vs Njovu (1968) ZR 132 (HC).*
2. *The People vs John Kenani Lilanda and Other (2011) ZR 41 (HC).*
3. *Lubendae vs The People (1983) ZR 54 (SC).*
4. *Nkandu vs The People SCJ No.52 of 2017.*
5. *Mwewa Murono vs The People (2004) ZR.207 (SC).*
6. *Nkhata and Others vs Attorney General (1966) ZR 124.*

1.0 INTRODUCTION

1.1 This appeal arises from a judgment of the High Court presided over by Mr. Justice M.D. Bowa. The judgment of the lower court was delivered on the 17th of January 2020 wherein the appellant, Patrick Chewe, was convicted of murder contrary to section 200 of the Penal Code chapter 87 of the laws of Zambia. Having found that there were no extenuating circumstances disclosed, the appellant was condemned to suffer the death penalty.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The prosecution relied on the evidence of six (6) witnesses. Among them were the appellant's son and daughter.

2.2 The evidence before the trial court was that on 7th day of September 2016, the appellant's son Patrick Chewe aged 21 was in the company of his cousin Andrew Tembo, who had come to visit them from Lusaka West. Whilst he was in the company of his cousin in his bedroom, he overheard his father, the appellant herein, questioning his mother as to why her relatives were coming to their home and not his relatives.

2.3 The mother was Aliness Tembo who is since deceased. According to Patrick Chewe, the quarrel over relatives escalated and he approached his father to inquire from him why he had taken exception to Andrew's presence when he

had been visiting them prior. He questioned his father why he was now protesting Andrew's presence.

2.4 It was his evidence that the appellant retorted to the mother that he did not want to see her relatives. And if ever he saw them again he threatened that she would see what would happen.

2.5 The following day which was 8th of September 2016, the first prosecution witness Victor Milupi, a soldier who was also a neighbor of the appellants saw the appellant between 09 to 10.00hours entering his home with an AK 47 rifle. He called out to him and asked him as to whether he was on duty. It would appear that he did not hear him as he did not respond. This witness then went back into his home to watch a movie. He subsequently heard people quarrelling outside and he went out and found that it was none other than the appellant and his wife. The approximate distance between the two homes is about two and half meters.

2.6 Upon seeing what was unfolding, he asked the appellant what was happening. The latter responded that it was none of his business and that he should leave as it was not his wife. Upon hearing this, he retreated back into his living room and 2 minutes later he called the appellant's daughter Monica Chewe and asked her where the weapon that he had seen with her father was. She said that it was in the bedroom.

2.7 Shortly thereafter Monica approached him and informed him that the appellant and his wife were struggling with the weapon. He in turn called the military police for assistance. In the process he heard two gun shots. When the military police came, he went with them into the appellant's house where he saw the deceased's body lying in a pool of blood. The weapon was recovered under a cushion on a sofa.

2.8 The star witness that was called by the prosecution, was the appellant's daughter, Monica Chola Chewe, aged 15 years. She narrated in detail what had transpired on the 8th of September 2016. She had testified that on this day her father had returned home around 08.00 hours and inquired where her mother was. She explained to him that she had escorted her cousin to board a bus. He then asked her if he could use her phone to call her mother as he was sick and wanted to go to the clinic. She subsequently called her mother who came and found her father sleeping on a sofa. She expressed surprised that a person who claimed to be sick was drinking and smoking a cigarette.

2.9 A quarrel ensued between her father and mother and after some exchange of words, the mother started crying and wondered why he had called her home only to start a fight. The appellant then pulled her mother by the shirt and took her inside the house. She sat in the living room whilst the father went to the bedroom. Shortly, thereafter, the mother

ran out of the house. He chased after her and pulled her back to the house.

2.10 When Monica and her brother wanted to gain access to the house, he told them to remain outside and close all the doors. They then went to play at the neighbor's house and started chatting with them. The neighbors were curious as to why she did not stop the fight. She informed them that the parents were used to fighting.

2.11 In the process of interacting with the neighbors, she heard her mother screaming and she run to peep through the toilet window to see what was happening. She was unable to see what was happening. She went to the neighbor and heard screams again. She went back to the window and observed that her parents were wrestling for the gun. Gripped with fear, she rushed to Victor Milupi's house. Whilst reporting to him, she heard two gun shots. This prompted her to flee from the scene.

2.12 She met another soldier on the way whom she notified of what had transpired whilst pointing at the house. She saw her father jumping out of the house through the window and run away. She returned home to check on her mother's condition whom she found on the floor bleeding on the stomach.

2.13 The appellant was subsequently apprehended and after investigations were carried out, he was formally arrested and

charged for the offence of murder. A postmortem was carried out which was witnessed by the deceased's sister, Esther Shumba. The cause of death appearing on the report by Doctor Viktor Telendiy was hemorrhagic shock and gun-shot wounds of the chest and back.

2.14 In his defence, the appellant testified that he signed for an AK 47 rifle at the armory around 08.00 hours in readiness for guarding duties set for 16.00 hours at Namulubwe Primary School. From the armory, he went home and was informed that his wife had escorted Andrew to board a bus. He found Monica Chewe and asked her if he could call her mother using her phone. The deceased was called and eventually returned home.

2.15 According to the appellant, his wife went straight to the wardrobe to get the firearm. When he asked her where she was taking the firearm, she told him to leave her alone as she was going to kill herself. He indicated that she was upset with the fact they were arguing over her brother's children.

2.16 He explained that while he was struggling with her for the gun, the ammunition came out and shot her on the right bosom. In other words the shooting was accidental during the course of the struggle.

2.17 The military police came shortly thereafter and apprehended him from the house and took him to Matero Police Station. He

stated that it was not his intention to kill his wife as they have stayed together in marriage for 20 years, and have three children.

3.0 FINDINGS AND DECISION OF THE LOWER COURT

3.1 The learned Judge considered the evidence from both sides. He found as a fact that Aliness Tembo died of hemorrhagic shock which was as a result of gunshot wounds of the chest and back. That the gunshots were discharged from the AK 47 rifle that was under the charge of the appellant.

3.2 That shots were fired in the appellant's homestead in Appollo Military Camp and that only the appellant and the deceased were in the house at the time of shooting.

3.3 The learned Judge considered the circumstantial evidence particularly that the prosecution evidence of a quarrel with the deceased and him being spotted pulling the deceased into the house prior to the fatal shooting. He accepted the prosecution evidence that the appellant was greatly displeased with the presence of his wife's relatives in the house, which led to sporadic disagreements.

3.4 The learned Judge concluded that the appellant shot the deceased in cold blood with intent to kill or cause grievous bodily harm. He out rightly rejected the defence suggestion that the shooting was accidental. The appellant was

consequently convicted of murder and awarded him with the capital punishment.

4.0 GROUNDS OF APPEAL

4.1 The appellant disappointed with the decision of the court below and has come to this court with one ground of appeal couched as follows:

> *"The learned trial Judge misdirected himself in law and fact when he rejected the defence of the appellant that the firearm was discharged on account of an accident and held that the prosecution proved beyond reasonable doubt the case of murder against the appellant."*

5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 In support of the sole ground of appeal, Mrs. Musonda submitted that the appellant in his defence admitted that he caused the death of the deceased but his explanation was that the firearm was discharged on account of an accident during a struggle in trying to disarm her. Counsel contended that the appellant did not, therefore, have an intention to kill his wife. The case of ***The People vs Njovu***[1] was relied upon where it was held as follows:

> *"To establish malice aforethought the prosecution must prove either that the accused had an 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."

5.2 In concluding her submissions, counsel argued that this court should instead find the appellant guilty of manslaughter in view of the fact that there was no proof of malice aforethought or alternatively return a verdict of guilty for murder with extenuating circumstances. In support of this argument, we were referred to the case of ***The People vs John Kenani Lilanda and Others***[2] where it was stated thus:

"Where death is caused by discharge of a firearm in the hand of the accused during a struggle for possession of the firearm in the course of committing an offence and notwithstanding that the accused must have known that death was likely to result, the Court is entitled to find a verdict of manslaughter, if it finds that the gun was not discharged by the voluntary act of the accused."

5.3 With these submissions counsel urged us to allow the appeal

6.0 RESPONDENT'S ARGUMENTS

5.1 In response, the respondent filed heads of arguments on 13th May, 2021. Pertaining to the sole ground, it was submitted that the trial court was on firm ground when it rejected the defence that the firearm was discharged on account of an accident. That this position of the lower court was arrived at after considering the evidence in totality.

5.2 Counsel stressed that the appellant admitted that he shot his wife but claimed that he did not intend to do so. His actions, however, were indicative of a clear intention to kill or cause grievous harm to the deceased. The case of ***Lubendae vs The People***[3] was cited as authority that:

"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 'likely result of such act."

5.4 It was contended that in *casu*, the facts on the record show a clear manifestation of the appellant's intention to cause grievous harm or to kill the deceased. She argued that the killing of the deceased cannot be said to have been unintended as the appellant was a person with military knowledge in use of firearms who would have taken appropriate caution to prevent accidents. Counsel further rebuffed the assertion by the appellant that the deceased took the gun twice while she threatened to kill herself.

5.3 Counsel observed that the appellant, during cross examination, indicated that there was a process before an AK 47 can discharge a bullet; putting in the magazine, corking the firearm, opening the safety clutch and finally firing.

5.4 It was argued, that one would wonder why the appellant put a magazine, corked and opened the safety clutch at 09.00 hours when his shift was scheduled to start at 16.00 hours. It was argued that the only reasonable inference was that the appellant prepared it for use as he intended to kill his wife.

5.6 Counsel further pointed out that it is difficult to understand how the deceased was able to get hold of the trigger of an AK47 and manage to shoot herself in the chest twice as indicated in the post mortem report. That this makes the appellant's explanation unbelievable.

5.7 Prior to the shooting, the appellant was heard by PW1 and PW4 arguing with the deceased. He was seen dragging the deceased into house where he locked the doors to prevent anyone from separating the fight. He was then spotted jumping out of the window after he shot his wife in an attempt to flee the scene. It was contended that these factors rule out the possibility of accidental shooting.

5.9 Our attention was drawn to the case of ***Nkandu vs The People***[4] where the Supreme Court considered the actions of the appellant in leaving his victim by the road side, driving off and failing to report the shooting.

5.10 In conclusion, Counsel asserted that the shooting in casu was not accidental as there was malice aforethought.

We were urged to dismiss the appeal.

7.0 CONSIDERATION AND DECISION OF THE COURT

7.1. We have thoroughly examined the evidence before us. The submissions by both counsel for the appellant and the respondent. It is clear from the submissions that the appellant is anchoring his appeal on the death of his wife being as a result of accidental shooting. The appellant's Counsel is contending that the prosecution did not discharge the burden of proof and did not prove the case to the requisite standard of proof being beyond reasonable doubt as enunciated in the case of ***Mwewa Murono vs The People.***[5] The argument as we understand it, is that the appellant and the deceased were struggling for the gun and as he was trying to dissuade her from killing herself, the gun accidentally went off and shot his wife. Therefore there was no malice aforethought on the part of the appellant and we should find him guilty of manslaughter or in the alternative guilty of murder with extenuating circumstances.

7.2 Having meticulously gone through the record, the following facts emerge;

1. On the material day, the appellant went to the armory at 6.45 a.m. and took the AK 47.
2. He was scheduled to start his shift at work at 16.00 hours.
3. The appellant had asked his daughter to request the mother to come back home.

4. The previous night, Patrick Chewe, the son, overheard his parents quarrelling over relatives.
5. On that fateful morning Monica Chewe, the daughter, witnessed the altercation between the parents and saw the deceased crying and overheard her state that she did not want to fight with the appellant.
6. Further it was not in dispute that the appellant dragged the deceased into the house and locked the door to prevent the children from entering.
7. Shortly thereafter, gun shots were heard and the appellant jumped through a window in a bid to run away.

7.4 Looking at all these series of events, can the trial Judge be faulted for arriving at the irresistible conclusion that it is the appellant who murdered his wife?

7.5 There are numerous cases where the Supreme Court has elucidated on when the defence of accidental death can be available to an accused person. One that immediately springs to mind is that of ***Lubendae vs The People***[3] held that:

"(i) 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 or a charge of murder, accident is no defence if the accused intended to kill, foreseen death as a likely result of his act, or if a reasonable prudent person in his position would have realized that death was the likely result of such act."

7.6 After a considerable analysis we hold the view that malice aforethought was established by the evidence which is that by getting the gun and loading it the appellant had an intention to cause death or grievous harm to the deceased.

7.7 This chain of evidence is complete and only leads to the conclusion that in all human probability the appellant harbored the intention to murder his wife. When the various strands of evidence are pieced together the court is entitled to conclude that malice aforethought was established.

7.8 As an appellate court, the instances where we can overturn findings of fact by a trial court have been outlined in a plethora of cases such as ***Nkhata and Others vs Attorney General***[6] where it was held that a trial judge sitting alone without a jury can only be reversed on fact, when it is positively demonstrated to the appellate Court that:

a) by reason of some non-direction or mis-direction or otherwise, the judge erred in accepting the evidence which he did accept; or

b) in assessing and evaluating the evidence, the judge has taken into account some matter which he ought not to have taken into account or failed to take account some matter which he ought to have taken into account; or

c) it unmistakably appears from the evidence itself or from the unsatisfactory reasons given by the judge for accepting it,

that he cannot have taken proper advantage of his having seen, and heard the witnesses; or

d) in so far as the judge has relied on manner, and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

7.9 In our judgment, taking into consideration the totality of the evidence on record, the trial Judge was on firm ground in rejecting the defence of accidental shooting. An assessment of all the facts and circumstances reveals that the defence does not hold water. We say so because we find it odd that he should have picked an AK.47 at that particular time, being 6.45 hours in the morning when he was only due for work at 16.00 hours. As rightly pointed out by the prosecution he is a man with military background and he knew the process for an AK.47 rifle to discharge. He explained this very well in cross-examination. It involves putting in the magazine, corking the firearm, opening the safety catch and finally firing. From the facts it is clear that it is the appellant who put in the magazine. The question is why would he put it in so early in the day if he only needed the gun for work at 16.00 hours. The only inference that can be drawn is that he had planned this heinous crime.

7.10 The act of getting the gun, loading it, locking the doors to prevent any intervention, leads us to only one inference, that is, it is the appellant who shot the wife twice in the chest. The whole story about the wife wanting to kill herself is a figment of the appellant's imagination. He has span a yarn to extricate himself from the cold blooded murder of his wife.

7.11 It is our well-considered view, that the appellant's actions when looked at as a whole speak volumes about his intentions.

7.12 The case referred to of ***Nkandu vs The People***[4] is applicable to the facts of this case in that the Supreme Court looked at the actions of the appellant as did the lower court in the present case. In addition we are fortified by the case of ***Lubendae vs The People***[3] in that accidental shooting cannot be availed to the appellant as what can be gleaned from the totality of evidence on record that he intended to kill or foresaw that death was likely to result from his actions. The shooting was not unintended, the consequence of which was the death of the deceased.

7.13 The trial Judge cannot be faulted for rejecting the defence of accidental shooting where it is found that the shooting was voluntary, malice aforethought was established.

7.14 In light of what we have stated in the preceding paragraphs we cannot find him guilty of manslaughter as the shooting was

voluntary. The case of ***John Kenani Lilanda***[2] is therefore distinguishable from the facts of this case.

7.15 By way of summary, there is overwhelming evidence against the appellant and the defence of accidental shooting can therefore not come to his aid and we dismiss it.

7.16 The appeal having been found to be bereft of merit, is dismissed accordingly. The conviction and sentence of death imposed by the lower court is upheld.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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B.M. Majula
COURT OF APPEAL JUDGE

.....
K. Muzenga
COURT OF APPEAL JUDGE