IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 196/2020
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

NSHIKA KAPUTO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga JJA
On 25th August, 2021 and 16th December, 2022

For the Appellant: Mr. H. M. Mulunda, Messrs L M Chambers

For the Respondent: Mr. N.T. Mumba, M. C. Mwansa, Chief State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Lengwe v The People (1976) ZR 127**
2. **Phiri and Another v The People (1973) ZR 47**
3. **Shawaza Fawaz and Sposper Chelelwa v The People (1995) SJ (SC)**
4. **Major Isaac Masonga v The People – Supreme Court Judgment No. 24 of 2009**
5. **Mangomed Gasanalieu v The People (2010) ZR 132**
6. **Abednego Kapesha and Best Kanyakula v The People – Selected Judgment No. 35 of 2017**

7. **Director of Public Prosecutions v Lukwosha (1966) ZR 14 (CA)**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Constitution of Zambia, Chapter One of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The circumstances from which this appeal arises are in truth a typical example of gender-based violence which has affected our society and country at large. The tragic death of Precious Mangesana and injury to her daughter Naila Kaputo on 5th October, 2017 was without question a dark day for her family as well as the residents of Meanwood Ibex Hill area, in the Lusaka District of the Lusaka Province of the Republic of Zambia. The circumstances of her death and injury to her daughter drew a lot of public attention. It involves two lovers who seem to have fallen out of love and their daughter Naila Kaputo, a child of tender age who seems to have been the centre of their unending quarrels.

1.2 Amidst the reported quarrels and misunderstandings emanating from their relationship and custody of their daughter, the deceased, who was the girlfriend to the appellant, was on the evening of 5th October, 2017 found dead outside the appellant's house. A postmortem report revealed the cause of death to be a fatal gunshot on the neck (homicide).

1.3 The suspected culprit now the appellant was arrested and subsequently tried by Mrs. Justice C. Lombe Phiri of the High Court. Despite the absence of direct evidence of his involvement in the murder, the appellant was convicted and sentenced to death. Dismayed with the conviction, the appellant has appealed against the conviction and sentence to this court.

2.0 BACKGROUND OF THE APPEAL

2.1 Nshika Kaputo (the appellant herein) on 11th April, 2018, appeared before the High Court at Lusaka, charged on an information containing two counts namely:

i. One count of murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**; and

ii. One count of acts intended to cause grievous harm.

2.2 It was alleged in the particulars of the offence in count one that the appellant, on 5th October, 2017, did murder Precious Mangesana and in count two, that the appellant on 5th October, 2017 shot his daughter, Naila Kaputo, an act intended to cause grievous harm.

3.0 EVIDENCE BEFORE THE TRIAL COURT

3.1 The summary of evidence that was adduced on behalf of the prosecution particularly from Christine Nkhuwa (PW3), the nanny employed by the appellant to look after Naila was that on the fateful day around 17:00 hours, Petronella Kaputo (PW4) visited the appellant's home and asked her to carry a washing basket containing Naila's clothes to the vehicle outside the gate. When she went outside the gate, she found the appellant and a lady who was holding Naila in her arms. She told the trial court that there was also a car parked. It was her further testimony that she did not know who the lady was and that Petronella Kaputo instructed her to put the washing basket in the boot of the car but it could not fit. She was then told to put the basket in the front seat of the car and that before she could do so, the appellant grabbed the basket and emptied the clothes in the vehicle. She stated that it seemed as though Petronella and the said lady were

quarreling over Naila. She could however not understand clearly what they were saying because they were speaking in Bemba language.

3.2 She went on to testify that the appellant handed her back the basket and she went back inside the yard. After she entered the yard, she heard what sounded like fireworks followed by a loud cry of a child. She told the trial court that she did not go outside the yard to see what had happened. After a short while the appellant went inside the yard and began to pace about with a gun in his hands. In cross-examination she stated that it was her first time to see the lady outside the yard at the appellant's house and that she never heard the appellant and the said lady quarrel.

3.3 According to Petronella Kaputo Sabi (PW4), on the fateful day, she received a phone call from PW1, the mother to the deceased asking her to intervene in the differences between the deceased and the appellant over their daughter. She then called the deceased, who told her that she will not leave the appellant's house without her child. After that, she and her husband went to the appellant's house located in Meanwood Ibex Hill where she found the appellant, the deceased and their daughter outside the gate arguing. The rest of her testimony is

similar to that of PW3 apart from the fact that the deceased went inside the house to collect her undergarments. It was at this point that PW4 left the premises.

3.4 She stated that before she could reach far, they heard what sounded like fireworks and they returned to the appellant's house. When they reached the house, she found the appellant holding Naila and that he appeared to be shaken. She asked the appellant what had happened and the appellant told her that there was a shooting.

3.5 PW4 reached out for Naila and took her to her car and left. It was when she reached her house that she realised that Naila was bleeding on her neck. She then decided to take Naila to Hilltop Hospital in the company of her husband. After leaving the hospital, her husband left them at her uncle's place in Waterfalls and he went back to the appellant's house. It was her further testimony that her husband returned after a short while and informed her that the appellant had been taken to the police station and that the mother to Naila had died. She told the trial court that she, along with her husband and other relatives took Naila to Fairview Hospital as she could not stop bleeding.

3.6 The evidence of PW7, Detective Inspector Patrick Kalumba Changwe was that on 5th October, 2017 he arrived at the crime scene around 22:15 hours. He found a motor vehicle facing north and on the rear right side was a body of a female lying in a pool of blood. He proceeded to process the scene by taking photos of the scene and recovered three cartridges about 1.5 metres from the back of the motor vehicle. He told the trial court that upon inspecting the body, he found car keys in the right hand of the deceased and a gunshot wound on the left side of her neck.

3.7 He stated that the deceased's shirt had a tear on it and that it had blood stains on the sleeve, near the elbow. Further, that there was some blood splatter on the rear side of the motor vehicle near the deceased's head. It was PW7's testimony that the right side of the deceased's body had dust on it from the ground whereas the left part had no dust. According to PW7, this was an indication that when the deceased fell from the gunshot, she did not get up. He told the trial court that after examining the crime scene, he took the body of the deceased and deposited it to the University Teaching Hospital morgue.

He later made a sketch plan of his findings and handed it over to the dealing officer together with the three cartridges.

3.8 Doctor Mcheleng'anga a State Forensic Pathologist testified that he conducted a postmortem examination on the body of an adult female who was identified to him as Precious Mangesana, the deceased herein. After the said examination he prepared a postmortem report in which he concluded that the deceased's death was caused by a gunshot wound to the neck, and that the death occurred within seconds of the shooting.

3.9 He stated that at the time of the examination, the deceased's body had no scratch marks on the neck, hands or face. He testified that he was of the opinion that the death was an act of homicide and that a firearm was used and the ammunition type was a bullet. He told the trial court that the deceased was hit with three shots and that the precise cause of her death was a severed cervical spine or neck part of the spine. Regarding the sequence of the bullet wound, PW8 testified that he was of the opinion that the first shot was to the left arm though not fatal broke the left arm. It was his further opinion that the second shot was on the neck and that this shot was fatal as it cut through a major blood

vessel in the neck and then penetrated the spinal cord completely. The third shot was to the left leg and the direction of the travel of the bullet in the left leg suggests that the deceased was lying down when she was shot the third time. He concluded that death was caused by homicide as opposed to suicide due to the pattern of the injuries. He also pointed out that the pattern of gunshots indicates that the wounds could not have been self-inflicted.

3.10 Assistant Superintendent Matildah Busiku a Russian trained Forensic Ballistic expert stated that on 17th October, 2017 she examined three cartridges, empty cartridge cases, projectiles, fragments, and a pistol firearm of serial number A832333. She stated that at the end of her examination, she compiled a forensic ballistic report. From her examination she concluded that the three empty cartridges were loaded and discharged from the exhibited firearm. She also stated that the safety catch on the firearm was malfunction.

3.11 Doctor Jabulani Munalula, a General Surgeon from Fairview Hospital testified that in the early hours of 6th October, 2017, he conducted an operation on a child of two years who had been brought to the hospital by her aunt. He told the court that during the operation, he extracted

a bullet from the child's neck. He admitted the child for observation and later prepared a medical report.

3.12 Detective Sergeant Bright Nsama testified as PW12. His testimony was that he was the first police officer to reach on the scene of the crime. He testified that he found a Toyota Runx parked outside the appellant's house. He also found a body lying next to the car and she had car keys in her hands. When he exanimated the body, he noted that it had no pulse. He also observed two injuries one on the neck another on the left elbow. He stated that he was able to see the appellant inside his yard talking on the phone while holding a gun.

3.13 The last prosecution witness was Detective Kakwisa Liyamba. His testimony was mostly similar to that of PW11 except that he warned and cautioned the appellant after which he charged him with the offence of murder which charge the appellant denied.

3.14 At the close of the prosecution case the court below found the appellant with a case to answer on each count and put him on his defence. The appellant elected to give evidence on oath and called no witness.

4.0 THE DEFENSE CASE

4.1 The appellant's narration of what transpired on the fateful day, was that the deceased came to his house around 17:00 hours to check on her daughter. He refused her to see the child as she was sleeping. The deceased left and returned around 19:00 hours and he went outside his yard with the child for the deceased to see her.

4.2 According to the appellant, while outside the yard, they started arguing and within a short time PW4 and PW5 arrived at his house. He testified that he realised from the conversation between PW4 and the deceased that the deceased had called PW4 and asked her to help her collect her clothes and the child from his home. He told the trial court that the deceased requested to get her clothes and the child from the appellant's house.

4.3 PW4 entered the appellant's yard and returned in the company of PW3, who was carrying a washing basket. The deceased then took the basket from PW3 and emptied the contents into the vehicle. It was his further testimony that PW3 went back inside the yard with the washing basket. He told the trial court that afterwards, the deceased requested to pick up her toiletries and make-up kit from the house.

She went inside the yard while the appellant remained outside with their child. It was at that point when PW4 and PW5 left.

4.4 It was the appellant's testimony that when the deceased came back from the house, she told him that she was tired and that she wanted their relationship to come to an end and she had a gun. He stated that he panicked and was traumatized. He tried to rationalize with the deceased by telling her that she could go with the child if she wanted to. He continued to narrate that when he got closer to the deceased, while holding Naila in his arms, he reached out for the deceased hands and the gun went off. At that point, Naila fell on the ground. About three shots were fired as he was trying to grab the gun from the deceased.

4.5 It was his further testimony that immediately after the shooting, he rushed to pick up Naila and he noticed she was bleeding from the neck. In no time PW4 returned and he informed her that there had been a shooting. PW4 got Naila from the appellant and drove off. Thereafter, he walked to where the deceased was lying and noticed that the body was still. He went inside his house to get his phone to inform his relatives about the shooting incidence. His uncle informed him that

the police had already been contacted and proceeded to change his clothes and put together all the accessories for the gun. According to him, the reasons he changed his clothes was so that he could get comfortable as he had been wearing pajama shorts and T-shirt.

4.6 He told the trial court that the police took an hour and half to arrive and when they arrived, he was still on his phone. When he finished talking on phone, he walked out of the yard through the gate which was partially open. He gave the officers the gun and all its accessories including the blue book. He stated that when he handed over the gun to the police, he told them to be careful as it was loaded.

4.7 He further stated that after about 5 minutes, a police van from Simon Mwansa Kapwepwe Police Station arrived to process the scene. After they finished he was taken to Lusaka Central Police Station where he was put in a holding cell. It was his testimony that the incident involving the deceased occurred so quickly that all he could remember was rushing to hold the gun to prevent the safety catch from going off. He stated that the safety catch was working at the time of the incident and may have malfunctioned because of the struggle between him and the deceased.

4.8 According to the appellant, from the time Naila started staying with him, the deceased was a frequent visitor and she would spend about 5 days in a week at his house. He denied having threatened the deceased with a firearm and also denied shooting at her while she was lying on the ground.

4.9 Regarding the second count, the appellant told the trial court that he did not intend to cause grievous harm to his daughter Naila who he loved so dearly.

4.10 In cross-examination, he confirmed that his house had one entrance into the yard and that he was the only one with the keys to the gate on the fateful day. He stated that a week before the deceased leaving his house, they had an argument and he denied throwing her clothes in the swimming pool. The appellant acknowledged the evidence of PW8 and stated that he and the deceased had faced each other during the struggle. He also stated that he sustained some injuries though he had no medical report to prove the same. He told the trial court he was aware that the deceased was found with keys in her right hand. He also confirmed that after firing the first shot, one would have to wait for almost a second to allow another cartridge to go into the

chamber. Additionally, he confirmed that he was the one who was found with the firearm that killed the deceased, along with the spare magazine and rounds of ammunition.

5.0 FINDINGS AND DECISION OF THE LOWER COURT

5.1 The trial court considered the evidence and written submissions presented before it by both parties. The trial court found as a fact that the deceased died of gunshot wounds to her person and that the scene of the crime was outside the appellant's house. The court further found that the firearm from which the fatal shots and the shot were discharged belonged to the appellant. She also found that prior to the shooting, there had been some dispute and altercation between the deceased and the accused concerning the welfare of their daughter, an infant who was also injured during the said shooting.

5.2 In further analysis of the evidence on record the trial judge found as a fact that the fatal shot and other gunshots injuries were inflicted on the deceased by the appellant. The court also found that in the process of inflicting the gunshots on the deceased, the infant child was also shot and injured. She concluded that the *actus reus* of both charges had been demonstrated by the prosecution. On the element of malice

aforethought the court found that the appellant having acted in a manner that demonstrates that his intention was to cause grievous harm to the deceased and in the process, he killed her, it follows that he was possessed of the requisite *mens rea* in the offence of acts intended to cause grievous harm.

5.3 The court further held that the prosecution had discharged its burden of proof beyond reasonable doubt on both counts of murder and acts intended to cause grievous bodily harm. The trial court also held that the appellant's defense cannot excuse or justify his conduct. Accordingly, the appellant was found guilty and was convicted for the offence of murder of Precious Mangesana and one count for acts intended to cause grievous bodily harm to Naila Kaputo. He was later sentenced to suffer the ultimate penalty of death by hanging for murder and 25 years imprisonment with hard labour for the one count of acts intended to cause grievous harm.

6.0 GROUND OF APPEAL

6.1 Disenchanted by the judgment, the appellant has appealed on eleven grounds of appeal couched as follows:

(i) **The learned trial judge erred at law and fact when she discounted the appellant's defence of self defence against the weight of the evidence on the record.**

(ii) **The court below erred in law and fact when it ignored the reasonable explanation of the appellant as to what transpired leading to the injuries sustained by the deceased and child thereby placing total reliance on the evidence of the pathologist PW8 herein.**

(iii) **The trial court erred in law and fact when it ignored the pieces of evidence given under cross-examination by PW7, PW8, and PW10 as relates to the struggle between the deceased and the appellant which created doubts in favour of the appellant.**

(iv) **The trial court erred in law and fact when it found that the evidence of the pathologist was conclusive despite the marked contradictions and inconsistences between PW7 and PW8 as regards the positioning and number of wounds.**

(v) **The learned trial court erred in law and fact when she refused the appellant to revisit the scene of crime in order to demonstrate at the scene.**

(vi) **The learned trial judge misdirected herself at law and fact when she ignored the demonstrations by PW10 and PW13 which clearly showed that two persons can hold a gun which demonstrations gives credence to the appellant's explanation that he jostled for the gun with the deceased.**

(vii) **The trial court erred in law and fact when it convicted the appellant of murder and sentenced him to death despite there being gaps in the prosecution's evidence as regards**

whether the deceased actually handled the gun and who brought the gun from the appellant's house.

(viii) The court below erred in law and fact and threw itself in grave error when it sentenced the accused to death despite there being extenuating circumstances.

(ix) The trial judge erred in law and fact when she convicted the appellant of acts intended to cause grievous harm despite there being no evidence led by the prosecution as to how the child could have suffered the injury.

(x) The learned trial judge erred in law and fact when she convicted the appellant in the second count of acts intended to cause grievous harm in light of the apparent evidence of self defence.

(xi) The court below erred in law and fact when it sentenced the appellant to twenty-five years in prison with hard labour despite the appellant being first offender.

7.0 APPELLANT'S ARGUMENTS

7.1 In support of these grounds of appeal, Mr. Mulunda, learned counsel for the appellant filed written heads of argument upon which he relied. Under ground one, counsel contended that the evidence before the court shows that the defence of self defence as put forward by the appellant was not rebutted by the prosecution. He pointed out that the prosecution evidence does not support the allegation that the deceased and the appellant engaged in any physical confrontation. It

was counsel's further contention that there is enough evidence from PW7 and PW8 on record supporting the appellant's defence. He contended that the court's observations regarding the defence are not supported by the evidence on record.

7.2 Mr. Mulunda stated that the judge made her observations without considering the stress of the moment and the fact that a person placed in the position that the appellant was placed in could not have time for reflective thinking. To buttress the argument, we were referred to the case of **Lengwe v The People**[1] where the Supreme Court held that:

> **"The trial magistrate rejected any suggestion of self-defense on the basis that the force used was excessive. The evidence is of one couple against another and it is very difficult to know where the truth lies, but certainly the victim came to the appellant's house in belligerent mood and, as the magistrate said, the appellant was entitled to repel him. In these circumstances a man cannot be expected to consider dispassionately precisely what force he may use or whether a weapon which happens to be ready to hand and which he picks up and uses in the heat of the moment is or is not more than the occasion warrants. This court has held in a number of cases that one cannot apply over-fine tests to the actions of people involved in fights of this kind. For all these reasons we consider it unsafe to allow this conviction to stand, and it and the sentence will be set aside."**

7.3 According to learned counsel, the learned judge in the court below was trying to look for the truth in the appellant's explanation and not what is reasonable as well as plausible given the circumstances the appellant found himself in. He contended that the only person present at the crime scene and before the court to tell the tale is the appellant and there was no need for the court to draw inferences and assumptions adverse to the appellant's case. We were referred to the case of **Phiri and Another v The People**[2] where this Court held that:

> **"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction the courts have no alternate but to acquit the accused, and when such an acquittal takes place because evidence which could and should have been presented to the court was not in fact presented, a guilty man has been allowed to go free not by the courts but by the investigating officer."**

7.4 It was counsel's submission that the evidence on record and the circumstances of the case did not leave room for the appellant to retreat as he was confronted with a firearm and retreating would have made his situation worse more so that he had a child in his hands. All

in all, counsel contended that there is no evidence to support the lower court's analysis of what transpired on the fateful day.

7.5 In arguing ground two of the appeal, counsel reiterated his submissions in ground one and added that the trial court erred in placing reliance on the evidence of PW8 despite there being inconsistences between the testimonies of PW7 and PW8. We were referred to the case of **Shawaza Fawaz and Prosper Chelelwa v The People**[3] where in the Supreme Court guided that:

> **"When dealing with the evidence of an expert witness a court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the court to come to its own conclusion basing on the findings of the expert witness. As we said in Chuba v The People (1), the opinion of a handwriting expert must not be substituted for the judgment of the court."**

7.6 Under ground three and ground four, counsel reiterated the arguments in ground one.

7.7 Under ground five of the appeal the main point taken by Mr. Mulunda was that it was absolutely necessary to allow the appellant for purposes of demonstrating what had transpired during the fateful night to visit the scene of crime. It is counsel's view that the refusal by the court to do so was unfair to the appellant and negates a fair trial. Mr.

Mulunda brought to our attention the case of **Major Isaac Masonga v The People**[4] where the Supreme Court guided that:

> **"It is trite law and a constitutional duty for the prosecution to guarantee a fair trial and a fair trial starts with investigations. Any shortcomings in the investigations may seriously jeopardize the right to a fair proceeding, and thereby also prejudice the accused person's rights to be presumed innocent. The Courts have a mandatory duty not only to guarantee a fair trial, but also to ensure that even the investigations are conducted in accordance with well-established principles of fair trial for all suspects regardless of their social status."**

7.8 In respect of grounds six and seven, Counsel reiterated the arguments in ground one. With respect to ground eight, Counsel contended that the evidence of an altercation and a fight as availed by the prosecution witnesses amounts to extenuating factors which the lower court ought to have found. According to Mr. Mulunda, evidence of confrontation in itself amounts to provocation and if the court found that the retaliation by the appellant was not proportionate to the danger, the court ought to have treated a failed defence of provocation as amounting to an extenuating circumstance.

7.9 Under ground nine of the appeal, Counsel for the appellant submitted that there is no evidence on record of how the baby was injured. He

argued that the only evidence before court is that a ricocheting bullet can cause injury to a person. There is no evidence of who could have fired the said bullet between the deceased and the appellant.

7.10 With respect to ground ten and eleven, Counsel reiterated the arguments he advanced under ground one of the appeal. In summation, Counsel reminded the court that the appellant was a first offender and that the trial court ought to have exercised leniency in meting out the sentence.

8.0 RESPONDENT'S ARGUMENTS

8.1 Ms. Mumba, learned counsel for the respondent filed heads of arguments. Ground one, two three, four, six and seven were argued together. Counsel stated that the state supports the conviction. She dismissed the argument by the appellant that the findings of the lower court are not supported by the evidence on record. She contended that the evidence on record clearly connects the appellant to the commission of the offence. She stated that the evidence of PW12 and PW13, the officers who were first on the scene found the appellant with the gun in his hands as well as extra ammunition on his person. According to counsel, the appellant's evidence as to how the firearm

came to the scene was an afterthought and therefore the trial judge was on firm ground when she found that the appellant's evidence was an afterthought.

8.2 It was contended that the trial court was on firm ground when she disregarded the appellant's evidence that the shooting of the deceased occurred during the appellant and the deceased's jostling for the gun. Counsel emphasized that according to the evidence on record, the deceased body was found lifeless on the ground with her car keys in her right hand. It was contended that had she been engaged in a struggle or jostle for the gun with the appellant the car keys could have dropped. Further, Ms. Mumba observed that it is on record that the deceased was first shot on her right arm. The question to be answered is how possible was it for the deceased to have shot herself in her left arm while holding her keys in the right hand?

8.3 It was submitted that in the face of the overwhelming circumstantial evidence on record and the expert evidence from PW8, the trial court was on firm ground when it accepted the evidence of PW8. We referred to the case of **Mangomed Gasanalieu v The People**[5] where it was held that:

> **"When dealing with the evidence of an expert witness, a court should always bear in mind that the opinion of an expert is his opinion only, and it is the duty of the court to come to its own conclusion based on the findings of the expert . . . the opinion of the expert must not be substituted for the judgment of the court. It can only be used as a guide, albeit, a very strong guide, to the court in arriving at its own conclusion on the evidence before it."**

8.4 It was contended that the evidence on the record shows that the trial court used the evidence of PW8 as a guide to help the court arrive at the decision to accept the evidence of PW8. We were urged to dismiss grounds one, two, three, six, and seven of the appellant's appeal.

8.5 In arguing ground five of the appeal, counsel contended that the refusal by the trial court to allow the appellant to revisit the scene in order to demonstrate at the scene is not fatal. It is submitted that no prejudice was occasioned on the appellant by the trial court's refusal to allow the appellant revisit the scene for purposes of demonstrating. According to counsel, even if it can be argued that the appellant could have shown the trial court the entrances and the ambiance of the house, the court was already familiar with the appellant's house having visited the same on two previous occasions therefore the appellant could have demonstrated what he wanted the court to know about his

house and its surrounding. We were urged to dismiss ground five of the appeal for lack of merit.

8.6 In arguing ground eight of the appeal, counsel contended that the trial court cannot be faulted for sentencing the appellant to death in the absence of any extenuating circumstances in the matter. It was contended that there is no evidence on the record to support the appellant's assertion that he acted in self defence. The trial court cannot therefore be faulted for finding that there were no extenuating circumstances as the appellant did not act in self defence.

8.7 Furthermore, counsel submitted that in the absence of any evidence showing that the deceased was confrontational, the appellant's accession was an afterthought. She brought to the attention of this court the case of **Abednego Kapesha and Best Kanyakula v The People**[6] where the Supreme Court held that:

> **"The issue of extenuating circumstances is all about the sentencing policy of the courts. There is no doubt whatsoever that one of the principle objectives of criminal law is the imposition of adequate, and proportionate sentences, commensurate with the nature and gravity of the crime and the manner in which the crime was committed . . . in exercising such discretion, however, courts are bound to consider a number of principles which include proportionality, deterrence and rehabilitation . . . courts must always keep in mind the**

gravity of the crime, the manner of the commission of the crime, the motive of the crime, the nature and prevalence of the offence and all other attendant circumstances."

8.8 According to Ms. Mumba, the death sentence that was imposed on the appellant by the trial court in view of the circumstances in which the offence was committed is fitting and proportionate to meet the ends of justice. She went on to submit that this case is a sad illustration of gender-based violence and entrenched attitude of male entitlement and subordination of women in parts of Zambian society.

It was contended that the appellant killed the deceased simply because the deceased wanted to spend some time with her daughter Naila. Counsel went on to state that it is clear from the appellant's conduct that he did not believe that a woman has an equal basis with a man to have access to their daughter whom she had not seen for some days. That the actions of the appellant falls within the definition of gender-based violence. We were asked to dismiss the appeal as it lacks merit.

8.9 In opposition to ground nine, ten and eleven, it was submitted that the trial court was on firm ground when it convicted the appellant for the offence of acts intended to cause grievous harm. It was the state's

contention that, the appellant having embarked on a shooting spree that led to the death of the deceased and inflicting injuries on Naila Kaputo, the appellant intended to cause grievous harm to Naila Kaputo who was present at the scene of the shooting. The state referred us to the case of **Director of Public Prosecutions v Lukwosha**[7] where it was held that:

> **"Intention and knowledge are not susceptible of direct proof, it is not possible to look into a man's mind and see the intention and knowledge thereon. That is about as near as one can get to direct evidence of intention and knowledge. More usually, intention and knowledge are matters of inference to be drawn from proved conduct and action. There is a presumption that a man intends the natural and probable consequences of this act."**

8.10 It was the state's submission that the trial court was on firm ground when it found that the prosecution had proved the case of causing grievous harm in the absence of any evidence showing that the projectile that hit Naila was a ricocheting bullet. In summation we were urged to uphold the lower court's judgment and dismiss this appeal for lack of merit.

9.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

9.1 At the hearing of the appeal, both counsel placed full reliance on the documents filed. They both made oral submissions wherein they reverberated the contents of their written submissions.

10.0 CONSIDERATION AND DECISION OF THE COURT

10.1 We have carefully considered the evidence on the record, the arguments by both parties and the judgment under attack.

10.2 We shall consider grounds one, two, three, four, six and seven together as they are related. The issue these grounds raise is the propriety of the conviction in the light of self defence raised by the appellant and the evidence on the record.

10.3 The explanation by the appellant was that it was the deceased who upon returning from his house, came with a gun which she pointed at him. At this time he was holding their baby (Naila). It was at this point that he reached out and held the other part of the gun and in the struggle three shots were discharged. The appellant does not in any way accept having shot at the deceased in an attempt to defend himself. He seemed to suggest accidental discharge of the firearm. We do not see therefore how

self defence may be availed to the appellant when he seemed to suggest accidental shooting. Self defence is a justification defence in that an accused people justifies causing death of the deceased on account that he was repelling an attack on him or apprehended immediate harm being inflicted on him or her. In the circumstances of this case, the appellant denied having fired the gun in issue. Self defence therefore fails. We thus find no merit in this argument.

10.4 It is clear, as the trial court rightly observed, that the only witnesses to the incident were the appellant, the deceased and their baby. Therefore, save for what the appellant explained, the remainder of the evidence is circumstantial. The learned trial court considered the explanation given by the appellant in the light of the other evidence on the record and disbelieved the account given by the appellant. The trial court had the following to say:

> **"From the cross-examination and defence launched by the defendant it was suggested that there was a struggle between the deceased and the accused leading to the firearm belonging to the accused being discharged and fatally injuring the deceased. However, there is no explanation regarding the**

> **injury to the thigh. The medical evidence which was unshaken by cross examination is unchallenged in that the injury could not have been self-inflicted. The said injury was inflicted by a person who was standing over the body of the deceased. The explanation by the accused person regarding the shooting and any such propositions are therefore discounted as afterthought rendered to absolve the accused of any liability for the death of the deceased . . .**

10.5 We have no reason to interfere with the decision of the court below on this score. The explanation by the appellant could not reasonably be true. When the police came to the scene, they found the deceased lying on the ground near her car with car keys in her hands. This clearly seems to be at variance with a person who had a gun in her hands, wanting to shoot the appellant and subsequently struggled for the gun until it discharged. How could she still have had keys in her hands after all that? Further, the deceased was shot three times after the fire arm discharged three times. All the three shots only hit the deceased and none hit the appellant, especially in the light of the allegation that she is the one who had the gun pointed at him.

10.6 The appellant's account of what transpired cannot reasonable be

true when looked at on the totality of the evidence. We cannot fault the trial court in not believing his version of events. Consequently we find no merit in grounds one, two, three, four, six and seven of the appeal and dismiss them.

10.7 Ground ten being anchored on self defence is equally dismissed in the light of the foregoing.

10.8 We now turn to consider ground five of the appeal. The gist of the argument attacks the refusal by the trial court to grant the appellant his application for the court to visit the crime scene so that he demonstrates what happened on the material date. The trial court declined to visit the scene during the case for the defence on account that it had already been there twice outside the yard and once inside. We are of the view that the learned trial court misdirected itself when it declined to grant the appellant's application to visit the crime scene in order to explain or show the entrances and the ambience of the house. **Article 18** of **The Constitution of Zambia** guarantees fair trial, which every court is duty bound to follow. It provides that:

> **"18. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the**

case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

10.9 One of the requirements for fair hearing is ensuring that equal opportunity is given to both the prosecution and the defence to present their cases. The trial court in this matter visited the crime scene three times at the behest of the prosecution. The same opportunity given to the prosecution ought to have been accorded to the appellant. Justice must not only be done, it must be seen to be done. Therefore, there was no justification for the refusal for the trial court to visit the crime scene during defence, on account that it had been there already during the prosecution case. This was a serious misdirection.

10.10 We however find that the appellant was not prejudiced in any way especially that he gave his side of the story in court and especially that he wanted to explain or show the entrances and the ambience of the house. These had very little or nothing to do with the issues before court. The shooting took place outside the yard. What he thus sought to show the court had no bearing on the issues. In the light of our verdict in respect of grounds

one, two, three, four, six and seven, the trial court's lapse cannot aid the appellant.

10.11 In ground eight, the appellant has argued that extenuating circumstances exist warranting the imposition of any other sentence other than death. The only evidence of an altercation or a fight is that given by the appellant only. His version was not believed by the trial court and in the light of the dismissal of grounds one, two, three, four, six and seven, this ground too has no merit and is dismissed. The trial court was on firm ground when it imposed the sentence of death.

10.12 Ground nine attacks the conviction on the second count relating to acts intended to cause grievous harm contrary to **Section 224(a) of the Penal Code**. It provides that:

> **"224. Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person –**
> **(a) unlawfully wounds or does any grievous harm to any person by any means whatever; or**

10.13 It is without doubt that a conviction for this offence is only

tenable if, in addition to proving wounding or grievous harm, the prosecution proves the intention to maim, disfigure or disable beyond all reasonable doubt.

10.14 There is evidence from PW10, Matildah Busiku to the effect that she examined two projectiles, one of which was from baby Naila. That projectile was deformed as it had hit a hard surface before ricocheting and penetrating baby Naila's body. This must have been the case, because Dr. Jabulani Munalula, PW11 testified that after extracting the deformed bullet from the baby's neck, they conducted a CT scan that established that the baby suffered no injuries to the bones or any other organ.

10.15 It is our view that had the trial Judge properly assessed this evidence, she would not have come to the conclusion that the appellant shot at his daughter with the intention to maim, disfigure or disable her.

10.16 In the light of this evidence, it is clear that the projectile that ended up lodging in baby Naila's neck was not aimed at her. It cannot thus be inferred that the appellant had the requisite mental element. The offence under section 224 requires positive

intent, which is absent in this case. Had the trial court properly directed its mind, it would have found that the prosecution had not discharged its burden in count two. The finding to the effect that the appellant had the requisite *mens rea* is set aside. We thus set aside the appellant's conviction on this count and quash the sentence. We acquit him. Having allowed ground nine, we find it unnecessary to consider ground eleven.

11.0 CONCLUSION

11.1 Grounds one, two, three, four, five, six, seven, eight and ten of the appeal are dismissed for want of merit. Consequently, the conviction for murder and death penalty are upheld. Ground nine is allowed. As a consequence, the conviction and sentence in count two is set aside.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE