

IN THE COURT OF APPEAL OF ZAMBIA
IN THE MATTER OF A CRIMINAL APPEAL
HOLDEN AT KABWE
(Appellate Jurisdiction)

Appeal No. 197/2022

BETWEEN:

NYOWA MUNDONGO

AND

THE PEOPLE



Appellant

Respondent

Coram: Mchenga DJP, Banda-Bobo and Sharpe-Phiri, JJA
On 10 October 2023 and 14 November 2023

For the Appellant: Ms. M. Nzala Senior Legal Aid Counsel and Mrs
J. Mumamba-Hamaleke of Legal Aid Board

For the Respondent: Mr. B. Siafwa, Acting Senior State Advocate of
National Prosecution Authority

J U D G M E N T

Sharpe-Phiri, JA, delivered the Judgment of the Court

Legislation referred to:

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

Cases referred to:

1. *The People v Njovu* (1968) ZR 132
2. *Mwiimbe v The People* (1986) ZR 15
3. *Edward Sankalimba v the People* (1981) ZR 251
4. *Kenious Sialusi v The People* (2006) ZR 87

1.0 INTRODUCTION

- 1.1 On 17 September 2020, Siboli Sibanga ('the deceased') was shot dead outside Sipumu Village Fish Pond at Mulobezi in the Mulobezi District of the Western Province.
- 1.2 On 18 September 2020, Nyowa Mundongo (the Appellant) and Nalishambo Mushwaule were jointly charged with one count of murder contrary to **Section 200 of the Penal Code**. The Appellant (also referred to as the accused in the court below) was convicted by the trial Judge for the said offence whereas his co-accused, Nalishambo Mushwaule was acquitted.

2.0 EVIDENCE IN THE HIGH COURT

- 2.1 The prosecution called 4 witnesses in support of their case. Their first witness was *Muleya Simanga* PW1. Her testimony was that on 17 September 2020 around 19:00 hours, she had gone with Chikoma Kaponde Senda (PW2) and the deceased to fish in the ponds at Imbula Village. There being no fish in the ponds, they moved to Sipumu Fish Pond. When they got to the fish pond, as she was standing in the shallow waters holding a net with PW2. The deceased was close by holding a flash torch. Kaponde and Chikoma were around the pond on the shore.
- 2.2 She saw a light flashing towards where they were. They initially thought it was just a passerby and they continued selecting the fish and placing them in a gallon. They observed the light continued beaming on them. They shone their light in the

direction of the other light. She observed that there were two (2) people coming towards them, who were about four (4) metres away. She recognized these 2 people as Nyowa and Nalishebo. She knew the two gentlemen from when she was young as they lived in the same village as her.

- 2.3 They had a big flash light. She used her torch on her phone and noticed that Nalishebo was carrying a bag while Nyowa had a phone in one hand and a pistol in the other. She stated that Nyowa then fired a shot in the air and asked who they were. They each answered giving their names with PW2 mentioning her name and saying “uncle it is us”.
- 2.4 She added that the Appellant, Nyowa, aimed towards where they were and fired a shot again. Chikoma and Kaponde ran while the three of them stood still. Then Nyowa fired a third shot which made her run leaving Senda and Siboli behind.
- 2.5 She said that as she began to run away, she noticed the deceased, Siboli, fall to the ground. She shouted for help from Chikoma and Kaponde as she was running, she shouted that Siboli had collapsed. While she was running, Nyowa fired a fourth shot and she fell down. She got up and ran to a shed and informed the people at the shed that one of their friends had collapsed. She reported to Charles, who immediately contacted people at the village and requested them to go to where the incident had occurred.

- 2.6 She added that they returned to the scene, and found the deceased foaming from his nostrils and blood was coming out of his mouth. The villagers then informed the police. She identified the 2 accused persons and confirmed that she was not related to them but that she was related to the deceased. He was her immediate older brother and Kaponde her twin brother.
- 2.7 During cross-examination, she reiterated that she had heard four gunshots, and that the police had recovered something from the scene.
- 2.8 In further cross-examination, she stated that she had not asked for permission to fish in the pond as it did not belong to anyone. She did concede that they were using a mosquito net for fishing which was not allowed. She also confirmed that she had recognized Nyowa's voice before she saw him and that she had seen his firearm which was black.
- 2.9 The prosecution's second witness, PW2, was Senda Sikumbwa. She essentially repeated the same account as PW1 as to the sequence of events that unfolded on 17 September 2020.
- 2.10 She confirmed that the Appellant had fired a shot from his pistol in the air as he asked who they were. That she had responded to him indicating who they were. However, he fired a second shot which prompted Kaponde and Chikoma to run. She said as they ran, she told them not to be afraid as he was her uncle who was firing. But Nyowa fired a third shot and a bullet hit the deceased

and he fell to the ground. They heard Nyowa say “stupid idiots, what were you doing here!”

2.11 She recounted that she ran away and hid behind a tree about 10 meters away. She could see Nyowa and Nalishebo and she started shouting for help from Chikoma and Kaponde. She met them as they were coming back with other people. When they returned to where Siboli was, they found him foaming from the nose and he was swollen on one side of the head with blood oozing out.

2.12 She confirmed that Nyowa was her uncle, her mother’s brother but she was not related to Nalishebo.

2.13 In cross-examination, PW2 stated that they did not obtain permission from Mwanza Village to fish in the stream and that they did not run away after Nyowa fired warning shots. She denied claims of a dispute between her mother and Nyowa. She confirmed that she no longer lived in Manuwela Village but clarified that her relocation was not as a result of any bad relationship between Nyowa and her family. She had no problem with Nyowa. She also confirmed that Nyowa had the two guns left by his grandfather.

2.14 Samasimbi Mushabati was the prosecution’s third witness PW3. He was a peasant farmer by occupation. He testified that on 17 September 2020, he was at home when he received a call around 20:00 hours from Silvia Kangumu informing him that Siboli had been shot. Thereafter, he, Milimo Mushabati, Sitali, Nalisa Namalumo and Nawa Nawa ran to the river. They found Siboli lying on the ground with a cut on his head and bleeding from his

nose and mouth. They contacted Sichili Police Post and the police arrived on the scene and picked up his body. He said Siboli's body was taken to Yeta Hospital in Sesheke where a postmortem was conducted. He had identified the body of the deceased for the postmortem.

2.15 In cross-examination, PW3 told the Court that his father was a Headman, but that a headman is never in charge of any stream and that the Sipumu stream did not belong to anyone. He also said that Nyowa and Nalishebo did not come from Sipumu Village.

2.16 Detective Chief Inspector Reuben Samulyata was the prosecution's fourth witness, PW4. His evidence in chief was that on 4 October 2020, he took over the docket of this case in which a report was made by Simasimbi Mushabati that his nephew Simanga Siboli had been murdered after being shot at by unknown gunmen on 17 September 2020 at a stream within Mulobezi District. That the initial suspicions were that he was shot by Nyowa and his herdsman Nalishebo.

2.17 PW4 stated that he was given an empty cartridge together with a docket in which two suspects, Nyowa and Nalishebo were apprehended and interviewed. They narrated to him that they had gone to Court on 17 September 2020, but the Court was not sitting. They returned to the village and attempted to locate a bus to Mangumi to see a client, but they did not find one going to that area, so got on a truck going to Sesheke, and went to Katima Mulilo, where they spent a night in the bush.

2.18 PW4 further recounted that it was narrated to him that Nyowa received a call from his wife on 18 September 2020 who told him that there was a murder case and members of the public suspected him of having killed the deceased. That upon receipt of said information, they decided to go back to the village. Nyowa narrated that he had carried his pistol which he decided to throw in the Zambezi River at Katima Mulilo Bridge together with the licence. That Nyowa had led the police to the river, but they could not recover the firearm.

2.19 He further stated that when he interviewed Samasimbi, he was told that the deceased was in the company of others at the river when Nyowa fired the shot and one bullet had hit the deceased. PW4 also confirmed that they interviewed the people who were with the deceased on the night of the incident.

2.20 PW4 confirmed that a postmortem was conducted on the body of the deceased at Yeta Hospital and a report had been issued. He had kept the empty cartridge as an exhibit and proceeded to charge Nyowa and Nalishebo with one count of murder contrary to Section 200 of the Penal Code.

2.21 In cross-examination, PW4 recounted that he had travelled to Mulobezi, but could not find the two accused. Further, that Nyowa's village was searched and, two firearms were retrieved. That among the guns found, none of the two were used to shoot the deceased.

2.22 In his re-examination, PW4 recounted that the 2 firearms were recovered from an abandoned house where the late father to Nyowa used to stay.

2.23 Having considered the evidence adduced, the trial Judge found the appellant with a case to answer and was accordingly put on his defence.

3.0 **THE DEFENCE**

3.1 The Appellant, Nyowa, and his co-accused, Nalishebo, opted to give evidence on oath and not to call witnesses. Nyowa the Appellant testified as DW1 and stated that in September 2020 as a traditional doctor, he had sometime in September 2020 received a request from Mary who resides in Mangumi, Mwandia District to attend to an illness that Mary and her family had been experiencing. That in the evening of 16 September 2020, as he awaited his trip, he received summons from Mulobezi Local Court where he was required to appear before Court.

3.2 On 17 September 2020, he went with Nalishebo Mushwaule and made an appearance at the Local Court and returned home later that evening. After freshening up, they headed out to Mangumi. As they reached their pond at Sipumu, they heard voices of people at the pond. He said no one was allowed to fish in that pond because the pond was a source of drinking water for animals and if stirred up, it would get dirty.

- 3.3 He said as they drew closer to the pond, he asked who the people were and why they were fishing and stirring the water where the animals drink. The people who were fishing responded to him rudely saying "who was asking stupid questions". He said the people began to advance towards him as if to fight and so he took out his gun and fired in the air. He could not remember how many times he fired. In the process of the confusion, he saw one person fall to the ground. He said it was not intentional for him to shoot at anyone and he could not understand why it happened. He said that after the incident he was afraid and fled the scene. He ran on the route to Mangumi and met his helper Nalishebo, ahead. He narrated to his helper how he fired in the air and had seen one person fall to the ground. They boarded a vehicle to Katima Mulilo.
- 3.4 While on their journey, he said he received a phone call informing him that someone had died. While in Katima Mulilo with Nalishebo, they tried to hide and went to Katima Mulilo Bridge where he threw his gun in the river. When they reached Simungoma, they stayed at the station and took time to reflect on what had happened. He then turned himself in to the police at Sesheke Police Station where he was apprehended. He said the DCIO, Mr Muzune, Mr Machona and Mr Mukololo took him and Nalishebo in and conveyed them to Sesheke Police. When asked about the gun, he told the police that he had thrown it into the river. He led the police to where he had thrown the gun but they could not retrieve it.
- 3.5 During cross-examination, he explained that the incident at the river happened around 19:00 to 20:00 hours. He indicated that he

had not heard PW2 say anything to him, and that there were a lot of people possibly 20 or 30 contrary to what the prosecution witness had said.

- 3.6 In further cross-examination, the appellant denied shooting the deceased. He however conceded that the deceased died as a result of the shot he had fired. He said he did not know if the people that had been there that night had firearms as it was dark. He was also not sure if the people he encountered had any sticks to attack him. He insisted that the people kept advancing towards him even though he had retreated.
- 3.7 The appellant also insisted that he was not upset about people fishing in the pond but had merely asked them what they were doing there. He said he did not realize that someone had fallen to the ground when he fired the shot. He also denied throwing away the gun to conceal the shooting.
- 3.8 In re-examination, the Appellant maintained that the 20 to 30 people approached him to attack him and hence the need to fire the shot as the people wanted to attack him.
- 3.9 Nalishebo Mushwaule, DW2, was the defence second witness. He was also the Appellant's co-accused in the trial below. He testified that in September 2020, the Appellant had asked him to accompany him to Mangumi to see his client. On 16 September 2020, he accompanied the Appellant to the Mulobezi Local Court and returned home later that day. Upon reaching Sipumu, they heard voices of people at the pond and the Appellant asked what

the people were doing at the pond. That the people had responded saying: "who is asking foolish questions". The people then advanced towards them to attack them and he started running on a path to Mangumi. He then heard sounds of a gun shot behind him. Later the Appellant caught up with him and narrated to him that he had seen one of the people who were advancing towards him fall to the ground when he fired a shot.

3.10 DW2 said he then went with the Appellant to Katima Mulilo. Upon reaching Katima, the Appellant threw his gun into the river. He did not see the Appellant throw the gun but he had informed him that he had done so. He added that the Appellant informed him that he wanted them to turn themselves in to the police and he went ahead to inform the police.

3.11 In cross-examination, DW2 admitted not going to help the person that had been shot. He also admitted not going back to the village or to the police station to report the matter. That was the close of the defence.

4.0 **TRIAL JUDGE'S FINDINGS**

4.1 The trial Court first addressed itself to the question of identification of the Appellant and his co-accused. The Court found that PW1 and PW2 who identified the Appellant and his co-accused stated that they were from the same village with the accused persons. That PW2 had informed Court that she was the Appellant's niece. That although it was dark at the time of the incident, both PW1 and PW2 had testified before Court that both

her group and the accused's had adequate lighting from their respective torches. That identification of the appellant was cemented by the fact he had confirmed that he had fired the gunshot and that both sides did confirm that there was a moment the accused persons spoke to each other during the incident. The Court therefore determined that there was no doubt that the identification of the accused persons was reliable and the danger of any honest mistake had been eliminated.

4.2 The trial Court considered that the Appellant's testimony was that he had fired the shot in the air when the people he was trying to remove from the pond, belonging to his village started advancing to attack him. Further, that he only purportedly shot in the air but was shocked that a person had fallen down. The trial Court determined that this evidence was adequate for the Court to consider the defences of self defence and the defence of property as provided under **Section 17** and **Section 10 of the Penal Code**. The Court also made reference to the holding in the case of **Kenious Sialusi v The People** in which the Court held that '*a Court is not required to deal with every possible defence that may be open to an accused person unless there is some evidence to support the defence*'.

4.3 The trial Court did not agree that the appellant had formed a prima facie basis for the defence of self defence and defence to property as he was not honestly and instinctively repelling an impending attack on his person by what he described as '*a mob in the dark*'. Further, the Court also referred to the case of **Edward Sankalimba v the People** on the issue of mistaken belief, in

which it was held that '*for the defence of mistaken belief to stand, it must be shown that it was reasonable and honest*'. The Court determined that for both defences to stand, there is a requirement of reasonableness (and honest in the case of mistaken belief) and the Court should consider that the degree of force used to repel the attack is reasonable considering the danger that is imminent to the accused in that moment.

- 4.4 The trial Court found difficulty in believing the credibility of the appellant's evidence regarding the fact that there were 20 people when he had also stated that it was dark and he could not see properly. That the Appellant made it clear that his intention was to remove the people from the pond whose voices he had heard and the only time he had become fearful was when he realized that a person had fallen down following the shot he had fired.
- 4.5 The Court found that it had no reason to doubt PW1 and PW2's testimonies. The Court also found that it did not believe the Appellant when he testified that he had only shot in the air as both PW1 and PW2 testified that the Appellant had initially fired in the air once and then subsequently aiming at them. The Court found that the Appellant had no reasonable justification to fire shots at the people who were fishing even if they were fishing from the pond which they should not have been fishing from. The Judge concluded that the defences raised were therefore not available to the Appellant.
- 4.6 On the second accused, the Court determined that there was no illegal act which he had undertaken resulting in the death of the

deceased as he had been merely requested to accompany the Appellant. That there was no common design established and the act of joining in the prosecution of an unlawful purpose had not been established against him. The Court thus concluded that the prosecution had proved its case beyond reasonable doubt that the Appellant had murdered the deceased but that there was no evidence against the co-accused, Nalishcbo. The Appellant was accordingly convicted while his co-accused was acquitted.

5.0 **THE APPEAL**

5.1 Being dissatisfied with the judgment of the trial Court, the Appellant filed an appeal on 9 October 2023 advancing 2 grounds of appeal, namely, that:

1. *That the trial Court erred in law and in fact when it convicted the Appellant of murder in the absence of evidence supporting malice aforethought; and*
2. *That the trial Court erred in law and in fact when it failed to consider that the death of the deceased was an accident on the part of the Appellant.*

6.0 **ARGUMENTS BY THE PARTIES**

6.1 The Appellants filed heads of arguments on 9 October 2023. The Respondent filed arguments in response on 10 October 2023. We shall not repeat them verbatim but will be referred to where relevant in our analysis and decision portion below.

7.0 **HEARING OF THE APPEAL**

7.1 We heard the appeal on 10 October 2023. The Appellant and the Respondent were both represented by counsel as indicated earlier. Counsel made brief submissions at the hearing to augment their respective positions, and the same will be highlighted where necessary in the analysis and decision portion of this Judgment below.

8.0 **ANALYSIS AND DECISION OF THIS COURT**

8.1 We have considered the appeal, the evidence on record and the arguments of the parties. We note that the Appellant's contention under ground 1 of the appeal is that the trial Court convicted the Appellant for the offence of murder without evidence to support malice aforethought on the part of the Appellant.

8.2 The Appellant argued that the offence of murder as prescribed under **Section 200 of the Penal Code** requires satisfaction of the ingredients of the offence, namely; the unlawful act of killing and secondly; the intention to kill. Counsel referred the Court to the provisions of **Section 204 of the Penal Code** on the definition of '*malice aforethought*'. Counsel argued that the purported firearm purportedly used by the Appellant was never recovered nor presented in evidence before Court. That the prosecution had therefore failed to prove that the Appellant had malice aforethought when he fired the gun shot.

8.3 The Appellant contended that there was overwhelming evidence which discounts any enmity between the Appellant and the deceased, adding that as a matter of fact, the Appellant was on that fateful night, heading to Mangumi in Mwandia District to visit some of his patients to perform treatment sessions for various ailments.

8.4 The Appellant contended that evidence from the witnesses revealed that the Appellant fired gun shots without aiming at anyone in particular, hence the Appellant possessed no malice aforethought within himself as established in the case of **The People v Njovu** where it was held that:

“To establish malice aforethought, the prosecution must prove either that the accused had actual intention to kill or cause grievous harm to the deceased, or that the deceased knew that his actions would be likely to cause death or grievous harm”.

The Appellant's Counsel contended that the Appellant never intended to nor aimed at killing the deceased person or any other person in the group for that matter.

8.5 The Respondent's Counsel rebuttal in reference to ground 1 of the Appeal that the malice aforethought as expressed in the **Njovu case** cited above relates to the state of mind of the accused person at the time he causes the death of the person. That the term is expressed to include certain specific intents and knowledge on the part of an accused which should be proven by establishing actual

intention to kill or to cause grievous harm to the deceased or that the appellant knew that his actions would be likely to cause death or grievous harm to someone.

8.6 Counsel for the Respondent further relied on the case of **Mwiimbe v The People** where it was held that for the defence of self defence to stand in any given case, the accused must show whether or not the situation in which he found himself or the gravity of eminent peril was such that it was both reasonable and necessary to take the particular action which caused death in order to preserve his life or to prevent grave danger to himself or another. The Respondent submitted that the Appellant's actions were both unreasonable and unnecessary, as having found the children fishing in the pond, the Appellant ought to have used other diplomatic means rather than resorting to the use of a gun. He contended that a gun is a lethal weapon which should only be used as a last resort under extreme circumstances. He submitted that the situation leading to the death of the deceased was avoidable as there were other means the Appellant could have used to resolve the matter as opposed to taking the law in his hands. Counsel summed that the Appellant was the aggressor of the whole situation and cannot claim the defence of accident.

8.7 The Respondent also submitted that the Pathologist's findings indicated that the deceased was shot from the right side of the head thereby dispelling any assertion that the deceased could have been advancing towards the Appellant with a view to attacking him. Counsel submitted that if the deceased was aiming to attack the Appellant, the gunshot wound would have been

found in front of the head and not on the right side. He argued that the position of the wound reveals that the deceased should have been running away, hence being shot on the side. He augmented that the Appellant ought to have known that his actions of using a firearm on innocent children, who were merely catching fish in a public pond, would probably result into the death of one of them or cause grievous harm to them.

8.8 We have examined the sequence of events as confirmed by the witnesses account on the fateful day. We have no reason to doubt PW2's testimony that they were fishing in the dark with a torch. That when the Appellant and his assistant advanced in their direction, they heard the first gunshot followed by a question asking who they were and that the deceased upon seeing the Appellant responded that '*it is me uncle*'. The fact of this brief interaction upon the first gun shot was also confirmed by the co-accused. There is no doubt that this brief account took place and that while in that moment, the deceased's group was able to positively identify the Appellant and his assistant as both the deceased's camp and the Appellant and his assistant had torches which provided enough lighting in the dark.

8.9 There was overwhelming evidence from the prosecution that the Appellant then continued to fire the second and third gunshots in the direction of the children that had been fishing in the pond. The sequence of these events reveals clear recklessness on the part of the Appellant and appetite to unreasonably use a firearm in a public place in circumstances that do not justify use of a gun.

8.10 The Appellant's conduct on the fateful night clearly falls within the ambit of what is envisaged under **Section 204 of the Penal Code**. For avoidance of doubt, the said provision provides that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

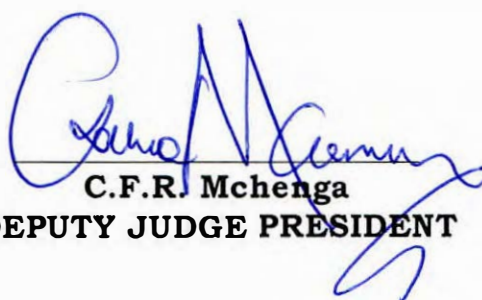
- (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;***
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- (c) an intent to commit a felony;..”***

8.11 The above evidence reveals that the Appellant had every intention to cause grievous harm to the deceased and/or the people he was with. The Appellant had ample opportunity to engage them with in a civil manner but opted to use his weapon, the gun, unreasonably, in circumstances that cannot justify use of a firearm. The Appellant's conduct was very intentional. The Appellant's account that he had fired in the air also lacks credibility as the evidence on record clearly shows that he fired gunshots aiming in the direction where the deceased and her group were and actually resulted in the shooting of the deceased in the head. For this reason, this ground of appeal fails for lack of merit.

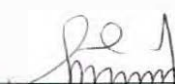
8.12 The Appellant in the second ground of appeal seeks to overturn the conviction of the Appellant on the ground that the trial Court erred in law and in fact when it failed to consider that the death of the deceased was an accident on the part of the Appellant. As we have determined above, the circumstances and facts of this case demonstrate a clear intention on the part of the Appellant to cause grievous harm or death of the deceased or the other people he was with at the pond. This ground of appeal cannot therefore stand in light of our determinations under ground 1 above. Ground 2 accordingly fails.

9.0 CONCLUSION

9.1 Having determined that both grounds of appeal have no merit, we uphold the conviction and the sentence of the Appellant in the Judgment of the High Court of 24 February 2022.



C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



A.M. Banda-Bobo
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE