

IN THE HIGH COURT FOR ZAMBIA

HK/47/2011

AT THE KITWE DISTRICT REGISTRY

HOLDEN AT KITWE

(CRIMINAL JURISDICTION)

BETWEEN:

LAWRENCE CHIKWIKWI

VS

THE PEOPLE

Before the Honourable Madam Justice C. K. Makungu

For the People: Mr. I. K. Waluzimba - State Advocate

For the Accused: Mr. E. Chongwe - Legal Aid

JUDGMENT

Cases referred to:

1. *Benwa and another vs The People (1975) ZR 1(S.C.)*

Acts referred to:

1. *Section 215 (a) of the Penal Code*
2. *Section 182 (2) of the Criminal Procedure Code Chapter 87 of the Laws of Zambia*
3. *Section 48 (1) of the Firearms Act Chapter 110 of the Laws of Zambia*

The accused stands charged with the offence of attempted murder contrary to Section 215 of the Penal Code Chapter 87 of the Laws of Zambia to which he pleaded not guilty.

Particulars of the offence are that Lawrence Chikwikwi and Rodgers Malambo, on 6th March 2005 at Kitwe in the Kitwe District of the Copperbelt Province of the Republic of Zambia, did attempt to murder Jeremiah Simusa.

The prosecution has the burden of proving this case beyond any reasonable doubt. The accused has no onus of proving his innocence.

A summary of the evidence adduced herein is as follows:-

PW1 Jeremiah Mozyamba Simusa testified that he is a retired Lecturer. He used to work for Copperbelt Secondary Teachers College (COSECO). In January 2005 a man by the name of Rodgers Malambo followed him to the college and threatened to kill him for allegedly having an affair with his wife by the name of Precious Munjila Malambo who was one of his students from Mansa. PW1 said he reported the matter to Mindolo Police Station, unfortunately they did not follow up it up.

On 6th March, 2005, around 08:30 hours his son Cholwe Simusa was sent by a certain Police Officer to call him from the house. When he went outside, the Police Officer told him that there were some Senior Police Officers who wanted to talk to him. PW1 said that as they were walking out of the yard to go and see the Senior Officers, his sons Cholwe and Chinyama and their friends followed them. As they were walking he observed that the Police Officer was wearing a stripped Police uniform and carrying an AK47 rifle with a wooden butt. The paint on the butt had come out in some parts so it looked old. He also observed that he was a young promising Police Officer who was smartly dressed.

PW1 further stated that when they reached the junction of Kalungwishi Street and 20th Avenue which was less than 50 metres from his house, the Police Officer decided to search him for weapons but found none. Thereafter he told him

to go back home because it might have been a mistaken identify. When he turned to go back he heard the sound of a gun being cocked. When he looked back the Officer shot at him thereby wounding his left leg and fracturing his right leg. PW1 added that at that time he was less than 6 metres away from the Police Officer. When he fell on the ground he saw him running to a certain vehicle which was parked at the junction about 100 metres away from him. He recognized the man who was standing outside the vehicle as Rodgers Malambo, the one who had threatened to kill him. His children and friends pursued the officer who got into the vehicle which was then driven off.

PW1 further stated that his wife later drove him to Kitwe Central Police where she obtained a Medical Report Form. On the same date he was admitted to Kitwe Central Hospital where his right leg was successfully operated on. He was advised by the Doctors that a lot of bone fragments had been removed from the leg. He stayed in hospital for 17 days before he was discharged. He was unable to do anything for himself until September 2005 when he started moving in a Wheel Chair. About 12 months elapsed from the time he was shot before he started using clutches but now he has fully recovered.

PW1 added that he was unable to attend the identification parade because the Doctor had ordered him at that time not to be moving about. He identified the accused in court. He also identified the AK47 rifle produced as P6 and his Medical Report which is on record and marked P5.

Under cross examination PW1 said that there were some witnesses the first time Rodgers Malambo confronted him in the Staff room at the College who intervened and stopped Malambo from forcing him to go with him his car. He

maintained that he had seen the accused running to a certain car before he became semi-unconscious. He even saw his children chasing him.

As regards the Medical Report, PW1 said that it does not include the fact that his left leg was glazed by a bullet probably because the right leg is the one that was badly damaged. He said he was face to face with the accused as they talked at home and when he was being searched. The Police officer had chased his children but they hanged around.

PW2 Cholwe Simusa testified that on 6th March 2005 he was outside the house with his elder brother Chinyama and younger brother Chabota who is speech impaired when a Police Officer with an AK 47 rifle hanging on his shoulder with a belt walked into the yard. He asked for his father (PW1) whom he went to call from the house. When his father got out, the Police Officer told him that he was urgently wanted at Central Police. The Police Officer had to go with his father outside the yard to see his Superiors. PW2 said he followed them with his two brothers Chinyama and Chabota. The Police Officer ordered them to go back just outside the gate so they stood by the road near the gate and watched them walk away.

PW2 said when they reached the junction of 20th Street and Kalungwishi Street which was about 40 metres away, they stopped. The Police Officer searched his father whilst turning him around. Thereafter his father started walking towards them but turned to look at the Police Officer, then the Police Officer pointed the gun down towards and shot him. When he fell down the Police Officer started running into Kantanta Street. PW2 said they started chasing him but he stopped to check on PW1. His brothers pursued him but he did not see where they went. However, he heard the skidding of tyres of a motor vehicle. His brothers returned

without the Police Officer. Then PW1 was taken to the hospital. PW2 said he observed that PW1's right leg was broken, the trousers were torn and there was blood.

On 22nd March, 2005 he went to Kitwe Central Police Station with his brothers to identify the suspect. They were kept in a certain office at the Police Station. They were called one by one to the identification parade. There were a few Police Officers in full uniform on parade. PW2 said he identified the accused person. Thereafter he was taken to a different room.

He added that he had seen the accused closely when he talked to him for about 2 minutes at home and as he walked away with his father. He observed that he was wearing a stripped Police uniform. He was dark with a shaved beard. It was his first time to see him. He said his gun was about 1½ metres long with a wooden butt. He identified the accused on parade and in court. He identified the AK 47 rifle (P6) in court as the one used to shoot his father.

Under cross examination he maintained what he said in examination in chief and added that at the identification parade the Police Officer wore the same uniform he was wearing on the material date. All the men on parade wore the same type of uniform.

PW3 Chinyama Simusa testified that on 6th March 2005 between 08:00 hours and 09:00 hours he was with PW2 outside their house when a Police Officer in full uniform with an AK47 rifle walked into the yard and asked for their father (PW1). He remained outside with the Police Officer when PW2 when to call PW1. PW1 walked out of the yard with the Officer to go and see the Police Officer's Superiors. Then he followed them with his two brothers. When they were outside the yard near the gate the Police Officer said "This is a Police case go back!" Then

they remained standing there watching as PW1 walked away with him. When they were about 30 metres away, at the junction of Kalungwishi road and 20th Street, the Police Officer searched his father. Thereafter PW1 started walking towards them. Then he stopped and looked back at the Police Officer. Thereafter the Police Officer shot him and ran through Kantanta Street. PW3 said he chased him and saw him enter a certain car. He reached the door but the car was driven away. There was only the officer and a driver in the car. He then went back and his father was taken to Kitwe Central Police Station and later Kitwe Central Hospital where he was admitted.

PW3 further stated that on 22nd March 2005 he attended an identification parade at Kitwe Central Police Station with his elder brother and younger brother. There were more than eight people on parade, all in Police uniform. The witnesses were called one by one and after identifying the suspect, they were taken to another room until the parade was over. It was the first time on 20th March 2005 for him to see the accused person whom he was with for about 3 minutes. The whole incident took about 15 minutes. He observed that he was tall, slim and dark. The rifle was made of a wooden handle and some metal. He identified the accused at the parade and in court. He also identified the gun in court.

PW4 Christopher Mulwanda testified that he is a Detective Chief Inspector of Zambia Police. On 22nd March, 2005 he was on duty at Kitwe Central Police Station where he was stationed as the Criminal Investigations Officer (CIO). He was detailed to conduct an identification parade on behalf of the Homicide Squad which was investigating a case of attempted murder. He said he lined up ten men all dressed in Police uniform including the suspect who was third in line. After explaining to the people on parade their rights, three witnesses were called one by one. The first witness Cholwe Simusa identified the accused person who said

nothing. The second witness Chinyama Simusa also identified the accused person who did not complain but requested to change position from 3 to 6 and was allowed. Then Chabota Simusa came and identified him at position 6. The accused still had no complaints. A photographer was present at the parade who took some pictures.

Under cross examination, PW4 said that there was nothing peculiar about the parade.

PW5 Simon Chushi testified that he is a Detective Inspector Scenes of Crime Officer employed in the Zambia Police and based at Kitwe District Criminal Investigations Department. On 22nd March, 2005 he took pictures of Cholwe Simusa, Chinyama Simusa and Chabota Simusa identifying the accused person at an identification parade which took place at Kitwe Central Police Station. He produced a photographic Album showing the four pictures. The first picture shows all the ten men in Police uniform in a line holding numbers. The second one shows Cholwe Simusa identifying the accused person. The third one shows Chinyama Simusa identifying the same person and the fourth one shows Chabota Simusa identifying the same person.

PW5 further stated that Rodgers Malambo and Lawrence Chikwikwi both led him to the Crime Scene in Nkana East. Rodgers Malambo showed him where he had parked a green motor vehicle registration number ACH 264, Nissan blue Bird along Kantanta Street. Thereafter Lawrence Chikwikwi led him to the junction of Kalungwishi and 20th Street where he said he shot PW1. PW5 said he took some photographs showing the accused at the scene. However the film was not processed due to lack of funds. He identified the accused in court.

Under cross examination he said that the said motor vehicle was once in Police Custody and he took photographs of it. They were on the film which was not processed.

PW6 Mulenga David Kabonde said he is employed as a Police Officer in the Zambia Police. He is a Detective Inspector based at Garneton Police Station. On 8th March 2005, he was assigned this case of attempted murder to investigate. During his investigations he went to the crime scene at the junction of Kalungwishi Street and 20th Street in Kitwe where he picked up three empty cartridges. He found some blood stains on the ground. Upon interviewing the complainant he said he suspected Rodgers Malambo who used to work for ZESCO in Mansa who was accompanied by the Police Officer who shot him. He said he saw Malambo's vehicle parked along Kantanta Street at the material time. PW6 said he sent a message to Mansa that Rodgers Malambo should be arrested. On 14th March 2005 he was informed that Rodgers Malambo had been apprehended.

PW6 further stated that he then went to Mansa with his fellow Police Officers and found the said Rodgers in Police custody. Upon interviewing him, he revealed that he had gone to Kitwe with Sub-Inspector Chikwikwi i.e the accused person, to scare the complainant so that he stops flirting with his wife. Thereafter the accused person was apprehended in Mansa.

PW6 said he checked the Armoury Register and found that the accused had withdrawn an AK47 rifle with serial number 785214 with 20 rounds of ammunition on 2nd March 2005. He returned the gun to the Armoury at Mansa Police on 14th March 2005 with only 5 rounds of ammunition. He later took the suspects to Kitwe where Chikwikwi led him to the junction of Kalungwishi and 21st Street where he shot the victim in the leg. Chikwikwi told him that he did not

want to harm the complainant but was chased by members of the public whom he started scaring. PW6 said he later made up his mind to arrest and charge the accused with the subject offence of attempted murder.

Under warn and caution in English which both accused seemed to understand well, they both gave free and voluntary replies denying the charge. They were then detained in Police custody.

PW6 said during his investigations he obtained the said gun and five rounds of ammunition, three empty cartridges and the complainant's Medical Report which he kept in his custody. He later took the gun to the Ballistics Officer for examination but that Ballistics Officer has since retired. He added that Rodgers Malambo passed away in 2006 and that he was informed by some people in Ndola that Precious Munjila Malambo also passed away. He identified Lawrence Chikwikwi in court. All the said items were admitted in evidence.

Under cross examination he said that he had inquired from the Police Officers who were working at the Airport with Lawrence Chikwikwi whether he was working at the Airport on 6th March 2005 and they said no. However he did not obtain any document to show that he was not at work on that day. The vehicle which Malambo had used in this case was given back to his wife pursuant to a Court Order.

PW6 further stated that he has 24 years experience as a Police Officer. From his experience a human being shot anywhere might die if he is not quickly attended to by medical personnel. If a Police Officer wants to scare or maim a person he would shoot him or her in the legs. If the intention is to kill that person straight away, he would shoot him in the head or chest.

DW1 Lawrence Chikwikwi testified that he is a Police Officer. He had worked as a Sub Inspector at Mansa Airport from 1997 until he was arrested. He was answerable to the Officer in charge who was also based at the Airport. On 2nd March, 2005 he did withdraw the firearm exhibited herein with 20 rounds of ammunition from the Police Armoury and signed for them in the Armoury Register. It was for an assignment to guard Barclays Bank in Mansa for 3 days only. On 6th March 2005 he left the gun at the Airport. He only took the gun back to the Police Armoury on 14th March, 2005 when he was instructed to do so by Inspector Demba. When he returned the gun with only five rounds of ammunition the Armoury Officer asked him to return the other 15 rounds of ammunition. He then explained to him that they had put the 15 rounds of the ammunition in another gun at the Mansa Airport. Thereafter, he went back to the airport and collected the 15 bullets which he gave to the Armoury Officer. He did not sign the Armoury book for the return of the 15 bullets. DW1 identified the gun exhibited herein as the one he had withdrawn from the Armoury.

He further stated that he does not know anyone by the name of Rodgers Malambo. He met with Rodgers Malambo for the first time at Mansa Police Station on 14th March 2005. A group of eleven Police Officers had called him in one of the Offices where Rodgers was. They told him that Rodgers had told them that he was with him in Kitwe on 6th March 2005. They beat him and Rodgers up before locking them up in a Cell. DW1 said whilst in the Cell, he interviewed Rodgers who said he would answer his questions later because he was unable to talk due to the beatings. DW1 said the people who beat him up caused one of his teeth to come out.

On 15th March 2005 they were transferred to Kitwe Central Police Station i.e. himself and Rodgers. On 18th March 2005 three Police Officers took them to

the crime scene. He was seated in the back seat of the car. On 22nd March 2005 the Police made him wear a Police Uniform and put him on an identification parade where two young men identified him as the one who shot somebody. DW1 further stated that he was unable to talk during the identification parade as his gum was swollen due of the lost tooth. That is why he did not complain about the identification. He said he was not happy that the witnesses who identified him had seen him coming out of the Cell in uniform. He said PW2 and PW3 just fabricated a story against him. DW1 denied having shot PW1 who only identified him in court because he saw him in the Police Cells on 11th and 13th June 2011. DW1 said he could not tell where the empty cartridges came from.

Under cross examination he said that he was warned and cautioned before being taken to the crime scene. He said the gun he was issued with was capable of being fired but he never fired it. The Police do not issue officers with obsolete firearms. The Armoury Register is supposed to be entered every time there is an activity.

He maintained that he saw Rodgers Malambo for the first time on 14th March 2005 at the Police Station. . He said his beard was shaved on 6th March 2005. He was very sure that shooting someone was likely to cause grievous harm to that person. PW2 and PW3 had seen him before identifying him because they were at the front desk when he passed to go to the parade. He then changed his statement by saying that any one at the front desk cannot see people coming from the Cells. He said he did not sign for the return of the 15 rounds of ammunition because he was treated in a cruel manner and taken to the CID office.

It is not in dispute that on 6th March, 2005 at the junction of Kalungwishi Street and 20th Street in Kitwe PW1 was shot in the legs by a man who was

wearing a stripped Police uniform. It is also not in dispute that at the time that he was shot his sons PW2 and PW3 were watching at a distance. These two witnesses and their brother Chabota had seen the shooter closely for about 3 minutes at home on the material date. The whole incident took about 15 minutes. After the shooting PW3 ran after the shooter who jumped into a vehicle which was immediately driven off. It is also not in dispute that PW1's right leg was badly injured by the bullet and the left leg was glazed. He was hospitalized for a long time and operated on. He fully recovered after a year or so.

I find that before PW1 was shot Rodgers Malambo of Mansa had accused him of having an adulterous relationship with his wife Precious in January, 2005 and threatened to kill him. PW1 had seen the said Rodgers Malambo standing by the car which the shooter ran to just after shooting him. I find that PW1, PW2 and PW3 and Chabota Simusa who is speech impaired and was not called as a witness, all had an ample opportunity of seeing the shooter in a calm situation before he left the house with PW1.

I have looked at the pictures in the photo album and observed that the people on the identification parade wore three types of Police uniform. They can all be said to be green or khaki. Two of them wore the plain uniforms eight of them wore the ones with horizontal straight stripes. The accused also wore one with horizontal stripes but the stripes were zigzag. Eight of them wore black barrets, two of them wore hats which were green stripped. Some of the uniforms looked newer than the others, like the ones worn by number 1 and number 10 which looked dark green. They all wore black boots most of them had no beard or mostache. There was no significant difference in skin tone. They were all dark. The accused is the only one whose uniform had zigzag stripes and he wore a black barret. When he was at position three, the person at position 4 looked very similar

to him facially and they were of the same height. Since the identifying witnesses PW2 and PW3 and Chabota were not told whom to point at, it would have been easy to mistake the accused for the person in 4th position or 10th position who looked like him. PW3 said that the people on parade wore the same uniform which means that he did not observe the difference in the pattern of the stripes. It cannot reasonably be assumed that the accused was identified because his uniform was unique because number 1's uniform was also unique and so was number 10's uniform. I therefore find that the accused was identified because he was seen by the witnesses on the material date. I reject the accused's evidence that the witnesses saw him before the parade because from his own explanation, it is clear that they did not see him just before the parade.

Furthermore, the accused himself did not even comment in his evidence about the type of uniform he wore. Probably because he saw no significant difference with the others. The accused made no complaint at the parade because he had none. I do not accept the accused's evidence that he was unable to talk whilst at the parade because he was able to tell the Police that he wanted to change positions. I also do not accept that the late Rodgers Malambo was unable to talk to him whilst they were in the Cells because the accused said Malambo said he would talk to him later. I am of the view that Malambo must have answered the accused's questions but the accused had something to hide from the court.

I further find that the accused was hired by Rodgers Malambo to go and threaten PW1 or maim him and not to kill him. I do not accept the accused's evidence that he did not know Rodgers Malambo because there is evidence by the prosecution which was not objected to that Rodgers Malambo actually told the Police that he was with the accused in Kitwe on the material date and that the accused was involved in the case. Since there are numerous Police Officers in the

Country, I am of the view that the late Rodgers Malambo who died on 19th January 2006 as shown in the order of appointment of Administrator which is on record could not have implicated the accused for no apparent reason. The Police had reasonably believed that the accused was a suspect in this case.

The accused has failed to give a satisfactory explanation as to why he had kept the AK47 rifle from 2nd March 2005 until 14th March 2005 when he got wind of the investigations which were going on. He has also failed to explain where he took the 15 rounds of ammunition. I reject his explanation that the 15 rounds of ammunition were put in another gun belonging to the Police because there is no reason why that would have been done. I find that he did not return the 15 rounds of ammunition because he had used some of them to shoot PW1. As a Police Officer, the accused would have insisted on signing for the return of the 15 rounds of ammunition if he had returned them because he knew very well that he would be seriously questioned about the same. There is insufficient evidence to prove that the accused led the Police to the Crime Scene. However I accept that the Police went to the scene with the accused person.

I have considered the submissions made by both advocates which I have taken into account in this judgment.

Section 215 (a) of the Penal Code ⁽¹⁾ provides that:

“Any person, who attempts unlawfully to cause the death of another person, is guilty of a felony and is liable to imprisonment for life.”

In the case of **Benwa and Another vs The People**⁽¹⁾ it was held that:

“ In a case of attempted murder the charge is to attempt unlawfully to cause the death of another. There is no question of constructive malice in that case; it is necessary to find the actual intention to kill.”

Considering the case of **Benwa and Another vs The People** ⁽¹⁾ I find that in the circumstances of this case the accused had no actual intention to kill PW1 but to maim him. If he had intended to kill him he would have aimed at a part of his body where death would have been inevitable like the head or the chest as stated by one of the prosecution witnesses PW6 who is a very experienced Police Officer. PW1 was shot at a very short range so the accused would have easily killed him if he wanted to. I therefore find that the prosecution has not discharged its burden of proof as regards the offence of attempted murder.

Section 181 (2) of the Criminal Procedure Code ⁽²⁾ provides that:

“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

In the case of **Benwa and Another vs The People** ⁽¹⁾ the Supreme Court stated that:

“It is not a condition precedent to the substitution of a minor offence under Section 181 (2) of the Criminal Procedure Code that it be cognate to the offence charged. The fact that the alternative is or is not cognate to the offence originally charged will be one of the factors to be taken into account by the court.

The test to be applied by the court in considering the exercise of its discretion to substitute a minor offence is whether the accused “can reasonably be said to have had a fair opportunity to meet the alternative charge.”

Section 48 (1) of the Firearms Act provides that:

“Any person who has in his possession any firearm or ammunition with intent to endanger life or cause serious injury to a person or property or enable any other person so as to do, shall whether or not any injury to person or property has been caused, be guilty of an offence and liable on conviction to imprisonment for a term not exceeding fourteen years.”

I am of the view that the said offence is cognate to the offence originally charged and that the accused had a fair opportunity to meet the said alternative charge. I therefore substitute the offence of attempted murder with the offence of possession of a firearm and ammunition with intent to endanger life or cause serious injury to a person.

It is not in dispute that the gun exhibited herein is a firearm as defined under the Firearms Act and that it was used to endanger PW1’s life and to seriously injure him as planned by the accused and the late Rodgers Malambo. It is clear that the accused did not shoot PW1 in the course of his duty. He unlawfully took the gun from Mansa to Kitwe.

I further find that the prosecution has proved beyond any reasonable doubt that the accused is guilty of the said minor offence. I therefore find him guilty of

the alternative charge and convict him accordingly.

Dated this day of 2011.

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C. K. MAKUNGU
JUDGE