

**IN THE HIGH COURT FOR ZAMBIA**

**HK/90/2011**

**AT THE KITWE DISTRICT REGISTRY**

**HOLDEN AT KITWE**

**(CRIMINAL JURISDICTION)**

**BETWEEN:**

**THE PEOPLE**

**VS**

**LUCKSON SIMWANZA**

Before the Honourable Madam Justice C. K. Makungu

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

For the Accused: Mr. C. Chali - Messrs Nkana Chambers

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**JUDGMENT**

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*Case referred to:*

1. *The People vs Mudewa (1973) ZR page 147*

*Acts referred to:*

1. *Section 200 of the Penal Code*
2. *Section 17 of the Penal Code*

The accused stands charged with the offence of murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia to which he pleaded not guilty.

The particulars of the offence are that Luckson Simwanza on 18<sup>th</sup> January, 2011 at Kalulushi in the Kalulushi District of the Copperbelt Province of the Republic of Zambia did murder John Phiri.

I must mention at the outset that the prosecution has the onus of proving this case beyond all reasonable doubt. The accused has no burden of proving his innocence.

A summary of the evidence adduced herein is as follows:

PW1 Francis Ntamba testified that on 18<sup>th</sup> January 2011 his uncle by the name of Peter Kauseni informed him on telephone that his young brother John Phiri had been killed at his work place. The deceased used to work for Yangjan company which has a project of building houses for NAPSA in Kalulushi. On 20<sup>th</sup> January 2011 the body of the deceased was removed from SINOZAM hospital and taken to Kitwe Central Hospital where a postmortem was conducted by Doctor Olga in his presence. He is the one who identified the body.

PW1 said he observed that one of the legs of the deceased had already been amputated. The Doctor removed seven pieces of metal from the thigh of the amputated leg. He identified seven pieces of metal in Court as the ones which were removed from the leg.

PW2 Kennedy Mbalazi stated that on 18<sup>th</sup> January, 2011 at 06:00 hours he reported for work at Kamalonde Housing Project along Kitwe/Kalulushi Road. He is employed by Habern Security Services Ltd as a Supervisor. His duties are to assign jobs to his subordinates and supervise them. He said that he issued a Shot Gun serial number 7553890 with three rounds of ammunition to the accused person who was a gunman in the same company. That was one of the guns which the security company was legally authorized to use in its operations. The accused was one of the security officers authorized by the Zambia Police to handle the

guns. The accused was assigned to guard the southern part of the site. Around 07:00 hours the accused phoned him saying that he had run out of ammunition because a group of workers who had assembled at Stores wanted to steal from Stores, so he fired a warning shot to disperse them. He said instead of dispersing they went running towards him. One of them ran faster than the others and was about to catch him so he feared that he might grab the Gun from him. In the process he shot him in the leg. He said he then had to run into the nearby bush to hide.

PW2 further stated that since the State Police were on site he told the accused that he would report the matter to them. The accused later reported to him that he was at the main gate, then the Police went and picked him up. PW2 identified the accused in Court and the said Gun.

Under cross examination he said that on the material date management got wind that the workers had planned to start a strike. That is why the State Police were brought in to secure the area. He added that the workers did go on strike that day. However, it was peaceful at the Administration Block where he was. The site is vast. He said according to his investigations some of the employees were trying to loot the Stores.

PW3 Shadreck Chilaka testified that he is a self employed Cameraman. On 18<sup>th</sup> January, 2011 around 07:00 hours he was at the site where houses are being built for NAPSA along Kitwe/Kalulushi road. He was supposed to be taking photographs of his friend Nyambe and his colleagues who worked there. He found Nyambe and other workers off loading some blocks from a Truck. Later a group of workers approached them saying that they had agreed to go together to the manager to collect their money for accrued leave days. Then some of the people

from the group started throwing stones at the Store Room where building materials and tools were kept. There was no one in that room. PW3 said thereafter, he ran into an unfinished building with some of the workers. He then heard a gunshot near the Stores. When he got out of the building, he heard some people saying someone had been shot. He then rushed to the scene to take some photographs. He took five shots showing the young man who had been shot. A while later, the Police showed up and he showed them the pictures on his Digital Camera. The Police requested him to give them the pictures after developing them. One of the Supervisors at the company requested him for the same pictures. So after having them developed he gave them to the Supervisor. The first photograph showed the deceased being lifted out of the foundation where he had fallen. The second picture showed the deceased from the waist down wards. The third picture shows his friends lifting him and tearing his trousers. The fourth one showed his friend moving him away from the scene and the fifth one shows the deceased lying on the foundation.

In Court PW3 was shown only two of the said pictures. One of them shows the deceased from the waist downwards. The second one shows the deceased with a torn pair of trousers.

PW4 Thomas Ngebe testified that he works as a Carpenter at NAPSA Housing Development Project along Kalulushi road. On 18<sup>th</sup> January, 2011 he reported for work around 07:30 hours and found that the workers were on strike. He went with his colleagues to mobilize the workers so that they could go and see their boss Peter. Some of the people who were working at Stores refused to join them and went to sit inside the Stores office. PW4 said he then joined the others in throwing stones on the roof of the Stores. Later, a Security Guard went and fired a warning shot in the air. Then part of the group charged at him and asked him why he had

fired a warning shot. Thereafter the Security Guard approached them and stood on a foundation about three metres away. Then the deceased moved towards the guard. He had stepped on the foundation with his left leg when he got shot in the thigh by the Guard. Thereafter, the Guard ran away. They chased him but when he turned and pointed the gun at them, they scampered.

PW4 added that he was one of the workers who went to assist the deceased who had collapsed in a ditch near the foundation. He said after lifting the deceased he tore the deceased trousers near the thigh. Then they put the deceased in a wheelbarrow. He noticed that the deceased's thigh was damaged. They took him to Peter's office to show him what came out of the delay in paying for the leave days. Later the matter was reported to the Police and the deceased was taken to Sinozam Hospital in Kitwe. The deceased was taken to the theatre. PW4 further stated that he was asked to sign a Consent Form so that his leg could be amputated, he refused and went and asked the deceased's relatives to attend to that. He added that it was the first time he had seen that Guard and did not observe his features. However, he described the Gun which he used because he had seen it often with different Guards. He said exhibit ID1 was the gun he was talking about.

In cross examination he said that there were 20 - 25 people who were advancing towards the guard before the shooting. They just wanted to ask him why he had fired a warning shot.

PW5 Oswald Musonda testified that he is a Carpenter employed by the company building houses at the Kalulushi Housing Project. On 18<sup>th</sup> January 2011 he reported for work in the morning but did not work because the workers had planned a strike in order to get payment for the accrued leave days. Some of his

colleagues started rounding up the workers. Some of the workers at Stores refused to stop working. So his colleagues started throwing stones at the Stores.

PW5 said he saw a Guard running towards them with a gun. When he was about 20 metres away from the group of workers, he fired a warning shot. Then the group of workers started walking towards him. PW5 did not know how many they were. They were asking him why he fired a warning shot. They started arguing with him as he stood on the foundation. The deceased was shot in the left leg when he jumped over the ditch. The Guard then started running away. He was pursued but he kept turning back and pointing the gun at them. They got scared and let him go. The deceased was later put on a wheelbarrow and taken to Sinozam Hospital. PW5 said he did not know the Guard who seemed to be new at the site. He was unable to identify him. However, he identified the Shotgun exhibited herein as the one which was used to shoot the deceased.

PW6 Joseph Nguni testified that he is a Forensic Ballistics expert catering for the Northern region. He is a Police Officer, an Assistant Superintendent based at Copperbelt Division Police Head Quarters in Ndola. He has 16 years experience. On 24<sup>th</sup> January, 2011 he received three exhibit items namely a Shotgun serial number 7553890, one 12 bore round of ammunition and one 12 bore empty Cartridge from Detective Sergeant Muzuni of Kalulushi Police Station for forensics ballistics examination. He examined the exhibits in all aspects of forensics ballistics examination techniques and identified the firearm as a 12 Bore Caliber Pump Action Shotgun known as Akkar Karatay, manufactured in Turkey. The firearm was in excellent working condition. Upon examining the gun further he found out that it had recently been fired. He also found out that the empty Cartridge was fired from the same gun.

PW6 further stated that he prepared a report which he sent to the CIO of Kalulushi Police Station. He identified two empty Cartridges, the Gun and his Report in Court. The Ballistics Report was produced as part of his evidence.

PW7 Gilbert Mzuni testified that he is a Detective Sergeant based at Kalulushi Police Station. On 18<sup>th</sup> January 2011 he was assigned the matter of shooting of John Phiri which was allegedly done by a Security Officer by the name of Luckson Simwanza. PW7 said that he found out that the accused used a Black Shotgun with serial number 7553890. The victim was taken to Sinozam Hospital where he passed away by 13:00 hours.

PW7 said he interviewed the accused who did not give him a satisfactory answer, so he arrested and charged him with murder. The accused denied the charge.

On 20<sup>th</sup> January, 2011 at 10:00 hours a postmortem was conducted on the body of the deceased at Kitwe Central Hospital by Doctor Olga.

PW7 said he recovered the said Gun which he kept in Police custody. He also obtained some pictures of the deceased from a concerned citizen by the name of Shadreck Chilaka which he kept in Police custody. He further stated that he witnessed the postmortem and the Doctor gave him a Postmortem Report which he also kept in his custody. He took the Gun, 1 empty Cartridge and 1 round of ammunition to Mr. Nguni a Ballistics expert for examination. When the examination was done, Mr. Nguni handed the Gun back to him with 2 empty Cartridges. He produced the firearm, 2 empty Cartridges, Photographs and Postmortem Report as part of his evidence. He said during his investigations he went to the crime scene where he found some blood stains.

Under cross examination he said that he found out that the deceased was a worker at the NAPSA Building Project. On that day there was a strike. He was one of the

Police Officers who were sent to the site to monitor the situation. His investigations revealed that the workers were throwing stones at the Stores but the intention was not to injure the accused. There was no mob charging at the accused.

In re-examination he said that he found out during his investigations that the accused had fired a warning shot.

The accused gave evidence on oath and called no witnesses. He said that he was working as a Security Guard at Herban Security Services Limited before he was arrested for this case. On 18<sup>th</sup> January 2011 he went to work at the NAPSA Housing Project. On that day his Supervisor Mr. Mbalazi gave him the Gun exhibited herein after briefing all Guards that the workers intended to go on strike on the same day. Whilst they were on parade some Police Officers from Zambia Police arrived.

He said he went to the Western Wing where he was assigned to work. About 30 minutes later, some workers started rounding up their workmates. They later went to make noise in the central part of the site. He then stood at a point where he could observe what they were doing. Some of them had stones, others had plunks which they started hitting the Stores with. The accused said he got worried that they might break the Stores and delay the project. When the situation got worse he went and stood where they could see him. Upon seeing him they did not stop what they were doing. One of them shouted "There is the Guard!" Then they made two groups, one group carried on throwing stones at Stores and the other charged at him.

He said he fired a warning shot in the air in order to alert the Police and his fellow guards and stop them. As he was waiting for back up the group continued advancing. He said he retreated for about 50 metres before reaching a foundation.



Some of the workers who were advancing towards him had plunks, others were throwing stones at him. They were about 100. When they were about 10 metres from him, he verbally warned them not to get close to him as he was holding a lethal weapon. He said he asked them to retreat and go and see their boss instead of damaging property. They just continued charging towards him. He jumped over a ditch of the foundation onto the ground. By then they were about 3 metres away from him. He realized that he was standing on muddy ground as it had rained the previous night. He was sliding and unable to retreat any further for fear that he might fall down. In order to protect himself and the firearm he fired at the feet of the workers. Since the gun shakes when its fired and the deceased was in motion, he was shot in the thigh and not the feet. Thereafter they all stopped and shouted that he had killed a person. The accused said he then ran into the bush.

An hour and half later he called Mr. Mbalazi and reported the matter to him. Mr. Mbalazi requested him to find his way back to the site. He went back and entered through the Eastern Wing. He hid in one of the incomplete houses and asked Mr. Mbalazi to send some more ammunition because he feared that the workers might chase him. He found the Police at the gate and surrendered to one of them the Firearm with one bullet and an empty Cartridge. They took him to Kalulushi Police Station and charged him with attempted murder. Around 15:00 hours they told him that the victim had passed away. Three days later, he was charged with murder.

The accused said he had no intention of killing anyone. His intention was to protect the property which they were breaking and himself. He also intended to protect the workers. He said the victim might have survived if he was given first aid instead of being taken around the site on a Wheelbarrow.

Under cross examination he said that his area of work included the Central part of the site. The group of workers who were running towards him were armed with stones and plunks. He did not run away after the warning shot because he wanted them to stop what they were doing. Nobody had gone to help him. He further stated that he aimed at the feet because it is a rule that when stopping a person he should maim him on the leg or below the knees. He said he was aware that shooting someone below the knees would cause grievous harm to that person.

It is not in dispute that on 18<sup>th</sup> January, 2011 around 08:00 hours the workers at the NAPSA Housing Project along Kalulushi/Kitwe road were on strike over payments for their accrued leave days. The deceased was amongst the striking workers. The accused was on duty as a Security Guard. He was lawfully armed with the Shot Gun which has been exhibited herein with three rounds of ammunition. There were two other armed Guards in different locations in the same area. The Zambia Police were also present in the area but stayed at the Administration Block.

It is also not disputed that as the accused was guarding the Western Wing of the site, he saw a group of workers who went to round up their colleagues so that they could go and see their boss. The workers then started throwing stones at the Stores. Some of them had stones others had plunks. It is also not in dispute that the accused then fired a warning shot. Thereafter the group separated into two. A group of about 100 workers started charging at the accused whilst asking him why he had fired a warning shot. He verbally warned them not to follow him.

I find that some of the workers who were charging at him were throwing stones at him. The accused was retreating but did not turn to run away. I accept his evidence that he did not turn to run away because he was keen on protecting the property. The other reason why he did not run away was because he was in

possession of a gun which would have slowed him down. I further find that the deceased was shot in the leg as he was advancing towards the accused person. The accused had aimed the gun at the feet but when the gun moved the deceased got shot in the thigh.

I find further that the accused run away after shooting the deceased and the workers pursued him. He ran into the bush and only returned on site after reporting the matter to his Supervisor PW2.

It is clear from the evidence that after the deceased was shot the workers put him in a Wheelbarrow and took him to their boss. The deceased was later taken to Sinozam Hospital before he was transferred to Kitwe Central Hospital where he died after his leg was amputated.

The accused has pleaded self defence. I have considered the viva voce submissions made by Mr. Waluzimba. I have also read the submissions filed herein by Mr. Chali on 5<sup>th</sup> October 2011.

Mr. Waluzimba submitted that self defence may be tenable if someone wanted to protect himself, another person whom he shares an immediate relationship with or property. If self defence is established the accused may be acquitted. In order to establish that defence the defence ought to show that it was necessary for the accused to take the defensive action which he took. He submitted that in this case none of the workers on site attacked the accused so the use of force was not necessary. Mr. Waluzimba said that the defence must also show that there was an imminent danger that the accused would be attacked. In this case there was no such danger. The third factor to be considered by the Court is whether reasonable force which was proportionate to the attack was used in order to repel the attack.

He urged the court to find that the use of a Firearm in this case where the workers were only armed with Stones and Plunks was excessive.

Mr. Waluzimba further submitted that another factor to be considered by the Court is whether the accused had retreated. He said retreating at law is not understood to mean running away in a dramatic manner. It is understood to mean that the accused showed that he did not want to fight his challenger. Mr Waluzimba submitted further that the accused said that he retreated as an afterthought because the prosecution witnesses were not cross examined about that. He said PW4 and 5 said that the accused did not retreat. Mr. Waluzimba submitted that the accused had malice aforethought because he knew that such an action may cause grievous harm to the deceased.

Mr. Chitala in his submissions cited **Section 200 of the Penal Code** <sup>(1)</sup> under which the accused is charged, which provides that:

*“Any person of malice aforethought who causes the death of another person by an unlawful act or omission is guilty of murder.”*

He said the ingredients of this offence are:

- (a) An unlawful act or omission on the part of the offender which causes the death of another person
- (b) Intention to cause death
- (c) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person.

Mr. Chitala also cited **Section 17 of the Penal Code**<sup>(2)</sup> which provides that:

*“subject to any other provisions of this code or any*

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

Mr. Chitala submitted that his client acted in self defence.

On the question of retreating he cited the case of **The People vs Mudewa**<sup>(1)</sup> where it was held inter alia that:

*“It is not as we understand it that in law a person threatened must take to his heels and run in a dramatic way .....but what is necessary is that he should demonstrate by his action that he does not want to fight. He must demonstrate that he is prepared to temporize and disengage and perhaps to make physical withdrawal.”*

Mr. Chitala therefore submitted that in the present case the accused was unable to retreat any further after falling down when he jumped the foundation considering the distance between himself and the mob. The accused physically tried to withdraw and disengage by moving backwards. His retreat is further supported by the fact that he actually fired a warning shot.

He further submitted that under the circumstances of this case, it was reasonable and necessary for the accused to use the force which he used. The accused was under attack by a mob of over 50 people. It is clear that his life was in danger.

I am of the view that the mood of the mob of about 100 men who were advancing towards the accused person was very bad. I say so because they were armed with offensive weapons and some of them had been throwing stones at the Stores. They were not afraid of following a person armed with a gun who had just fired a warning shot.

I do not accept Mr. Chali's submission that the accused fell down. Evidence on record is to the effect that the accused moved backwards until he could not move anymore due to the slippery ground. I find that it became necessary for him to defend himself at that point because the mob had gotten very close to him. It was therefore necessary for him to use the gun in order to maim one of them. The use of the Firearm in the circumstances was reasonable. I therefore find that the accused's intention was not to kill anyone. Initially he had fired a warning shot in an attempt to disperse the mob and protect company property.

It is clear that there was a delay in taking the deceased to the hospital and he was not given first aid. The postmortem report shows that the cause of death was profuse bleeding and pain shock. It also shows that the right leg was amputated. Since the Doctor who wrote the Medical Report was not called as a witness, I accept the accused's evidence that the deceased's life might have been saved if first aid had been applied and he was rushed to the hospital as there is no evidence to the contrary.

For the foregoing reasons, I find the accused acted in self defence and is not guilty

and acquit him. The case is dismissed.

Dated this ..... day of ..... 2011.

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**C. K. MAKUNGU**  
**JUDGE**