

**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT KABWE
(CRIMINAL JURISDICTION)**

HB/125/11

THE PEOPLE

VS.

JOHN KENANI LILANDA	ACCUSED 1
PETER MUSUKUMA	ACCUSED 2
EZRON MWABA	ACCUSED 3

Before the Honourable Madam Justice M.S. Mulenga in Open Court on the 25th Day of July, 2011 at 09.30 hours in the forenoon.

**FOR THE PEOPLE : MR. K. WALUZIMBA - STATE ADVOCATE
MR. J. AKAPELWA - STATE ADVOCATE**

FOR THE 1ST AND 2ND

ACCUSED : MS. B. PIZO – LEGAL AID COUNSEL

**FOR THE 3RD ACCUSED: MR. F.B. NANGUZGAMBO OF MESSRS
NANGUZGAMBO & CO.**

JUDGMENT

CASES CITED

1. KAZEMBE AND ZEBRON V. THE PEOPLE (1969) ZR 22 (C.A)
2. R V. HUGHES, PETRYCK, BILLAMY AND BERIGAN (1943) DLR1

JOHN KENANI LILANDA (A1), PETER MUSUKUMA (A2) and EZRON MWABA (A3) stood charged with one (1) count of Murder contrary to Section 200 of the Penal Code Chapter 87 of the Laws of Zambia.

The particulars of the offence were that **JOHN KENANI LILANDA, PETER MUSUKUMA** and **EZRON MWABA** on the 6th day of January, 2011 at Kabwe in the Kabwe District of the Central Province of the Republic of Zambia, jointly and whilst acting together did murder **THOMAS MUVUMBI**.

The prosecution called twelve (12) witnesses. **PW1 ENOCK TUMBAMA** a Peasant farmer of Mumbwa District stated that he was the father to the deceased Thomas Muvumbi and he identified the body to the police and the doctor for post mortem purposes on 8th January, 2011. He observed that the body had a wound at the bladder area.

PW2, TILMAN FELIX NAWALOWSHI a Manager at CMR Farm Kabwe testified that on 6th January, 2011 after receiving a phone call from his boss Ms. Sara Ashworth (PW3), he picked the deceased who was a game guard and left him to patrol an area where suspected poachers had been seen. He was informed around 12.30 hours by the deceased that he had sighted two (2) men armed with a firearm carrying 2 sacks of meat. He picked two (2) other scouts (PW5 and PW6) and joined the deceased in trailing the intruders to Jabali Farms. They later saw the two men who had been seated stand up and pick the sacks of meat and they ran towards them. He fired in the air and commanded the two to stop but they dropped their sacks and ran in different directions. He then fired five shots with the pistol as the gun had jammed. The three scouts chased the men while he tried to unblock the gun. He then heard a gun shot and was later informed by PW5 that the deceased had been shot. He informed PW3 who went to report to the police. He went with PW5, PW6 and Mr. Ashworth to the scene and found the deceased dead. He did not make any observations on the body and could not identify the two men but the one who had a firearm was wearing a green overall.

In cross examination he said the scouts were behind him when he fired. The men did not shoot at him, he only heard the gunshot later.

PW3 SARA ASHWORTH a Farmer of CMR Farm Kabwe said she was informed by a neighbour of the presence of people in her farm. She sent PW2 to get scouts and verify. At around 14.30 hours she heard gunshots and was later informed by PW2 that a scout was shot.

She went to report to the police and came back with three (3) police officers and later fetched other officers from Anti Robbery and scenes of crime. At the first scene they found two sacks of meat and at the other scene the deceased and a half pair of Bata boot. She observed blood on the abdomen part of the deceased.

PW4 CHIKASHI WAMBULULA a Soldier based at Chindwin Barracks stated that his gun (exhibit P1) had a fault and he took it to A3 for repair in October, 2010. He was not finding A3 every time he went to check on the progress. On 14th January, 2011 the police picked him from the barracks and he identified his gun at the police and told the police he had given it to A3 for repair. In cross examination he said the gun was never in his custody again after he gave it to A3 in October, 2010. He had never seen A1 and A2 before and had never received any meat on account of the gun. A3 was a fellow soldier who had since retired.

PW5 SHABBY NYAMBE a Scout at CMR Farm said that on 6th January, 2011 at around 12.00 hours PW2 picked him and PW6 to go and see the poachers. They found the deceased who showed them the direction the men had taken. They followed and he saw two men who stood up from where they had been sitted and were carrying bags containing meat. PW2 fired and the men dropped the bags and started running. He was chasing on the left side while the deceased was on the right side when the one who had a gun (A1) fired. He followed the one with a gun whom he identified as A1 and found the deceased holding him. The deceased then fell and he (PW5) hit A1 with an iron bar on the forehead. A1 pushed him down and picked the gun (exhibit P1) and ran away. He went to the deceased and saw some blood and discovered that he was not breathing. He went and informed PW2. He identified A1 at an identification parade held at the police station. He also identified P2 as the right gum boot A1 had left at the scene and P3 as the overall A1 was wearing.

Cross examined , he said he identified A1 as he struggled with him for a short time during day light and could not mistake his identify. He only heard PW2 fire one shot and A1 also fired one shot from P1 which killed the deceased. The three of them were in front of PW2 when PW2 fired.

PW6 DOUBT SHILAMA a scout of CMR Farm narrated that he with PW5 were picked by PW2 on the material date and his testimony on how they encountered and chased the two men was in line with that of PW5. He further stated that of the two men, one was carrying a gun and the other an axe whom he identified as A2 at a police identification parade. He caught A2 and they struggled for about 10 minutes till he fell down. A2 picked the axe and PW6's matchet and ran away. He later learnt that the deceased had been shot. When cross examined he said the three of them (scouts) were together with PW2 who was slightly behind them when he (PW2) fired the warning shot.

PW7 Detective Sergeant **FRED CHILUFYA** based at Prospect Police Station testified that upon receipt of information he with other officers went to the house of A2 who ran away upon seeing them. He got permission from A2's grand mother to search A2's house where he recovered the matchet (Exhibit P4). He also attended the post mortem examination of the deceased. PW6 identified the matchet (P4) that he had recovered and the matchet was peculiar to the ones used at CMR Farm only in that area.

PW8 was Detective Seargent **ROGERS KAFULA** a Crime Officer under the Forensic Section. He went to the scene with the complainant PW3 and other officers and took photographs of the place where the two (2) sacks of game meat were dropped and at another scene 100 meters away where he photographed the body of the deceased and the half pair of boot (P2) near the body. He attended the identification parade where A1 and A2 were identified. He later interviewed and cautioned them and they agreed to lead him to the scene on 14th January, 2011. They took him to the place they said they had slaughtered the animal from where he picked two empty cartridges (P6). They also took him to the place where they had dropped the sacks of meat and where the deceased was left laying. The two latter scenes matched with the earlier ones he was led to by the complainant (PW3). He took photos at all the points and produced them as contained in the photographic album (P7). In cross examination he said the two empty cartridges were picked at the scene where the animal was killed and not where the deceased body was laying.

PW9 Constable **FABIAN MBANGU** of Prospect Police Station testified that he apprehended A2 who was on the run, through the leading of A1.

PW10 Detective Inspector **MATILDAH BUSIKU** a Forensic Ballistic expert based at the Police Headquarters in Lusaka told the court that she received a greener shotgun Serial No. G80500 (Exhibit P1) and three Exhibit cartridges and a pellet (collectively marked as P8) for examination. She fired two (2) cartridges from P1 to obtain the test cartridges (Exhibit P6). She examined the exhibit and the test cartridges and the pellet and found that they were fired from the same firearm (P1). She produced the ballistic report (P9) and the photographic album (P10). She further stated that the cartridges and the firearm P1 were dangerous and restricted commercial weapons capable of causing fear, injury or death.

PW11 Detective Chief Inspector **JOSEPH CHANDA CHIPALATA** based at Kabwe Central Police Anti-Robbery narrated that on 14th January, 2011 he conducted an identification parade comprising twelve (12) people where PW5 and PW6 each identified A1 and A2, respectively. Before the parade he had explained to A1 and A2 their rights as suspects and after the parade he asked them if they had any complaints to which they replied that they had none.

PW12, Detective Chief Inspector **MORGAN NGENDA WAKUWILU** of Prospect Police Station was the Investigating/Arresting Officer. He testified that on 6th January, 2011 when he received a report from PW3, he visited the scene with other officers and saw the two sacks of meat, a grey cap, half pair of boots and the deceased's body. The deceased body had three wounds on the abdomen and there were signs of struggle as the grass was disturbed. On 12th January, 2011, he received information that there was an injured person in Malisope Village. He went to the village and apprehended A1 from his house. A1 had a wound on his forehead and he consented to the search of his one roomed house and the kitchen. He found eight (8) rifle rounds and eight (8) shotgun ammunition (Exhibit P13) in the house and the shot gun (P1) in the thatched kitchen roof. He also picked the axe (P5) in the kitchen. A1 said he got the ammunition and the shotgun from A3 for purposes of hunting game meat and also confessed to having killed a person at CMR. A1 later led to the apprehension of A2 and A3. He got the firearm licence (P14) for P1 from A3's house. A3 was also at the identification parade but was not identified by both PW5 and PW6. A1 led him to recover the other half pair of the gum boots (P12) hidden in the field. He took the two exhibit cartridges with one cartridge he had picked

sometime in November, 2010 (P8) for ballistic examination. He produced Exhibits P1 – P6, P8, P11- P16 as part of his evidence. He later warned and cautioned and then jointly charged A1, A2 and A3 for the subject offence.

In cross examination, he said he did not go through the photographic album (P7) as it was not in his custody and he did not see the bullet wounds on the deceased thigh. The postmortem report stated that the deceased was shot dead. He did not find cartridges or shells that were fired from PW2's guns at the scene. He said he jointly charged A3 with the others because the murder resulted from the poaching and A3 had given A1 and A2 the gun and ammunition. He was aware that A3 had been also charged with failure to secure a firearm.

This marked the close of the prosecution case and all the parties relied on the evidence on record for a ruling of case to answer. After considering the evidence, I was satisfied that the prosecution had not established a prima facie case against A2 and A3 with regard to the offence of murder although they had a common intention to carry out an unlawful act of poaching. A2 and A3 were therefore found with no case to answer and were acquitted and the State was advised to charge them with an appropriate offence in line with Section 139 of the Criminal Procedure Code despite the acquittal. On the other hand, I found A1 with a case to answer and placed him on his defence.

The accused (A1) opted to give evidence on oath without calling any witnesses. He testified that on 6th January, 2011 he was with his friend Peter Musukuma (formerly A2) at CMR Farm where they had killed an animal. They each carried a sack of meat. After resting at some point he heard a gun shot in the air and saw people running after them and telling them to stop. They dropped the sacks and upon hearing a lot of gun shots in their direction, they feared and started running. He ran into some shrubs and was caught by one person who grabbed his hands and the gun that was on his back while shouting to others saying “come, I have apprehended him.” He saw another person come with an iron bar who hit him three times on the head while he was being held by the first person. He asked them not to kill him but to take him to the police but one of them responded that they would kill him. The one who had the iron bar put it down and came and held his neck. In the process of trying to free himself from the two, they all fell down

and then he heard a gun shot. He did not know what made the gun to fire since they were struggling for about five (5) minutes before they fell down. The person who was holding his neck left and ran away. He saw the other person laying near and he got the gun whose belt was now loose and ran to his home. He was later apprehended by the police who went to his house from where they also picked the shot gun (P1) and the ammunition, P13. At this time, he was not informed by the police that he had killed a person and he disputed PW12's evidence that he confessed to having killed a person at CMR Farm. He later took PW8, a scenes of crime officer to where they had killed an animal and where they had dropped the sacks of meat.

In cross examination, he said he did not know that poaching was an offence and could not confirm that it was his bullets that killed the deceased. He heard the gun fire while they were struggling but could not say that it shot the deceased. When the other person left, he just stood up and ran away as there was no further struggle. The gun fired when the three of them were struggling at the scene and he did not hear any other gun shot at that time. In re-examination, he said the gunshots he first heard stopped after the second person came to where he was being held by the first person. He did not know what made the gun to fire.

This was the close of the defence case and both parties relied on the evidence on record.

The summary of the facts not in dispute are that the accused A1 and his friend (formerly A2) went poaching in CMR Farm on 6th January, 2011, whilst carrying two sacks of meat, they were confronted by four (4) CMR Farm workers one of whom fired in the air and ordered the two to stop. The two dropped the sacks of meat and ran in different directions. The accused (A1) was carrying a shotgun (P1) and his friend, an axe (P5). A1 was pursued by the deceased and PW5 and in the process the deceased was shot and left lying on the ground. The details on how the deceased was shot are the subject of the conflicting evidence of PW5 and A1. PW5 stated that A1 fired at the deceased who continued running until he caught A1. When he arrived at the scene he found the deceased holding A1 and shortly after the deceased fell down. He proceeded to hit A1 with an iron bar and was pushed down by A1 who then ran away. He observed some blood on the deceased and that he was not breathing. A1 on the other hand, narrated that as he was running he was caught by the deceased who held his hands and the gun which was on his

back. PW5 came with an iron bar and hit him three times on the head. He then put down the iron bar and held his neck and the three of them continued struggling for five minutes before they all fell down. He heard a gun shot when they fell and PW5 got up and ran away while the deceased was still lying near him. He got up and picked the gun and ran home. I have considered the two conflicting stories and I find that the version of A1 is the more plausible one. I say so because it is highly improbable that a person who is shot at an apparently close range and dies shortly after would continue running after A1 until he caught him. Further PW5's demeanour when giving evidence was not of a very confident witness compared to PW6 and other prosecution witnesses.

Having established the facts, I now consider whether the prosecution has proved its case beyond reasonable doubt. In murder cases, it must be proved that the accused person with malice aforethought unlawfully caused the death of the deceased. This naturally shows the two ingredients to be proved. Did the accused cause the death of deceased?

Causing death is defined in Section 207 of the Penal Code as inflicting bodily injury whether aggravated by treatment or not, and actual or threatened violence which causes or hastens death among others. An act may be deemed to have caused death even though it is not the immediate or sole cause of death. Section 207 in part states as follows:

***“207. A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases:
(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.”***

The facts as stated by A1 are that while he was struggling with PW5 and the deceased who held both his hands and the gun which was on his back, the three of them all fell down and he then heard a gun shot. Shortly afterwards both PW5 and A1 ran away leaving the deceased lying on the ground. The gunshot wounds on the deceased were on the front part of his body and therefore consistent with the fact that the gun which was on the scene (P1) inflicted the wounds. Had it been another gun fired towards them, the gunshot wounds would have been on the back or

sides of the deceased body. I find so despite A1's denial that the gun he had (P1) shot the deceased. However, it is not clear from A1's account as to who fired the single shot that killed the deceased because the three of them were struggling before they fell and the gun fired. An act or omission which could not have caused death on its own may be deemed to have done so even when it is not the immediate or sole cause of death. In this case, A1 had committed an unlawful act of poaching and was resisting to be apprehended and hence the struggle that eventually resulted in the gun shot which killed the deceased. Had the accused not resisted to be apprehended, the unfortunate incident would not have happened. In **Kazembe and Zebron v. The People (1969) ZR 22 (C.A)** Section 207(e) as it now stands (then Section 184(e) was interpreted as follows:-

“We would not care to attempt an exhaustive or precise definition of the meaning of the word “accompanied “ and we think it likely that the extent of application of this provision will depend very much upon the circumstances of each individual case to which it is relevant. In our view, however, the word ‘accompanied’ as used here, must connote a close connection in time, possibly also in place and certainly in translation. There can be no “accompaniment” in the sense envisaged by paragraph (e) where there is substantial difference in time.”

It was further stated that the section should always be interpreted in line with common sense and justice. In this current case, the act which led to the death of the deceased was what properly accompanied the action of the accused in struggling and resisting to be apprehended and the acts were connected both in time and transaction. This therefore proves that the accused's action though not the sole cause, did substantially cause the death of the deceased.

Did the accused have the requisite malice aforethought? Section 204 of the Penal Code lists circumstances that can prove malice aforethought which, among others, include; intention to cause death or do grievous harm whether death occurs or not, intention to commit a felony or intention to facilitate flight or escape from custody. There is nothing in the facts of this case to prove malice aforethought as defined in the Act. The prosecution has thus only proved one element of the offence of murder and the charge cannot therefore stand. However, the charge of

Manslaughter has been proved beyond reasonable doubt that the accused unlawfully caused the death of the deceased. This finding is in line with the Canadian case of **R v. Hughes, Petryck, Billamy and Berigan (1943) DLR1** in which it was held that where death is caused by discharge of a firearm in the hand of the accused during a struggle for possession of firearm in the course of committing an offence (robbery in that case) and notwithstanding that the accused must have known that death was likely to result, the court is entitled to find a verdict of manslaughter if it finds that the gun was not discharged by the voluntary act of the accused.

I therefore find A1 guilty of 1 count of Manslaughter contrary to Section 199 of the Penal Code Cap 87 of the Laws of Zambia.

M.S. Mulenga

JUDGE