

IN THE HIGH COURT FOR ZAMBIA

HP/03/2014

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:



VERSUS

TIMOTHY TWAMBO

Before the Honorable Mr. Justice C.F.R. Mchenga SC

For the People: M. C. Zimba, National Legal Aid Clinic for Women.

For the Accused person: M. Cheelo, Muleza Mwiimbu & Associates

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## J U D G M E N T

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Cases referred:

1. Chimbo and Others v The People [1982] Z.R. 20
2. Molley Zulu, Abraham Masenga and Smiling Banda v The People [1978] Z.R. 227
3. Mbinga Nyambe v The People S.C.Z. Judgment No. 5 of 2011

Legislation referred to:

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

Timothy Twambo, the accused person, stands charged with the offence of Acts Intended to Cause Grievous Harm contrary to Section 224 (a) of the Penal Code. The particulars of offence allege that on 24<sup>th</sup> May

2013, at Chongwe in the Chongwe District of the Lusaka Province of the Republic of Zambia, with intent to maim, disfigure or disable he did cause grievous harm to Moshen Kayomena. He denied the charge and 7 prosecution witnesses were called.

The first witness was Moshen Kayomena (Pw1). His evidence was that on 24<sup>th</sup> May 2013, at about 17 hours, he set off in the company of Charlton Malambo (Pw2) to collect some grass from the accused person's farm. They were using an ox cart and when they got there, Pw2 went and alerted the people that they had come to collect the grass. On his return, Pw2 told him that he had informed the people he found that they had gone there to collect grass.

They loaded a heap of grass and as he was about to get out of the cart to pick the second heap, he heard a gunshot. He was shot in the chest and he got to the front of the oxen where his friend was. He showed Pw2 where he had been shot and he started running. Pw2 ran behind him. He saw the accused person who was also running away. Even though there was tall grass it was visible enough for him to see.

As they ran away, he fell down and Pw2 by passed him and proceeded to inform the people at home of what had happened. He remained on the

ground for a long time because he lost strength. When he regained his strength, he started off for home slowly. His pace was limited by the pain he was suffering as a result of being shot. He followed the furrows in the field until he got to Mr. Chinondo's village where he explained what had happened before fainting.

Mr. Chinondo helped him get to Galagan's house where a motor vehicle took him Mpango Clinic. At the clinic, he was referred to Chongwe Clinic where he was in turn referred to Mwanawasa General Hospital. He went to the hospital where he was operated on and two pellets were removed from his right arm. He was given a medical report which he identified (Exhibit P5). Ever since he was shot, he has been unable to do any work because he suffers from body pains whenever he attempts to do so. He does not know why the accused person shot him because he did not do anything wrong.

When he was cross-examined, Pw1 said Pw2 asked him what had happened because he was in the cart while Pw2 walking and he did not know what had happened. Pw2 heard the gun shot but did not know where it came from. After the gun shot, he jumped off the ox cart and begun to run in front of it and Pw2 ran behind him. He fainted after sometime and

only regained consciousness later. Even though he got confused after hearing the gun shot, he remained alert.

Pw1 admitted that he saw the accused person whilst in a state of confusion and fright. He has known him for about ten years and has never seen him act in that manner. It takes less than an hour for him to get to the accused person's farm from his house but on the material day it took about 15 minutes because the oxen were running. They arrived in the accused person's field to collect the grass between 16 and 17 hours but he was shot around 18 hours. It was not dark at the time.

He knew a person called Silas Hanalubila and that they got along despite of the fact that he is older than him. He recalled telling Silas Hanalubila that he had been shot at by someone but did not tell him who it was because he became unconscious. Pw2 was not the one who went to inform his relatives about the shooting. He remembered giving a statement to the police in which he said that he felt as though he had been shot at. When he first heard the gunshot, he thought it was a tyre burst but he later discovered that his chest was wet. When he got to Mr. Chinondo's house, he found him putting maize in a barn. They met because Mr. Chinondo started following him as he was crying. He

denied being confused at that point.

Under re-examination, Pw1 maintained that he did not tell Silas who shot him because he became unconscious immediately after telling him that he had been shot. He managed to identify the accused person because he was not completely confused at the time; he still had the sense to recognise him.

Cosmas Charlton Rambo Malambo was the second prosecution witness (Pw2). His evidence was that he asked for grass to thatch a maize barn from their neighbour, the accused person. He gave him permission to cut the grass from his farm and on 24<sup>th</sup> May 2013, he went to ask for oxen from his brother to collect the grass. His brother gave him the oxen and he requested Pw1 to go with him. They started off around 17:00 hours and when they got there, he went to inform the accused person's son that he had got permission from his father. He only found his wife whom he informed that he had got permission.

They proceeded to collect the grass but when they were about to collect the second heap he heard a sound. Pw1 who was in the cart jumped off and went to the front of the cart where he was and asked him what had happened. He told him that he did not know what happened

and they started running. Pw1 was in front of him and they ran in the direction where the accused person was.

Pw1 asked him if he saw the person who shot him and he agreed doing so. Pw1 told him he had been shot after touching his chest and discovering that it was wet. Then ran after seeing the Accused person and it was towards 18:00 hours. It was not yet dark. There were scattered small trees in the area. After running for a short distance, Pw1 fell down but he continued on to inform the people at home what had happened. When he reached home, his sister advised him to remain there because he was a bit disturbed and she went to inform Mr. Luyando of what had happened.

There was a misunderstanding between his father and the accused person because from the time his father built houses for the accused person, he has not paid him any money to date. He could not tell why he was allowed to cut the grass despite the misunderstanding. He has known the accused person for a long time and has done some farm work for him.

When he was cross-examined, Pw2 said it is Pw1 who asked him what happened after they heard the sound. He could not estimate the number

of minutes they ran when they saw the accused person. As they ran towards him, the accused person also started running whilst holding a firearm. He was not very far but he could not tell the type of firearm he was carrying because he was running and he did not pay attention. It was brown in color but he did not see its length. He denied being confused when he heard the gun shot. He only got confused when he got home.

He ran after hearing the gun shot because he was scared. He maintained that he did not get confused when he heard the gun shot but when he saw the accused person. He went to report the incident to Pw1's relatives but he did not go to the scene. He was not amongst those who went to the hospital. He remembered giving a statement to the police on 25<sup>th</sup> May 2013, but it was not read back to him. The statement is not correct on the point that they went to the scene to collect Pw1. He gave his statement in Nyanja a language that he did not choose. He cannot read Nyanja and he did not sign the statement. The accused person was in the company of one of his workers when he asked for the grass.

Pw2 said he went to ask for grass after the difference between his father and the accused person because he was in good terms with him.

He denied telling lies to support his friend and implicate the accused person, what he said is what he saw. He maintained that the shooting was around 18:00 hours and it was not very dark. The accused person was around because he saw him disembarking from a car at the road side around 16:00 hours.

He could not recall what the accused person was wearing. They did not talk to him. He did not remind the accused person about the grass because he already had his permission but he informed his son because he did not want to take them by surprise. He maintained that it was the accused person he saw disembarking from a motor vehicle earlier on.

Dauti Malambo was the third prosecution witness (Pw3). His evidence was that on Friday 24<sup>th</sup> May 2013, around 18:30 hours, he received a phone call requesting him pick up someone who had been shot by the accused person. He went to where the caller was and found that it was Pw1 and he was lying on the ground. Pw1 told him that he had been shot by the accused person and he had blood all over his chest. He took him to Mpango clinic where they were referred to Chongwe Clinic.



He knew Pw2 and his father. He also knew how the accused person and Pw2's father related. Pw2's father differed with the accused person over some 7,000 bricks he had burnt for the accused person. It is not true that he is the one who drove the accused person back from Chongwe on that day, the vehicle was driven by his in law, Mwembeshi Hakalubila. He only retrieved it from the football ground after the phone call.

When he was cross examined, Pw3 said Mwembeshi called him and informed him that he had dropped the accused person from town. He admitted knowing Pw1. He admitted that he was not the one driving the motor vehicle when the accused person was dropped and that he only drove it after Pw1 was shot. Pw1 told him that he was shot by the accused person while he was lying on the ground. Cyrus Hanakubila is the person who took Pw1 to his house and at the time he had gone to check on the vehicle. He denied seeing the accused person disembarking from the motor vehicle.

They went straight to the hospital and only went to the police station on the 25<sup>th</sup> of May where they found Pw2. He looked confusion. He used to get along with the accused person even though he never used to relate well with his father.

Mwembeshi Mwanagimbila was the fourth prosecution witness (Pw4). His evidence was that 24<sup>th</sup> May 2013, he left Chongwe for his village around 14:00 hours. He was driving a Toyota Hilux and gave a lift to people who included the accused person who disembarked at the junction leading to his house around 16:00 hours. He knew him because they used to live in the same area and they relate well.

When he was cross-examined, Pw4 said that he dropped the accused person around 16:00 hours and not around 18:00 hours.

The fifth prosecution witness was Detective Inspector Andrew Mumba (Pw5) and his evidence that on 25<sup>th</sup> May 2013, they received a report from Mpango Area, in Chibombo District, that a man was shot by the accused person. The following morning, at around 08:00 hours, Pw1's relative went to the police station and took him to the scene of the incident. He went there in the company of two other police officers, Detective Inspector Chileshe and Detective Constable Walawala. In the accused person's farm, they found a heap of cut grass and they were then taken to the accused person's house where they found him. They explained to him the purpose of their visit and requested to see all his guns.

The Accused person allowed them to enter his house and they found three guns after a search. One was a shotgun and the other 2 were rifles. They apprehended that accused person and took him to Chongwe Police Station. The following morning, he went to the hospital to visit Pw1 who had two pellets stuck in his body. He had gunshot wounds on his left arm and neck. The doctor informed him that it must have been a shot gun because of the pellets. After the pellets were removed, he took them to the police headquarters.

Pw5 also testified that they recovered green overalls which the accused person allegedly wore at the material time. The pellets, gun, overalls and report were admitted into evidence as exhibits P1, P2, P3 and P4 respectively. He then warned and cautioned the accused person who denied the charge.

Under cross-examination, Pw5 said the accused person denied the allegation. He said it was not him because at the material time he was in Chongwe. He did not ask him what he was doing there or who he was with but he interviewed the people he was with in the motor vehicle. He took into consideration what the accused person said and the other passengers confirmed to have been with him. He prepared a report on

the 10<sup>th</sup> of June and denied including in it things the accused person did not tell him.

It was his evidence that at some point the accused person told him that he was at home with his workers. When he questioned them, they told him that he had already arrived at home at that time. All the concerned workers were dismissed before they could record statements from them. He denied leaving them out because they gave evidence favourable to the accused person. He went to the accused person's farm twice but did not find them.

The accused person told him that some people had entered his farm to illegally harvest timber and grass but Pw1 told him that they had sought permission to cut the grass. He did not know whether the accused person and the others were in good terms. He was told that the accused person was moody; at times he was a good person and but on other occasions he wasn't. He could not tell if it made sense for the accused person to shoot at Pw1 after allowing him.

Pw5 further testified that even though Pw6's ballistics report indicated that the firearm was not fired, he charged the accused person because it was possible that he could have used a different

firearm. The accused person did not tell him that he bought the overalls on the day of the shooting. He could not recall the accused person telling him that he only wore the overalls on the day that he was apprehended. Two of the accused person's workers said that on the day of the incident he was at home with them.

In addition, the workers said it was possible for the accused person to have shot because from time to time he would leave them and return. The scene was about 10 to 15 minutes' walk from the farm house. He could not tell if a gunshot could be heard from that distance because it is dependent on the weather. He admitted that the workers told him that they did not hear a gunshot. He collected the shotgun because the doctor said that is what was used.

The workers also told him that they were at the farm with him but were concentrating on their work. None of them told him that they saw the accused person carrying a gun. He denied the suggestion that his evidence was false and that he failed to investigate the matter. He took all the necessary steps and there was no need to go to Chongwe.

In re-examination, Pw5 maintained that he did a professional job. He did not go to Chongwe because the driver of the motor vehicle confirmed having brought the accused person back from Chongwe.

Dr. David Kadisha a medical practitioner at Levy Mwanawasa Hospital was the sixth prosecution witness (Pw6). His evidence was that in May 2013, he received Pw1 as a patient in the course of his duties. He was brought to the hospital with a history of being shot. He was conscious and had multiple lacerations on the left arm, right arm, chest and the back. An x-ray showed two bullets on the right hand close to the elbow. After removing them, he handed them over to a police officer from Chelston Police Station. Pw1 was discharged the same day.

When cross examined, Pw6 said he did not ask Pw1 if he knew who shot him.

The last prosecution witness was Senior Superintendent Nyafika Pius Illunga (Pw7) a forensic ballistic expert. He recalled that on the 29<sup>th</sup> of March 2013, Detective Inspector Mumba of Chongwe police submitted a firearm with serial number 09070080 to their lab for examination. In addition, on 31<sup>st</sup> May 2013, two pellets connected to the same matter were submitted to their lab examination. After examinations, he found

that the firearm was a Baikal shotgun of caliber 18.5 mm, capable of loading, firing and ejecting cartridges were of the same caliber. He tested the shotgun to see if was possible to fire it without pressing its trigger and the result was negative.

The pellets were of an 18.5mm cartridge and they were deformed because they hit a target after being fired from a firearm of 18.5mm calibre. It was not possible to connect the pellets to the firearm because he was unable to get gunpowder residues from them as they were retrieved from human flesh. His report was admitted into evidence as Exhibit P6.

Under cross examination, Pw7 said that he could not tell whether the pellets were ejected from the exhibit firearm.

At the close of the prosecution's case, I found the accused person with a case to answer and placed him on defence. He elected to give sworn evidence and called two witnesses.

The accused person's evidence was that he did not know anything about the matter. On the material day, a Friday, he went to Chongwe in the morning to buy the medicine. Around 15:00 hours, he got on to Pw4's motor vehicle back to the farm and arrived around 16:00 hours. He

started preparing a meal for his family and only finished around 21:00 hours. He served the meal to his two children, Moliness Twambo and Timothy Twambo, at 22:00 hours. His house is 2<sup>1/2</sup> kilometres from the scene of the shooting. At the material time, he was busy cooking for the children and that is what he told Pw5.

Under cross-examination, the accused person said what he cooked was nshima and minced meat. He started cooking around 17:00 hours and he took long to cook because he was using a brazier and charcoal. He did not know Pw1 but knew the village where he came from, it was 5 kilometres from his farm and that it was unusual for people to ask for grass. When he was apprehended he was wearing a green overalls and that is what he usually put on.

He is not aware of why the witnesses gave false testimony against him. He admitted that the shotgun was his and that he lives with his grandchildren aged 15 and 12 years respectively.

When he was re-examined, the accused person said the witnesses made up the story that they saw him putting on green overalls. It was not him that they saw.



The second defence witness was Timothy Twambo (Dw1) aged 12 years old. I found that he was possessed of sufficient intelligence and understood the duty of speaking the truth before receiving his evidence. His evidence was that on 24<sup>th</sup> May 2013, he was at home with his elder sister and the grandfather, the accused person. The accused person was with them the whole time and he was cooking minced meat. He finished cooking around 22:00 hours.

Under cross examination, Dw1 said what he told the court is what he saw and not what he was told to say. It was in 2013 but he could not recall the date and month and it could not have been any other day because he couldn't recall the accused person cooking minced meat on any other day. He started cooking around 17:00 hours. He denied being with his friends and playing on that day because there was no one. He maintained that he finished cooking around 22:00 hours.

He confirmed that the accused person had gone to Chongwe on that day. No one goes to ask for grass from there. He admitted that he knew Pw1 who stays near the road where they pass when going to school. It takes one less than an hour to walk between Pw1's house and the accused person's house. He also admitted knowing Pw2. He met him and his

friends going to his grandfather's farm and at the time he had left the accused person at home.

Moliness Twambo was the third defence witness (Dw2). Her evidence was that on 24<sup>th</sup> May 2013, between 1700 and 1800 hours, she was at home with Dw1. around 7:00 hours, the accused person sent Dw1 to go and call Mosten. She was with the accused person from 1600 to 2200 hours. He begun to prepare the meal around 16:00 hours and finished around 22:00 hours. He was within her sight all the time.

When she was cross-examined, Dw2 said she recalled the day he told them what to say in court but had forgotten the date when he talked to them. No one else was present at the time.

When she was re-examined, Dw2 said the accused person did not tell them what to say in court. She insisted that they were with him at the material time.

From the evidence before, I find that it is not in dispute that on 24<sup>th</sup> May 2013, around 18:00 hours, Pw1 was shot at while in the accused person's farm. At the time, the accused person was well known to both Pw1 and Pw2. It is also not in dispute that following the shooting, he

was taken to Levy Mwanawasa Hospital where he was operated on by Pw6. Pw6's findings were as follows: "Multiple Deep cuts Lt. Arm.....Chest, Rt. Arm, Back.....2 bullets extracted from Rt. Elbow" (see the medical report, Exhibit P5). I accept these findings as they are not undisputed. I also find that it is not in dispute that the "bullets" or pellets recovered from Pw1 were discharged from a shotgun. Further, I find that it is not in dispute that following the incident a shotgun, Exhibit P2, was recovered from the accused person's house. It was examined by Pw7 and he could not link the pellets recovered from Pw1's arm to the firearm.

What is disputed is whether it is the accused person who fired the shotgun that injured Pw1. Before dealing with the issue, I will comment on the evidence of the arresting officer that the ballistics expert found that the recovered shotgun "was not fired". Pw7 did not make such a finding, in his report (Exhibit P6) and testimony in court, he indicated that the firearm did not fire when he attempted to fire it without pulling the trigger. He never made a finding that the firearm was not recently fired. Pw5's said evidence is therefore without basis.

The evidence linking the accused person to the shooting is that of both Pw1 and Pw2. Their evidence is that they saw him running away soon after Pw1 was shot. Pw2 went further and said he was carrying a firearm as he was running away. It can be said that the accused person is implicated by Pw1 and Pw2's recognition evidence as they both previously knew him. In the case of **Chimbo and Others v The People (1)** it was held, *inter alia*, that:

*"Although recognition is accepted to be more reliable than identification of a stranger, it is the duty of the court to warn itself of the need to exclude the possibility of an honest mistake."*

Further, in the case of **Molley Zulu, Abraham Masenga and Smiling Banda v The People (2)**, the Supreme Court held, *inter alia*, that:

*"Although recognition of a person one knows is less likely to be mistaken than identification of a stranger, even in cases of recognition the danger of mistake is present and must be considered."*

and that

*"On the facts the opportunity for reliable identification was poor within the meaning of the Turnbull case (2); in order to test the reliability of the identification it was therefore necessary to consider whether there was any other evidence or circumstances which supported the identification."*

Pw1 and Pw2's evidence was that they recognised the accused person as they were running after Pw1 had been shot. As they ran away, they saw the accused person in front of them. Both witnesses say it was around 18:00 hours and not dark. Pw1 also said though he was frightened and

confused, he was able to see the accused person and recognise him in the tall grass. In the case of Pw2, his evidence was that there were scattered trees and he saw the accused person carrying a firearm as he ran away. He was not confused at the time and he only became confused when he got home. Further, both witnesses did not see the accused person shoot Pw1.

I accept Pw1 and Pw2's evidence that it was not dark at the time Pw1 was shot. Even if this was the case, consideration must be given of the possibility that they were mistaken given the circumstances in which the identification took place; it was after Pw1 was shot and the two were running away.

The accused person's position is that he was not present at the time of the shooting as he was at home. His alibi was supported by his grandchildren Dw1 and Dw2. The two confirmed being with the accused person and that he prepared supper for them from 17:00 hours up to 22:00 hours when they ate their food. There is also evidence that the accused person's house is about two and half kilometers from where the shooting took place.

When Dw1 and Dw2 were cross-examined, it became apparent that though they had indicated at the beginning of their testimony, that on 24<sup>th</sup> May 2013, they were with the accused person, they did not actually know the date when the incident which is the subject of these proceedings. This being the case, I find that they cannot link the day on which the accused person cooked minced meat for them to the shooting. Consequently, their evidence that they were with the accused person from 17:00 hours to 22:00 hours on 24<sup>th</sup> May 2013, is not credible and does not support the alibi.

I have considered the possibility of Pw1 being mistaken when he identified the accused person. He had just been shot and by his own admission, he was frightened and confused. This is not surprising given the circumstances. I find that his evidence of identification is supported or confirmed by that of Pw2. Though he was equally terrified by the shooting, his evidence, which I accept, is that he only became confused after seeing the accused person. I find that he had the opportunity to see and properly identify the accused person who was previously known to him. That is why he was able to see that the accused person was carrying a firearm.

I find that the two witnesses, who did not know where the firearm had been fired from, unwittingly run in the direction where the accused person was and were able to see him and recognise. I am satisfied with the circumstances in which the identification took place and I rule out the possibility of an honest but mistaken identification. I have also considered the possibility that they have decided to falsely implicate him. I find that it is not the case. Had it been the case, I have no doubt that they would have both said they saw him shoot at Pw1.

In the case of *Mbinga Nyambe v The People S.C.Z. Judgment No. 5 of 2011* the Supreme Court held as follows as regards circumstantial evidence:

- 1. Circumstantial evidence or indirect evidence is evidence from which the judge may, infer the existence of the fact directly.*
- 2. It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue, but rather is proof of facts not in issue. But relevant to the facts in issue and from which an inference of the fact in issue may, be drawn.*
- 3. A trial judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture, so that it attains such a degree of cogency which can permit only an inference of guilt.*
- 4. Where a conclusion is based purely on inference, that inference may, be drawn only if it is the only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may, be said to be reasonably possible cannot be condemned as speculation.*

The evidence against the accused person is circumstantial in that no one saw him shooting Pw1 but seen running away from the scene carrying a gun. The ballistics evidence has failed to link the shotgun he was found with to the one fired at the scene because the pellets recovered had gone through a human body. Notwithstanding, I find that the only inference that can be drawn from the evidence is that it he is the one who fired the firearm that injured Pw1. His conduct on that day was not consistent with that of an innocent man.

I have considered the possibility that he was also running away from the shooter but I find that it was not the case. Had it been the case, given that the shooting was on his own farm, he would have lodged a report to the police or any person about it but he did not. He behaved as if nothing had happened and this is for reasons that are very obvious.

Pw2's evidence was that he got permission from the accused person to collect grass from his farm. This raises the question why then would have the accused person shot at Pw1? In my view, it would have been an issue if the person who was shot was Pw2. Pw1 is not the person who asked for permission but Pw1. Further, there evidence before me that Pw1 was in the Ox cart while Pw2 was on the ground. It is possible



that he did not see the person he gave permission. But I find that it is a non issue.

The offence of Acts Intended to Cause Grievous Harm is set out in Section 224 of the Penal Code. It provides as follows:

*"Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person-*

- (a) unlawfully wounds or does any grievous harm to any person by any means whatever; or*
- (b) .....*
- (c) .....*
- (d) .....*
- (e) .....*
- (f) .....*

*is guilty of a felony and is liable to imprisonment for life."*

Section 2 of the Penal Code defines "grievous harm" as:

*".....any harm which endangers life or which amounts to a maim or which seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense"*

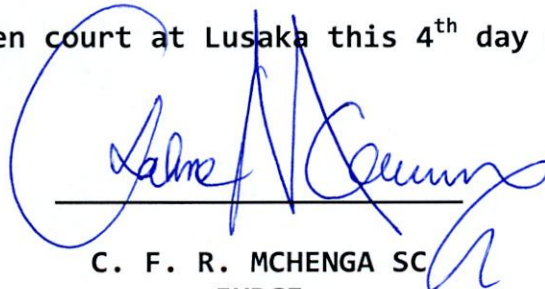
The same provision defines "a wound" as

*" any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is exterior for the purpose of this definition which can be touched without dividing or piercing any other membrane".*

Though the accused person has not said why he shot Pw1, I am satisfied that the injuries Pw1 suffered, "Multiple Deep cuts Lt. Arm.....Chest, Rt. Arm, Back.....2 bullets extracted from Rt. Elbow" do amount to either a wound or amount to grievous harm. I am also satisfied that he intended to maim or disable Pw1 when he fired at him with the shotgun.

Consequently, it is my finding that the prosecutions have proved that on 24<sup>th</sup> May 2013, at Chongwe in the Chongwe District of the Lusaka Province of the Republic of Zambia, with intent to maim, disfigure or disable the accused person caused grievous harm to Moshen Kayomena. I find him guilty as charged and I convict him

Delivered in open court at Lusaka this 4<sup>th</sup> day of March, 2016



C. F. R. MCHENGA SC  
JUDGE