

Selected

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/ 82/2017

BETWEEN:

THE PEOPLE

VS.

PATRICK CHEWE

**Before the Honourable Mr. Justice M.D Bowa in Open Court on
17th of January 2020.**

For the State: Mr. Chimbeka Sakala State Advocate Npa

For the Accused: Mr. O Ngoma of Lungu Simwanza and Company

JUDGMENT

Cases referred to

1. *The People v John Kenani Lilanda & Others ZR (2011)*
2. *R vs. Hughes and others (1943) D.L.R.I*
3. *3.Chisiwa vs. the People SCZ appeal No. 17 of 2016*
4. *Precious Longwe vs. the people ZMCA Appeal no 182/2017*
5. *Nkandu vs. the People SCJ No 52 of 2017 appeal 33 of 2016*
6. *Lubedae vs. the People 1983 ZR 54*
7. *Kambarage Kaunda vs. the people SCJ no 1 of (1992)*
8. *David Zulu vs. the people (1977) ZR 151*

Legislation referred to

1. *The Penal Code Cap 87 of the Laws of Zambia s 200 and 204*
2. *The Criminal Procedure Code Cap 88 of the Laws of Zambia*

Warrant Officer Patrick Chewe (the Accused) herein appeared before the High Court sitting in Lusaka for 1 count of murder contrary to section 200 of the Penal Code Cap 87 of the Laws of Zambia. In the particulars of offence the State alleges that on the 8th day of September 2016 at Lusaka in the Lusaka District and Province of the Republic of Zambia Mr. Chewe murdered one Aliness Tembo. He pleaded not guilty to the charge.

Six (6) witnesses were called on behalf of the prosecution. PW1 was Victor Mulupi of house No. 131 Lusaka West Apollo Snow Match Military Camp and Sergeant in the Zambia Army. His evidence was that on the 8th of September 2016 between 09:00 and 10:00 hours he was off duty and at his home in the camp. At some point as he was heading to the bathroom to freshen up he saw the Accused who was his neighbor, carrying an AK 47 rifle entering his house. PW1 shouted out a greeting and asked whether he was on duty but did not receive a response. He assumed the Accused did not hear him and went back to his living room to watch television.

After a while he heard what sounded like people arguing. Curious to find out what was going on he went outside his house to the source of the noise and found the Accused and his wife quarreling. They

were standing between their house and PW1's home which he approximated was a distance between 2-3½meters apart. PW1 asked the Accused what was happening. The response he received was that it was none of his business and he should Leave. PW1 accordingly went back into his house whilst the quarrelling continued.

He decided to go out again and at that point the couple had gone inside their house. He called the Accused's daughter Monica who was outside at the time to inquire where the AK 47 rifle was and she told him it was in her parents' bedroom. A little while later PW1 decided to water his plants. Monica approached him and told him that her parents were struggling with the weapon. PW1 then called the Military Police (provost) at 1 infantry Brigade to come in and assist with the situation as this fell in their portfolio. Whilst communicating he heard two (2) gun shots. He was able to tell what he heard were gunshots from his training as a soldier. When the provost arrived they opened the door to the Accused house with PW1 following closely behind.

Once in the house, PW1 saw Mrs. Chewe's dead body lying on the floor. He also saw an AK47 rifle that was found under the cushion

on a three (3) seater sofa. He testified further that he had known the couple for over 3 years at the time of his testimony. He identified the Accused as Patrick Chewe.

In cross examination PW1 maintained that he did see the Accused carrying an AK 47 into the house. Further that he shouted out asking if the Accused was on duty precisely because he was carrying a firearm. He admitted that he did not see the Accused coking the firearm, nor did he see him shooting the deceased. He further confirmed that Monica Chewe did tell him that her parents were struggling with the firearm.

Questioned further the witness testified that he was familiar with the operation of an AK 47 rifle. He contended that the firearm cannot discharge in circumstances where the safety catch is open and there is a struggle. He however agreed that if the safety catch is open and the firearm is coked, any interference with the trigger can discharge the ammunition. He accepted that he did not know what the condition of the firearm was in, whether the safety catch was off or on, or if the weapon was coked. He explained that he did not move in at the time he was informed there was struggle for the firearm because he did not know the conditions obtaining in the

house and was fearful of being a casualty. Further that it was not his duty to do so which was why he called the military police to intervene.

The witness was not re-examined.

PW2 was Patrick Chewe aged 21 of L85 Lusaka West Snow Match Compound. He recalled that on the 7th of September 2017 his cousin Andrew Tembo came to visit at their home. PW2 and his cousin decided to go to church at around 19:30 hours. Upon their return they found the door to the house locked. PW2 then remembered he had left his bedroom window open and entered the house through the window. He got the spare keys for the house and opened the door to let his cousin in. He then went straight to his father (the Accused) who was in the living room at the time, and asked him why he had locked them out. His father did not respond.

According to PW2, the Accused then started asking his mother why her relatives were always coming to their house and not his own. PW2 questioned his father why he was making an issue about Andrew visiting when he had done so all along. His father's

response was that his own relatives seldom visited. His father went on to tell his mother that he did not want to see her relatives the following day and that there would be consequences if he did so.

Early the next morning on the 8th of September, the Accused woke up PW2 and told him to water the garden and left for work. PW2 and his cousin later made their way to town and were escorted to the bus stop by his mother.

There was no cross examination.

Woman constable Katati of Matero Police station was the prosecution's third witness (PW3). Her evidence was that on the 10th of September 2016, she was assigned to attend to a postmortem examination at UTH on the body of female Aniless Tembo alleged to have been killed by her husband. She testified that the body of the deceased was identified by her sister whom she came to know as Esther Shumba. She noticed the deceased had 2 wounds one around the chest and the other in the waist area. The witness suspected the wounds to have been sustained from gunshots because they had entry and exit points. It was her further evidence that the postmortem was conducted by Doctor Victor Telendi and the results were given to the arresting officer thereafter.

Cross examined PW3 insisted she believed the wounds were a result of gunshots because of the entry and exit points.

PW4 was Monica Chola Chewe aged 15 of house No L85 Lusaka West. Her evidence was that on the 8th of September 2016, her father (the Accused) was on guard duties. He came home very early in the morning. Her mother, brother and cousins were not at home so she was only with her young brother Mapalo Chewe when her father got home. The Accused asked where her mother was. She told him she had escorted her cousin to the bus stop. He then asked PW4 if she had credit on her phone to call the mother and tell her he wasn't feeling well and needed to be taken to the clinic.

She told him that she did not have talk time but went outside to call her mother. She informed her mother that her father wanted her home. Her mother eventually came home and checked on the Accused. She came out of the house and said her father was actually drinking and smoking a cigarette despite the claim that he was sick. PW4 was at the neighbour's house at the time when her mother joined her and told her about her father's condition. The Accused came out of the house and stood by the door. He asked

why the deceased was at the neighbours house when he had asked for her.

The deceased in response questioned why he was asking for her when he was drinking and smoking in the house in spite of his claim that he wanted her to take him to the clinic. She then started crying and queried whether the intention of bringing her home was for them to start fighting. The Accused proceeded to pull her mother by her shirt and dragged her into the house. She sat in the kitchen whilst the Accused went to the bedroom. The deceased then run out of the house but the Accused chased after her. He caught up with her and dragged her back into the house.

Anxious to see what was unfolding between their parents, PW4 and her young brother attempted to get into the house but the Accused chased them away. He did not allow them to get in and closed all the doors. Her young brother accordingly went to play whilst she went back to the neighbour's house. After a while she heard her mother scream. The toilet window for the house was open. PW4 thus decided to peep through the window and noted that the inner door was closed so she was unable to see anything. She went back to the neighbour's house. Whilst there she heard her mother

scream a second time. She went back to peep through the same window and this time was able to see her parents. They were struggling with a firearm. PW4 then dashed to Mr. Mulipis house (PW1) a neighbour and soldier who was off duty on that day, to seek help.

While with him she heard 2 gunshots and she run off. She found another soldier who had just knocked off from guard duties, explained what had transpired and asked him for help. She pointed to where their house was. As she was doing so she saw the Accused jumping out of a window and running away. People around took chase after the Accused, some on foot others in vehicles until they caught him. PW4 then went home to check on her mother and found her lying on the ground bleeding on the side of her stomach.

When cross examined, the witness agreed that she saw her mother and father struggling with the rifle. Further that both of them were holding the firearm. She testified that it was after she saw this that she run away to seek help. She confirmed that her father and mother used to fight on several occasions. She disagreed that her mother was shouting when responding to the Accused call on why she was at the neighbour's house. She accepted that she did not

see her father pull the trigger when her mother was shot. She agreed that it was therefore true that she did not know the circumstances of how the firearm was discharged.

The witness was not re-examined.

PW5 was Esther Shumba of house number 511/03 Desai compound in Lusaka. Her evidence was that on the 8th of September 2016, she received a call informing her that her young sister Alliness Tembo had allegedly been killed by her husband. She proceeded to her sister's house and confirmed it was true her sister had died. She found the body had been put in a vehicle. She observed that the body was covered in blood and had wounds on the waist and chest. The body was then taken to UTH and deposited in the mortuary and she later gave a statement to the police.

Detective Chief Inspector Felix Mwenda of Matero Police station was the 6th prosecution witness (PW6). He recalled that on the 8th of September 2016 he was assigned to follow up a report of suspected murder which was reported from Appollo L85, a military camp situated in Lusaka West. He proceeded to the camp in the company

of other officers. Upon arrival, they were received by military personnel who already had in their custody one suspect.

They were directed to a house within the camp. The house was locked and opened in the officer's presence. They entered the house and walked through to the living room door. PW6 observed that there was a body of a lady lying in a pool of blood facing upward. He inspected the scene of crime and the body. He noted that the deceased suffered 2 suspected gunshot wounds-one around the waist and the other in the chest. After a further search in the living room, PW6 found one AK47 rifle on a 3 seater chair under the cushions. He picked up the firearm and immediately took the normal safety precautions. He observed that the firearm had 1 bullet in the chamber.

PW6 proceeded to search the house and noted that the gunshots had entered through the living room wall up to the kitchen. He established that a bullet was embedded in the bathroom wall. He testified further that due to the large number of people, who were around the scene of crime that wanted to vent mob justice on the suspect, the officers had no choice but to rush him to Matero police and the body was taken to UTH mortuary.

PW6 carried the firearm which was retrieved from the house and accompanied the group of officers that took the suspect to the police station. Another group took the body to UTH. Upon arrival at the police station, the suspect whom he came to know as Patrick Chewe was warned and cautioned. On the 10th of September 2016, PW6 received a postmortem report of the examination done on the deceased and witnessed by constable Katayi. The report confirmed that the deceased died from gunshot wounds. He established that the deceased names were Aliness Tembo aged 39. He identified and tendered in evidence the firearm and postmortem report which were marked P1 and P2 respectively. He proceeded to arrest the Accused for the subject offence.

In cross examination, the witness acknowledged that he did not see the deceased being killed. He accepted that he recalled the Accused stating in his interview that he was confused and did not know what happened on that particular day. He was nonetheless not satisfied with his explanation. He thus did not take him to Chainama and proceeded to charge and arrest him without establishing his mental state. As far as PW6 was concerned there was no need to do so as he found him mentally stable. Cross

examined further PW6 confirmed getting information that the couple was having marital problems.

That was the case for the prosecution.

At the close of the prosecution's case I was satisfied that a prima facie case had been established against the Accused and I placed him on his defence. He elected to give sworn testimony and did not call any witnesses. He testified that he is a soldier with the Zambia Army based at Appollo Military Camp. He recalled that on the 8th of September 2016, he left home at about 06:00 hours for work within the camp. He proceeded to sign for a rifle at the armoury. The officer on duty was Corporal Richard Bwalya who issued him with an AK 47 rifle serial number GH3989.

He left the armoury and went to Namulambwe Primary School where he was to perform his sentry duties. He specifically went there to inform the school that he was the one that would be working from there that day. He explained that he would ordinarily start his duties at the school at 16:00 hours. After informing the school about his schedule, he went back home.

Once at his house, he did not find his wife. He asked his daughter Monica (PW4) where her mother had gone and was told she had escorted her cousin to the bus station. The time was then around 09:00 hours. He went to his bedroom and placed the firearm in the wardrobe and lay down to have a nap.

After an hour, his wife returned home. When she entered the house, she went straight to the wardrobe and got the firearm. She walked out with it and headed to the living room. He asked her where she was taking the firearm. In response she told him to leave her alone and that she wanted to kill herself. He then got a hold of her and managed to wrestle the weapon off her. The deceased then sat on a chair for a while and then went outside the house. He followed her and asked her to come back in the house so that they could discuss what was bothering her.

He walked with her into the house and she opened up about what was troubling her. She asked the Accused why he was bent on chasing her brother's children from the house and said it appeared he wanted them to be arguing over the same issue. She stated further that if he continued to insist on chasing the children she would kill herself. Whilst they were having this conversation, the

Accused observed the deceased walk into the bedroom where she got the firearm a second time. He again got a hold of her and started struggling to get the weapon from her. In the process both of them fell down and she held on to the trigger. The firearm discharged and she was shot in the upper right part of her chest.

He then got up and shortly after military police led by sergeant Nkole arrived. He explained what had transpired and in particular about the accidental shooting in the process of the struggle for the firearm. Sergeant Nkole picked up the firearm and later with others apprehended the Accused and took him to Matero Police. He testified that it was not his intention to kill wife. He had been with her for more than 20 years and had 3 children with her. He insisted that the firearm discharged whilst they were struggling for the firearm and his intention was to get the weapon from her.

He further testified that he had no recollection was transpired shortly after the incident as he was in a state of confusion at the time. He denied the assertion that the firearm was found under the cushions. He maintained that it was on top of the cushions. He further denied that PW1 ever saw him dragging his wife to the house. Further that it was not true that he told PW1 to mind his

own business for apparently trying to intervene in a quarrel he had with his wife as alleged.

He explained that at no time did he force his wife to the house. He asked her to come into the house and she did so on her own. The Accused testified further that his children's cousins grew up in his home. He therefore had no issue with them nor did he have any intention of chasing them. He thus did not agree as accurate the evidence given by his son Patrick Chewe (PW2) that suggested he was not pleased with their presence in the home. In closing his testimony the Accused emphasized that he did not kill his wife. She wanted to kill herself and in the process of a struggle to disarm her she ended up pulling the trigger and got shot.

When cross examined, the Accused testified that he was a soldier of 10 years' experience and knew how to handle an AK 47 rifle. He testified that the deceased was a businesswoman and had no military training or background. He accepted that he was supposed to report for work at 16:00 hours but picked up the firearm at 06:00 in the morning.

He further disclosed that he was given 10 rounds of ammunition and a magazine. He accepted that he was the one who put the

magazine on the firearm and that he did go with the firearm into the house. He further agreed that for the firearm to discharge it needs to be coked. He accepted that at no point in his evidence did he say that this wife coked the weapon.

Cross examined further the Accused accepted that the firearm has a safety catch. In addition that for the firearm to discharge the safety catch has to be off. He agreed that he did not tell the court that the deceased turned off the safety catch. The Accused further agreed that the rifle can be placed on rapid mode or single mode. He disagreed that it was on single mode in this case. He insisted on this position in spite the fact that the postmortem report shows that there was a bullet that went through the chest and another in the waist. He also insisted that it was possible for a person to shoot himself in the chest and waist in the circumstances of this case.

Pressed further the Accused denied that he run away after the incident. He insisted that sergeant Nkole found him in the house. He agreed that he did state in his evidence in chief that he was confused after the incident and could not remember what had happened. He further accepted that in an answer to a question in

his evidence in chief, he did testify that it was not his intention to kill his wife.

In re-examination the Accused was referred to the postmortem report (P2). He testified that there was no mention in the report about a bullet entrance in the waist. That it only made reference to the chest. He further confirmed that he did not give evidence that his wife opened the safety catch.

That was the close of the case for the defence.

None of the parties filed in their final submissions in spite of both expressing their desire to do so within set time frames. I therefore proceeded to write this judgment without the benefit of counsel's thoughts. Be that as it may, the offence of murder is set out in Section 200 of the Penal Code Cap 87 of the Laws of Zambia. The section provides as follows:

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

Malice aforethought is defined in section 204 of the Penal Code in the following terms:

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

(a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

To sustain a conviction therefore, the prosecution has to prove beyond reasonable doubt that the Accused with malice aforethought as defined above caused the death of the deceased.

From the evidence before me I find that it is not in dispute that Aliness Tembo is dead. The postmortem report exhibit P2 confirms that the cause of death was hemorrhagic shock from gunshot wounds of chest and back. I further find that it is not in dispute

that the fatal shots were discharged from exhibit P 1, an AK 47 rifle serial number GH3989 which was signed for and in the charge of the Accused person in furtherance of his sentry duties.

I further find as not in dispute that the shots were fired in the Accused's homestead at house No. 9813/04 Appollo Military Camp and that only the Accused and the deceased were in the house at the time of the shooting. The prosecution contends that the Accused deliberately shot and killed his wife with malice afterthought whilst the Accused raises the defence of accidental shooting that occurred in the process of a struggle for the firearm during a domestic dispute with his wife. The question(s) I am then to resolve are firstly, what are the circumstances that led to the discharge of the firearm? Secondly, what if any is the extent of the Accused culpability?

It is useful at this point, to consider how and in what circumstances the defence of accident operates and is available to an accused. The starting point would be section 9 of the Penal Code Cap 87 of the Laws of Zambia. The section provides that:

“9. (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or

omission which occurs independently of the exercise of his will, or for an event which occurs by accident.”

A read of the section makes clear that an accused is exempt of criminal liability for an act or omission that occurs independent of exercise of will implicit in accidents. Thus in the case of *The People vs. John Kenani Lilanda & Others*¹ which did consider a raised defence of accidental shooting, Lady Justice M. Mulenga sitting as a High Court Judge persuaded by the Canadian authority of *R vs. Hughes and Others*² held that:

“Where death is caused by discharge of a firearm in the hand of the accused during a struggle for possession of the firearm in the course of committing an offence 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 the gun was not discharged by the voluntary act of the accused.”

A read of some Supreme Court and Court of Appeal decisions demonstrates that a determination of whether a fatal shooting was accidental or not boils down to an examination of the circumstances disclosed on a case by case basis. In the case of *Chisiwa vs. the People*³ the Supreme Court after reviewing all the

evidence on record dismissed the defence of accident. The court agreed with the lower court's assessment that on the evidence there was nothing to support the assertion of a struggle for the firearm that discharged the fatal shots in that case.

Similarly in *Precious Longwe vs. the people*⁴ the Court of Appeal upheld the conviction of the Appellant after dismissing the defence of accidental shooting. In agreeing with the trial court that had assessed all the surroundings circumstances of the shooting in which there was no eye witness, the court found that the trial judge could not be faulted for her conclusion in the face of evidence of shooting from the back as confirmed in a pathology report.

In *Nkandu v the People*⁵ the Supreme court in assessing the facts and circumstances of the shooting also dismissed the defence of accidental shooting. The court found that an associate of a victim allegedly shot from an accidental shooting would not have left him on the road side, driven off and failed to report the incident at the first check point where he was stopped. The court thus dismissed the defence as a creation of the Appellant's imagination in his quest to avoid the consequences of intentional killing.

From the above authorities it is fair to conclude that a trial court must carefully assess all the surrounding circumstances and conduct of the accused in order to be satisfied that the defence is available. I would suggest that the need for such scrutiny becomes even more apparent in cases where there is no eye witness to the shooting.

It is not in dispute in the present case, that there was no eye witness account to the shooting. The Defendant does not dispute being in an altercation with his wife on the fateful day but suggests she was the agitated party threatening to kill herself on the day. According to the Accused, she came into the house whilst he was in the bedroom resting and went straight to the bedroom to get the firearm with a view of killing herself. He disarmed her and she went outside the house. She came back a second time and picked up the firearm. It was in process of trying to disarm her that the firearm accidentally discharged.

The prosecution's evidence to the contrary places the Accused as the aggressor. He was displeased that his wife was not at home and asked his daughter (PW4) to call her to return to the house and to take him to the hospital. Sensing there was trouble to follow, the

daughter told her father she did not have credit to make the call but quietly called her mother and informed her the Accused was asking after her. Further, contrary to the Accused's assertion, when the deceased arrived at home she was not asked to get into the house to discuss the problem at hand. Instead she was aggressively dragged into the house.

This evidence was given by his daughter PW4, who twice saw her father pull the deceased into the house. In fact that on the second occasion he chased after the deceased, caught up with her and dragged her into the house. Evidence of an argument between the Accused and the deceased was also given by PW1. He testified that he was in his house watching TV but was disturbed by the sound of the couple arguing outside. When he went outside to intervene, the Accused literally told him to mind his own business. There is further support of the fact that he was not pleased with the presence of his wife's relatives in the home. PW2 testified that the Accused had made this an issue the night before on the 7th of September. Whether this is what the couple was arguing about or something else is unclear. One thing is certain- the mood that morning was anything but cordial.

There is also credible evidence from PW4 that once the Accused had taken the deceased into the house he did not let her or her young brother in. He instead chased them away and closed all the doors to the house. There was further unchallenged evidence of the screams that came from the house that prompted PW4 to peep in from the toilet window. I accept that PW4 witnessed her parents engage in a struggle for the firearm and this led her to rush for help at PW1's house. I accept that 2 gunshots followed shortly thereafter that turned out to be fatal. I however do not accept the defence that the firearm was discharged on account of an accident.

The fact that the firearm discharged meant that the safety catch was disabled, that the magazine had been put in position and the weapon was coked. I take judicial notice that military personnel are trained in the use of firearms and that the Accused being a soldier of 10 years standing who also performed sentry duties was very knowledgeable on safety precautions of such firearms.

It cannot be contended that the Accused person having such training and knowledge walked into the house where his wife and children lived carrying a coked AK 47 rifle with a disabled safety catch and not foreseen or intended that grievances harm or death

would result if handed by an untrained person. I am certainly not persuaded to believe that his wife, a businesswoman with no military background would have the knowledge of how to operate the firearm and disable all the safety features and importantly that she was able to cork the firearm in her quest to kill herself. I am quite prepared to infer from the circumstances that the firearm was in that condition because the Accused placed it so intending to use it on his wife.

In the case of *Lubendae v the People* ⁶ the Supreme Court held that

“An event occurs by accident if it is a consequence which is in fact unintended, unforeseen or such that person of ordinary prudence would not have taken precautions to prevent its occurrence and on a charge of murder, accident is no defence if the accused intended to kill, foresaw death as a likely result of his act, or if a reasonably prudent person in his position would have realised that death was likely resort of such act.”

Based on this holding therefore, I find that no reasonably prudent soldier placed in the Accused position would not have walked into the house without securing the firearm that he had in his possession.

What else is there to be said about the defence offered by the Accused? He suggested that when the wife came into the house she reached for the rifle and walked with it to the living room. According to the Accused she then told him she wanted to kill herself. A reasonably prudent officer if that were true, would not allow any family member to have access to the firearm. Secondly having seen her touch the firearm one would expect he should have immediately disarmed her. This, on his own evidence he did not do. He instead watched her go to living room with the firearm and then disarmed her from there after she declared her intent.

He doesn't stop there. He claimed he put the rifle back in the bedroom and curiously, in a position where the wife was able to access it a second time. One would expect an officer of ordinary prudence faced with a wife threatening to kill herself in the circumstances described by the Accused, to have secured the weapon, alternatively left the house with the firearm or at the very least submitted it to his colleague who was equally trained in its use and lived just next door 3 meters apart.

I find the explanation given far-fetched and fabrication of what really transpired. The tussle that ensued was, I find, the wife's

attempt to repel the attack that the Accused unleashed on her and he shot her in cold blood with intent to kill and or cause grievous bodily harm within the meaning placed in section 204 of the Penal Code Cap 87 of the Laws of Zambia.

I am further fortified in my findings by the conduct of the Accused following the shooting. He hid the firearm beneath the cushions of his sofa although he denies that he did so and jumped out of the window of the house to make his escape until he was caught. This in my view, was not conduct consistent with a person who accidentally shoots his spouse.

He makes a claim he was confused following the shooting and does not recall what transpired but rather oddly, distinctly recalls not putting the firearm under the cushions and actually being found in the house when the military police came to his home. The only bit of evidence that conveniently fell in his "state of confusion" therefore, was the jumping out of the window and attempting to make an escape. I do not accept his evidence in this regard and am prepared to find he made up this story of confusion as the only way to cover the fact that he attempted to get away following the shooting of his wife.


There is every indication that he had planned to execute this deed. The fact that he chased his children and locked the house after twice dragging the deceased into the house clearly signaled the Accused's intention to exact a certain punishment on her undisturbed. I am thus ready to infer that he placed the magazine in the firearm, corked it and deliberately shot his wife in the process.

I am mindful that 2 of the prosecution witnesses (pw2 and pw4) are the deceased children. *Kambarage Kaunda vs. the people*⁷ calls for trial courts to exercise caution and need for a warning against the danger of convicting based on evidence given by this category of witnesses who as relatives of a victim may have an interest of their own to serve and give biased testimony against an Accused. I warn myself of such danger and exclude it based on the corroboration provided by Pw1 specifically on the quarrel, mood of the Accused and gunshots that were fired. I found no reason for them to give false testimony and importantly also found their evidence to be credible and consistent in all respects.

I am also mindful that the Prosecution's evidence is at best circumstantial as there was no eye witness to the actual shooting. I

recognize following the Supreme court decision in David Zulu vs. the people⁸ that it is incumbent upon me as the trial court to guard against drawing wrong inferences from the circumstantial evidence at my disposal before i can feel safe to convict. Having reviewed the evidence and for reasons I have stated above, I am satisfied that the circumstantial evidence has taken the case out of the realm of conjecture and attained such a degree of cogency which permits only an inference of guilt. On the whole therefore I find that the prosecution has established its case beyond a reasonable doubt and I convict the Accused for a count of murder contrary to section 200 of the penal code as charged accordingly.

This^{17th} day of ^{January}..... 2020.


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M.D. BOWA
HIGH COURT JUDGE