

IN THE HIGH COURT FOR ZAMBIA

HP/101/2020

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

THE PEOPLE

VS.

SLEY NJALIKA

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
THIS 17TH DAY OF JULY, 2020, IN OPEN COURT, AT LUSAKA**

*For the People: Mrs. R. M. Jackson - Acting Senior State Advocate,
National Prosecutions Authority.*

*For the Accused: Mrs. M. Wina Vukovic - Legal Aid Counsel, Legal
Aid Board*

JUDGMENT

CASES REFERRED TO:

1. *Love Chipulu v the People* (1986) Z.R. 73;
2. *Nyambe v The People* (1973) Z.R. 228;
3. *Katebe v The People* (1975) Z.R. 17;
4. *Yokoniya Mwale v the People* - SCJ Appeal No. 285 of 2014 (unreported);
5. *Emmanuel Phiri v The People* (1982) Z.R. 77;
6. *Gideon Mumba v The People* - Appeal No. 50/2017;
7. *Shawaz Fawaz and Prosper Chelelwa v The People* (1995) Z.R. 3;
8. *Molley Zulu, Abraham Masenga and Smiling Banda v The people* (1978) ZR 277;
9. *Mwabona v the People* (1973) Z.R. 284;
10. *George Lipepo and others v The People* (1978) Z.R. 271 (S.C.);
11. *Haamenda vs. The People* (1977) Z.R. 184 (SC);
12. *Machipisha Kombe v The People* (2009) Z.R. 282;
13. *Ilunga Kabala and John Masefu v The People* (1981) Z.R. 102;

14. *Baldwin Kalenga and Two Others v the People - Appeal No. 116, 117 and 118/2010; and*
15. *John Nyambe Lubinda v the People (1988-1989) Z.R. 110 (S.C).*

LEGISLATION REFERRED TO:

1. *The Penal Code, Chapter 87, Volume 7 of the Laws of Zambia; and*
2. *The Criminal Procedure Code, Chapter 88, Volume 7 of the Laws of Zambia.*

1 INTRODUCTION

- 1.1 The Accused person **Sley Njalika** stands charged with the offence of **Acts intended to cause grievous harm** contrary to **Section 224 (a)** of **The Penal Code**¹.
- 1.2 The particulars of the offence are that **Sley Njalika** on 11th March, 2019, at Chirundu District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did wound Davison Siamabuyu with intent to maim, disfigure, disable or do some grievous harm.

2 EVIDENCE AT TRIAL

- 2.1 The case for the Prosecution centred on the evidence of PW1, PW2 and PW3.
- 2.2 **PW1** was **Davison Siamabuyu**, who testified that on the 11th of March, 2019, at around 19:00 hours, he sat outside on a chair within his yard waiting to bath as his wife Theresa Namwinga, who had prepared some water for him to bath had gone to fetch a bar of soap. As he stood up, he heard a gunshot and realised that he was shot on his right shoulder. He shouted for his wife who rushed to get a torch and switched it on. His wife shone the torch in the direction where the gunshot sound came from and PW1 together with his wife saw the Accused

person as he attempted to flee, but fell in a ditch and looked back at them. At that point, PW1 who recognised the Accused person, said *"Sley, you are the one who has brought the person with a firearm, it is alright you can go, I have known you"*.

- 2.3 PW1 further testified that the distance from where he was standing to where he saw the Accused was between 8 to 10 meters and that the Accused person was putting on a black trousers and a whitish short sleeved shirt. According to PW1, the Accused person who has been known to him since he was a child and lives in the same village as PW1, had been accusing PW1 of being a Wizard since 2016.
- 2.4 PW1 also testified that he was taken to the Police Station where he obtained a medical report and thereafter to Mtendere Mission hospital where it was determined that his bones were fractured in the right shoulder. He identified the medical report in Court and it was marked "ID1". He further identified the Accused person as Sley Njalika.
- 2.5 During cross-examination, PW1 testified that he saw the Accused person as there was moonlight and that his wife had shone the torch light in the direction of where the gun shots were heard from. He further stated that he did not understand why the witness statement recorded from him at the police station stated that the Accused wore a short and blue shirt when he told the police that he wore a black trousers and a not very white shirt. However, he

admitted that the witness statement was read to him by the police and that he signed it.

- 2.6 PW2 was **Theresa Namwinga**, the wife of Davison Siamabuyu, who testified that on the 11th of March, 2019, after she had prepared some water for her husband to bath in the field, she was fetching a bar of soap for her husband when she heard a gunshot and immediately got the torch that was near her. When she shone the torch in the direction of the gunshot sound, she saw two people who were at a distance of about 8 to 10 metres away from where she and her husband were. Upon seeing the two people, she heard her husband say "*Sley, you have killed me*".
- 2.7 It was her further testimony that as the two people started running away, one fell in a ditch and looked back at them. PW2 and PW1 recognised the person who fell into the ditch as Sley Njalika, the Accused person, who has been known to her since he was a child. The Accused person was putting on a short sleeved whitish shirt and black trousers.
- 2.8 PW2 also testified that she helped her husband to reach their home where they called for a taxi which took them to Chirundu Police Station. She made a report at Chirundu Police Station, whilst her husband remained in the taxi and thereafter they went to Mtendere Hospital where the injury on his upper right arm was sutured.
- 2.9 During cross-examination, PW2 testified that she gave a partial statement at the police station as the officers felt that they were traumatised and that after two days the

police followed them to the hospital to record the full statement. She further testified that she told the Police that the Accused was wearing a white shirt and black trousers at the time of the incident and that the police did not record her correctly when they wrote that the Accused was wearing a blue shirt and short.

2.10 **PW3** was **Detective Inspector Pyson Chishala**, Service Number 11314, stationed at Chirundu Police Station. He testified that on 11th March, 2019, he reported for duty at Chirundu Police Station from 18:00 hours to the following day at 06:00 hours. Whilst on duty at around 21:40 hours, he received a complaint of attempted murder from Davison Siamabuyu, who complained that whilst he was at his garden field, he was shot at by the Accused who was with other persons unknown. A Medical Report was issued and the victim who had sustained an injury on the right arm, was rushed to Mtendere Mission Hospital for treatment.

2.11 **PW3** further testified that on 12th March, 2019, at around 07:00 hours, he went to the scene of crime and whilst making observations there, he picked up two pellets and a wad, which were taken to Ballistics for examination. Later, a report was issued from the Ballistics Department and on 15th April, 2019, he apprehended the Accused whom he took to Chirundu Police station, where he interviewed him in connection to the alleged offence. **PW3** stated that after interviewing the Accused he made up his mind to arrest and charge him with the offence before Court.

2.12 PW3 further testified that under warn and caution administered in Nyanja language, the Accused gave a free and voluntary statement denying the charge. PW3 identified all exhibits collected during investigations and they were produced in Court as follows: -

1. Medical Report – marked as **P1**;
2. Ballistic Report – marked as **P4**;
3. Wad – marked as **P5**;
4. Pellets – marked as **P6a** and **b**.

2.13 During cross-examination, PW3 testified that he did not go to the victim's premises but went to the Accused's premises where he searched his gardens and did not recover the fire arm. PW3 further testified that he told the Accused's wife to tell him that he was wanted at the Police Station, but that the Accused did not go to the Police Station and efforts were made to arrest him prior to 15th April, 2019.

2.14 Furthermore, PW3 testified that during interrogation, the Accused denied the allegations and said that he was not at the garden at the time of the incident but was at home with his wife. PW3 did not believe the version of events that the Accused gave and that was why he charged him.

2.15 The Prosecution closed its case and from the evidence adduced, I was satisfied that a *prima facie* case had been established against the Accused person. I accordingly placed him on his defence pursuant to **Section 207 (1)** of **The Criminal Procedure Code**². When the case came

up for defence, the Accused person elected to give evidence on oath and called four witnesses.

2.16 **DW1** was **Sley Njalika**, the Accused herein and he testified that on 11th of March, 2019, he was watering his garden with his wife and child from 08:00 hours to 22:00 hours. DW1 stated that he did not know anything about the State Witnesses' testimonies and that he does not own a gun nor has he held a gun before in his life. DW1 testified that it was on 12th March, 2019, that he heard that the victim was shot and had been taken to the hospital.

2.17 DW1 further testified that on 13th April, 2019, he went to Chirundu to look for pasture for his cows, because there was a drought in his area. When he returned on the same day at around 22:00 hours, he was told by his wife that police officers had come to his house looking for him and when he asked his wife why they were looking for him, she told him that the police officers told her that he was a cattle rustler who had stolen some cattle. His wife told him that he was required to go to the Police Station the following day.

2.18 The next morning, DW1 prepared himself to go to the police station and before he left, he received a call from the Neighbourhood Watch Chairman, Martin Nalubamba, who told him that he had received a phone call from the Police Officers who asked him to inform DW1 that he should report to the Police officers on Monday instead of Sunday.

2.19 Furthermore, DW1 testified that on Monday, he started off for the Police Station alone and he called the Neighbourhood Watch Chairman to inform him that he was on his way to the police station so that he could inform the police officers that he was on his way. The Neighbourhood Watch Chairman later called back DW1 to inform him that he had informed the police that he was on his way to the Police Station. On his way to the Police Station, DW1 passed through the market to request his children, who were at the market, to accompany him to the Police Station as his witnesses. Whilst at the market he felt a touch on his right shoulder and when he looked back he noticed that it was a Police Officer, by the name of Constable Kabwidi. DW1 testified that at that point, the Police Officer was not aware that he was heading to the police station.

2.20 According to DW1, he got into the vehicle with the Police Officer and went to the Police Station, which was about 100 metres from where he was found. At the Police Station, DW1 was told that the reason he was brought there was because he had shot Mr. Davison Siamabuyu. He then asked them why they had told his wife that he had stolen some cattle but were now telling him that he had shot Mr Siamabuyu. He further asked them why he was only being apprehended on 15th April, 2019, instead of 11th March, 2019, when Mr. Siamabuyu was allegedly shot. The Police Officers responded by saying that they were still investigating the matter. DW1 also asked the

Police Officers whether they had any evidence linking him to the case and they said that they had none.

2.21 DW1 also testified that the reason he did not get on well with the victim despite being related was because when his younger sister realised that the victim was her father, she complained that as her father the victim had not been helping her and accused him of being a wizard. DW1 stated that being the eldest child, the victim believed that he was the one who was encouraging her to say that. According to DW1, prior to this altercation between the victim and his younger sister, he used to get along with the victim.

2.22 In cross-examination, DW1 reiterated that he used to get along with the victim, whom he has known from a very young age.

2.23 **DW2** was **Hannah Busiku**, the wife to the Accused, who testified that on 11th March, 2019, she was seated at their garden with her husband and their daughter Falesi Njalika watering the crops. She stated that they watered the garden until 22:00 hours and that her daughter went back to their house, while DW2 and DW1 remained at the garden where they usually sleep. The following morning, her daughter came back and they continued watering the garden. Between 10:00 and 11:00 hours, whilst they were working in the garden, they heard from some passer-by that the victim had been shot and taken to the hospital. They were surprised at the news and continued working.

2.24 DW2 further testified that after some days she never heard anything about the victim until 13th of April, 2019 between 21:00 and 22:00 hours, when Police Officers went to their house, but she and her husband were not there as on that day her husband had gone to Chirundu enroute to Kafue to look for grazing land for their cattle while she was spending the night on the banks of the river to keep animals away from their crops. DW2 stated that whilst she was at their garden, she saw Police Officers with lit torches and that when they asked where her husband was, she told them that he was in Chirundu. When she asked them why they were looking for him, they accused her of lying and asked her to call her husband, which she did but when her husband answered, the line got engaged before she could ask him his whereabouts. The Police officers then told her to tell her husband to go to the Police Station the following day and she informed him when he returned.

2.25 Furthermore, DW2 testified that the following day, when her husband was preparing himself to go to the Police Station, he received a phone call from the Chairman of the Neighbourhood Watch by the name of Mr. Martin Nalubamba. The Police Officers had told Martin Nalubamba to tell the Accused to report to the Police Station on 15th instead of 14th April, 2019. The following Monday, 15th April, 2019, the Accused started off for the Police Station and he called Mr. Nalubamba, whom he requested to inform the Police that he had started off for the Police Station.

- 2.26 In cross-examination, DW2 admitted that she had not brought anything to Court that would confirm that there was a conversation between Mr. Nalubamba and the Accused.
- 2.27 **DW3** was **Falesi Njalika**, the daughter to the Accused person who testified that on 11th March, 2019, she was at the garden with DW1 and DW2 where they were watering the garden and that around 22:00 hours, she went home to sleep. The following day, she went back to continue watering the garden with DW1 and DW2 where they heard that there was an old man who had been injured and taken to the hospital.
- 2.28 DW3 further testified that on 13th April, 2019, Police Officers went to their garden and found her mother as her father had gone to Chirundu to look for grazing land. She asked her mother why the Police Officers wanted her father and that her mother said the Police Officers did not say anything.
- 2.29 In cross-examination, she reiterated her statement that she left the garden at 22:00 hours after they finished watering the garden and always slept home, while DW1 and DW2 slept at the garden.
- 2.30 **DW4** was **Martin Nalubamba**, the Chairman of the Neighbourhood Watch, who testified that on the 13th of April, 2019, around 21:00 hours, a Police Officer by the name of Kabwidi called him on his phone and asked him to meet him near a school at Simaundu and that he would find them at the house of the Accused person. When he arrived there, the Police Officers told him that

they were looking for the Accused as they did not find him at his home. DW4 then asked the Police Officer why they were looking for the Accused and Officer Kabwidi told him that they had a matter that they were investigating which had to do with PW1. Officer Kabwidi tasked him as Chairman of the Neighbourhood Watch Association to apprehend Mr. Sley Njalika and take him to the Police Station whenever he was seen.

2.31 DW4 further testified that the following day on 14th April, 2019, on a Sunday, he called the Accused and told him that the Police Officers went to his home the previous night and that they wanted him to go to the Police Station in the morning. DW4 further told the Accused that he should give him a call before starting off so that he could inform the Police that he was heading there. The following day on Monday, the Accused person called DW4 at around 08:13 hours and informed him that he was proceeding to the Police Station. DW4 called Officer Kabwidi to inform him that the Accused was on his way to the Police Station.

2.32 DW4 also testified that when the Accused person arrived at the station, he called him to tell him that he had arrived at the station. DW4 called Officer Kabwidi to confirm whether the Accused had arrived at the Police Station and he confirmed that the Accused was with him.

2.33 In cross-examination, DW4 stated that he had not told the Court that he knew where the Accused was when he called him on Sunday and Monday. He further stated that he did not physically see the Accused going to the

Police Station. DW4 also stated that he did not go to the Police Station to confirm that the accused was indeed at the Police Station.

2.34 In re-examination, DW4 reiterated his earlier statement that he was informed by DW1 and Officer Kabwidi that DW1 was at the Police Station and was never informed of DW1 being apprehended at the market.

2.35 The Defence closed their case and the parties indicated that they would file written submissions to augment the evidence on the record.

3 SUBMISSIONS

3.1 By the Accused person's Submissions dated 23rd June, 2020, it was contended that the alleged shooting of the victim occurred at around 19:00 hours, which raises the issue of poor visibility and the possibility of an honest mistake by PW1 in identifying the Accused person, regardless of the fact that the Accused was known to him, cannot be ruled out. It was further submitted that the ringing out of the gun shot and the wounding of the complainant occurred simultaneously, thus with PW1 experiencing excruciating pain, fear and increased adrenaline, his identification of the Accused in such a highly charged and traumatic situation, could not be reliable. Reliance was placed on the case ***Love Chipili v the People***¹, wherein the Supreme Court held that: -

"Where the circumstances of the attack are traumatic and there is only a fleeting glimpse of the assailant, the fact that an appellant had

previously been seen by the identifier does not render the identification safe."

3.2 Learned Counsel further submitted that the fact that PW1 was unable to see clearly without his glasses in Court was a clear indication that his poor sight impeded his ability to properly identify the Accused on the night in question and was worsened by the traumatic circumstances of the night. It was further contended that according to PW2's testimony, it was PW1 who purportedly saw the Accused and who subsequently called out the Accused's name. That therefore, the purported identification amounted to a single witness identification. The case of ***Nyambe v The People***² was cited, where the Supreme stated as follows: -

"In the case of a single identifying witness, there should be some other evidence supporting the identification."

3.3 Furthermore, it was contended that PW1 and PW2, gave testimonies which were in direct contradiction of their witness statements recorded a few days after the alleged attack, when they stated that the Accused was wearing black trousers and a whitish shirt and not the blue shirt and short indicated in both the witnesses' statements. It was therefore submitted that this placed clear doubt on the authenticity of their evidence as the identification of the Accused is unreliable and should not stand in this instance.

3.4 Defence Counsel in her submissions, implored the Court to take Judicial Notice of the fact that though the State

produced a Ballistic Report, they did not call an expert to speak to the document. It was further contended that PW3 produced into evidence, pellets and a Wad allegedly picked from the alleged crime scene, but that in cross-examination, PW3 failed to produce any evidence to show that the said pellets and Wad were indeed recovered from the scene of the crime. It was argued that such failure on the part of the police should be held in the Accused's favour.

3.5 Defence Counsel submitted that the said pellets were reported to have been deformed by hitting a hard target and that if that were the case, the said target being PW1's body and human flesh, can hardly be referred to as a hard target. Therefore, it is suggested that the said Wad and pellets could have been recovered from a different crime scene altogether. According to Defence Counsel, the fact that no weapon was recovered despite a search conducted at the Accused's premises goes to show that the Ballistic Report was merely speculating as to the type of firearm the said pellets were discharged from.

3.6 The Defence contended that PW3 conceded to the fact that he did not follow up on the *alibi* given by the Accused and placed reliance on the case of ***Katebe v The People***³, where the Supreme Court stated that: -

"Where a defence of alibi has been raised and there is some evidence of such alibi, it is for the prosecution to negate it. There is no onus on the accused person to establish his alibi; the law as

to onus is precisely the same as in cases of self-defence or provocation."

- 3.7 Counsel for the Accused submitted that the prosecution did not in any way challenge DW1's testimony as to his whereabouts on that night in question and that the *alibi* he gave was confirmed by DW2, his wife and DW3, his daughter and that therefore, PW1 implicated the wrong person.
- 3.8 It was also contended that an entire month had elapsed between the date of the incident to when the Accused was apprehended and that therefore, the naming of the Accused by PW1 was done with ulterior and sinister motives as the police would have apprehended the Accused immediately after the recording of PW1's witness statement, had that been the case. Finally, Counsel submitted that the prosecution had failed to establish DW1's guilt beyond a reasonable doubt and have therefore failed to discharge the burden of proof in this case.
- 3.9 By the Prosecution's final submissions filed on 2nd July, 2020, it was submitted that in as much as PW2 is the complainant's wife and may be regarded as a witness with an interest to serve, there has been no deliberate attempt to falsely implicate the Accused person as she only testified to what she saw and hence was not biased. This submission was fortified by the holding of the Supreme Court in the case of ***Yokoniya Mwale v the People***⁴, as follows: -

"...We ought to however, stress that these authorities did not establish nor are they intended to cast in stone, a general proposition that friends and relatives of the deceased, or the victim are always treated as witnesses with an interest to serve and whose evidence therefore routinely required corroboration. Were this to be the case, crime that occurs in family environments where no witnesses other than near relatives and friends are present, would go unpunished for want of corroborative evidence. Credible available evidence would be rendered insufficient on the technicality of want of independent corroboration. This in our view, would be to severely circumscribe the criminal justice system by asphyxiating the Courts even where the ends of criminal justice are evident. The point in all these authorities is that this category of witnesses may, in particular circumstances ascertainable on the evidence, have a bias or have an interest of their own to serve, or a motive to falsely implicate the accused. Once this was discernible and only in those circumstances, should the Court treat those witnesses in the manner we suggested in the Kambarange case. A conviction will thus be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or victim, provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or for the Court to satisfy itself that there is no danger in the implication."

3.10 It was further submitted that the Accused ran away from the village the next day after the complainant was shot and that the act of running away by the Accused is not an act of an innocent man and amounts to corroboration

of the commission of the offence. The case of **Emmanuel Phiri v The People**⁵ was cited in support of this submission.

3.11 Furthermore, the Prosecution Counsel contended that the defence of *alibi* raised by the Accused was an afterthought, as there was nowhere in his testimony where he stated that he informed the police that he was at the garden on the material night. The Prosecution fortified this contention with the case of **Gideon Mumba v The People**⁶, where the Court held as follows: -

"The defence of alibi was only raised when the appellant was conducting his defence. We cannot fault the trial court for concluding that the defence was raised as an afterthought. The Court correctly warned itself on the danger of relying on such evidence."

3.12 Finally, it was contended that there were various inconsistencies in the evidence adduced by the Defence in that the Accused testified that he went to Chirundu on the 13th April, 2019, but that DW2 stated that he went to Chirundu on the 13th March, 2019. Further, that the Accused stated that he was told by his wife that the police were looking for him concerning a case to do with cattle, but that DW3 stated that when she asked her mother why they were looking for her father, she responded that the police did not tell her the reason. To support this contention, the case of **Shawaz Fawaz and Prosper Chelelwa v The People**⁷, was cited, wherein the Supreme Court held as follows: -

"Cross examination cannot always shake the evidence of an untruthful witness in every respect. It is sufficient to show the unreliability of a witness if he is shown to have told an untruth about an important part of his evidence."

4 THE LAW

4.1 I am indebted to both Counsel for the submissions filed which coupled with the evidence adduced before me, I have taken into consideration in rendering my decision.

4.2 The starting point of my decision is to highlight the provisions of **Section 224 (a)** of **The Penal Code**¹ which 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...

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

4.3 Based on the above provision, this Court is tasked with determining whether the Accused person beyond reasonable doubt, with intent to maim, disfigure or disable, unlawfully wounded or caused grievous harm to the victim.

5 ANALYSIS AND FINDINGS

5.1 From the evidence on record, I find that it is not in dispute that on 11th March, 2019, at around 19:00 hours, PW1 was shot in his garden and that the Accused was well known to both PW1 and PW2. It is also not in

dispute that following the shooting, PW1 was taken to Mtendere hospital where his wound was treated. I accept these findings as they are not in dispute. What is disputed however, is whether it is the Accused Person, who fired the gun that injured PW1.

5.2 Where the evidence of identification of an accused person is in issue, Courts must guard against the danger of such evidence particularly the danger of an honest but mistaken identification. In such a situation the Court must look for a supporting link to aid the witnesses' evidence of identification. The above position is fortified by the case of ***Molley Zulu, Abraham Masenga and Smiling Banda v The people***⁸, where 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."

5.3 In the same case, it was also held that: -

"On the facts the opportunity for reliable identification was poor within the meaning of the Turnbull case; 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."

5.4 The evidence linking the Accused person to the shooting is that of PW1 and PW2. I have analysed PW1 and PW2's evidence relating to the identification of the Accused. PW1 in his testimony stated that the incident happened

at around 19:00 hours and as the assailant attempted to run away PW2 shone a torch light in the direction where they heard the gunshot and that he identified the assailant as the Accused when he fell in a ditch in his attempt to flee and looked back at them. He further stated that the Accused wore a whitish shirt and black trousers at the scene of the crime.

5.5 Similarly, PW2 in her testimony mainly reiterated what PW1 had said and stated that she too saw the Accused when she shone the torch in the direction of the gunshot sound and that the Accused looked back at them when he fell in a ditch as he attempted to flee the scene. I must state at this point that PW2's witness statement produced in Court taken on 17th March, 2019, contemporaneous to the incident, indicates that it was PW1 who recognised the Accused person and not PW2. This position contradicts the testimony of PW2. I further note, that PW2 being the wife to PW1 (the victim) may have been biased and I therefore warn myself of this possibility. My finding is fortified by the case of **Mwabona v the People**⁹, where it was held as follows: -

"The evidence of a biased witness should be treated with caution and suspicion and failure to regard him as such is a misdirection on the part of the court which may lead to a conviction to being quashed."

5.6 PW2's witness statement indicates that at the scene of the crime, the Accused wore a blue shirt and short, but both PW1 and PW2 testified at trial that the Accused

wore a whitish shirt and black trousers. Based on the foregoing, I am of the view that the discrepancies in her testimony raises doubt as to her credibility as a witness and therefore I find her testimony as to the identity of the Accused unreliable.

5.7 Having found that the evidence of PW2 is not reliable in the identification of the Accused person, I find that only the testimony of PW1 directly links the Accused person to the commission of the crime. I will now consider whether the testimony of PW1 as a single identifying witness is reliable in identifying the Accused person. The guiding principle in determining the reliability of a single identifying witness was discussed in the case of **George Lipepo and others v The People**¹⁰, where the Supreme Court stated as follows: -

"Evidence of a single identifying witness can properly warrant any competent Court to convict upon it provided it is reliable... For the evidence of a single identifying to be reliable the witness in question must have had an opportunity to positively and reliably identify the suspect(s)."

5.8 Based on the foregoing, I will now determine whether PW1 had an opportunity to positively and reliably identify the Accused person at the scene of the crime. Considering that the incident occurred at 19:00 hours and despite the presence of moonlight and the use of torch light, I find that the conditions for identification of the Accused were poor as the identification took place right after PW1 had been shot and by his own admission,

in shock, whilst the two assailants were fleeing the scene. Further, the fact that there was a discrepancy in the description of the clothes worn by the assailant at the scene goes to show that the identification, by PW1, of the Accused cannot be relied upon.

5.9 In the case of ***Haamenda v The People***¹¹, it was held as follows: -

"The poorer the quality (in reference to identification) the greater the danger. In the latter the Court should look for supporting evidence which has the effect of buttressing the weak evidence of identification. Odd coincidences can provide corroboration."

5.10 I will now consider if the prosecution managed in any material way to adduce evidence that would place the Accused at the scene of the crime. Counsel for the Prosecution in her submissions contended that the Police were unable to arrest the Accused after the complainant reported that it was the Accused that shot him as he had ran away from the village the day after the incident and that this action by the Accused amounted to corroboration of the commission of the offence. The term corroboration in evidence was described as follows in the case of ***Machipisha Kombe v the People***¹²: -

"That corroboration must not be equated with independent proof. It is not evidence which needs to be conclusive in itself. It is independent evidence which tends to confirm that the witness is telling the truth when he or she says that the

offence was committed and it was the accused who committed it."

5.11 The above description of corroboration presupposes the existence of some other material evidence implicating the accused person, which in the presence of the corroborative evidence establishes beyond reasonable doubt that the crime was committed by the Accused.

5.12 From the evidence on record, PW3 visited the scene of the crime on 12th March, 2019 and stated that he had been looking for the Accused until 15th April, 2019, when he was apprehended. The Police's attempt to find the Accused was confirmed by the testimony of DW4, the Neighbourhood Watch Chairman, who stated that he met with the police who requested him to avail the Accused to the police station when he saw him.

5.13 DW1 in an attempt to demonstrate to the Court that he voluntarily availed himself to the police, testified that he was arrested at the market on his way to the Police Station on 15th April, 2019. I find that the testimony of DW1 regarding when and how he was apprehended was inconsistent with that of PW3. I am inclined to accept PW3's version of events as DW1's testimony was marked with various inconsistencies and therefore, I find that DW1's testimony regarding how and when he was apprehended by the police is unreliable.

5.14 Based on the foregoing, I find that the Police attempted to look for the Accused and that his leaving the village shortly after the incident could have corroborated any material evidence that could have been adduced by the

prosecution that directly implicated the Accused to the commission of the crime. However, the lack of the said material evidence that would have been corroborated by the Accused's action of leaving the village, weakens the Prosecution's attempt to connect the Accused to the commission of the crime.

5.15 At trial, DW1 (the Accused) stated that he was not at the scene of crime on the night in question but that he was at his garden with his wife and daughter. His testimony was confirmed by DW2 (his wife) and DW3 (his daughter), who testified that the Accused was with them watering the garden from morning until 22:00 hours. Further, PW3 conceded in cross examination, that during interrogation, DW1 told him that he was at home on the night of the incident. From the record, there is no evidence indicating that the *alibi* raised by DW1 was challenged by the prosecution.

5.16 In the case of ***Ilunga Kabala and John Masefu v The People***¹³ the Supreme Court held as follows: -

"In any criminal case where an alibi is alleged, the onus is on the prosecution to disprove the alibi. The Prosecution takes a serious risk if they do not adduce evidence from the witnesses who can discount the alibi unless the remainder of the evidence is itself sufficient to counteract it."

5.17 Furthermore, in the case cited by Defence Counsel of ***Katebe v The People***³, the Supreme Court held that: -

"Where a defence of alibi is set up and there is some evidence of such an alibi it is for the

prosecution to negate it. There is no onus on an accused person to establish his alibi; the law as to the onus is precisely the same as in the cases of self-defence or provocation."

5.18 Based on the foregoing authorities, I find that the fact that the *alibi* was raised by DW1 during his interrogation gave the prosecution ample opportunity to investigate it. Therefore, the failure of the prosecution to adduce evidence to negate DW1's *alibi*, is in favour of the Accused as the onus is on the prosecution to disprove the *alibi*.

5.19 I will now consider the evidence adduced by PW3, who testified that when he visited the scene of the crime he picked pellets and a wad, but that the gun said to have been fired had never been recovered. In the case of ***Baldwin Kalenga v the People***¹⁴, the Supreme Court held as follows: -

"An empty bullet cartridge or bullet shell usually speaks for itself; particularly in circumstances where it was recovered from a scene of crime where gun shots were heard and guns were seen."

5.20 I note however, that PW3 did not adduce any cogent evidence before Court that indicated that the said pellets and wad were indeed recovered from the crime scene, an omission which was challenged by Counsel for the Accused. In cross-examination, PW3 merely stated that he picked the pellets from the garden at the scene, but did not take any pictures of the exact location at the scene.

5.21 In the case of ***John Nyambe Lubinda v the People***¹⁵, it was held as follows: -

"Where the evidence available only to the police is not placed before the Court, it must be assumed that had it been produced it would have been favourable to the accused."

5.22 Based on the foregoing, I find that PW3's testimony regarding the recovery of the pellets and wad from the scene of the crime is unreliable.

5.23 PW3 adduced a Ballistic Report in relation to the wad and pellets allegedly found at the scene of the crime. I considered this evidence as it was in the custody of the witness, and I further note that the witness did not speak to its contents as he was not a Ballistic Expert. However, I find that the contents of the said report are self-explanatory and did not require a Ballistic Expert to interpret.

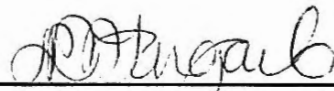
5.24 The said Ballistic Report indicates that the deformed characteristics on the pellets were an indication that they hit a hard target. However, in my view, this finding merely confirms that a gun was fired but does not show that the wad and pellets that were examined were in fact recovered from the crime scene nor does it show when they were discharged from the gun that was fired. Had this information been available, it would have assisted the Court in determining whether there was a possibility that the said wad and pellets were the ones used at the scene of the crime. Furthermore, the fact that the said gun was not recovered from the Accused or

at all, further weakens the prosecution's attempt at placing the Accused person at the scene of the crime.

6 CONCLUSION

- 6.1 In view of the above findings, it is clear that doubt has been raised on the guilt of the Accused person. I find that the Prosecution has failed to prove the case against the Accused person beyond reasonable doubt, that he committed an act intended to cause grievous harm in this case.
- 6.2 I hereby find the Accused Person **Sley Njalika** Not Guilty of the offence of **ACTS INTENDED TO CAUSE GRIEVOUS HARM** and I acquit him accordingly.
- 6.3 Leave to Appeal is granted.

Delivered at Lusaka this 17th day of July, 2020.



**P. K. YANGAILO
HIGH COURT JUDGE**