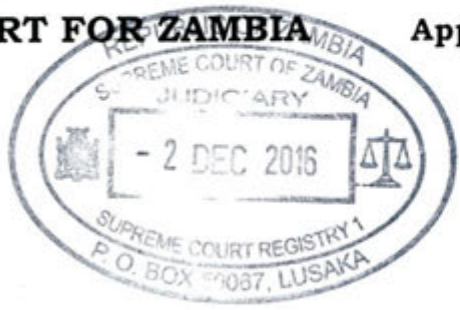
IN THE SUPREME COURT FOR ZAMBIA **Appeal No. 25/2016**

HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

MACLEAN KAFUNDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: MUYOVWE, KABUKA AND KAJIMANGA, JJJS
on the 9th August, 2016 and 29th November, 2016

For the Appellant: Mr. A Ngulube, Director of Legal Aid Board

For the Respondent: Mrs. C.L. Phiri, Deputy Chief State Advocate

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J U D G M E N T

MUYOVWE J, delivered the judgment of the Court

Cases referred to:

1. **R v. Buries [1947] ALR 460**
2. **Elisha Malume Tembo vs. The People (1980) Z.R. 209**
3. **R v Scully 1 C & P 319**
4. **R v Whyte [1987] 3 All ER 416**
5. **Mwiimbe vs. The People (1986) Z.R. 15**
6. **Joseph Mwandama vs. The People (1995/1997) Z.R 133**
7. **Lubendae vs. The People (1983) Z.R. 54**
8. **Elisha Malume Tembo vs. The People (1980) Z.R. 209.**
9. **Simutenda vs. The People (1975) Z.R 373 (reprint)**

Legislation referred to:

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

The appellant was convicted by the High Court sitting at Chipata of the offence of murder contrary to Section 200 of the Penal Code Cap 87 of the Laws of Zambia. The particulars were that the appellant on the 9th of January, 2015 at Lundazi in the Lundazi District of the Eastern Province murdered Shadreck Ngoma (hereinafter referred to as "the deceased").

The undisputed facts accepted by the trial court are that on the 7th January, 2015 three officers from the Office of the President, that is, Gerald Mazuba, Christopher Mwanza and the appellant set off from Lundazi on an operation in pursuit of a truck laden with mukula logs after a tip off from a concerned citizen. Christopher Mwanza, who was the senior officer advised Gerald Mazuba to carry an AK 47 rifle with a magazine of 30 rounds. The three set off after 19:00 hours in a land cruiser and they eventually met the truck at Mcheleka turn off. The truck stopped off the road and the occupants were seen abandoning the truck. The appellant got the firearm from Gerald Mazuba and deflated the tyres of the truck. Shortly, the deceased arrived at

the scene in his vehicle driving at high speed. Still armed with the AK 47 rifle the appellant confronted the deceased who was advancing towards him in his vehicle with lights on. Finally, the deceased's vehicle came to a stop and after the appellant ordered him to come out of the vehicle, the deceased came out of the vehicle and started charging towards the appellant. The appellant fired a warning shot but the deceased continued advancing towards him. The appellant then shot at the deceased. Miraculously, in spite of the serious injury the deceased sped off in his car away from the scene of the shooting. He managed to get help and he was taken to hospital in Chipata where he died a day later. The post-mortem report revealed that the deceased was shot in the thorax.

According to the appellant's defence the environment prevailing at the time of the shooting was unsafe owing to the fact that it was unclear where the occupants who abandoned the truck had gone; that probably they were within the vicinity and that this posed a danger to his life and that of his workmates. Further, that the conduct of the deceased who advanced and charged towards him in spite of the fact that he (the appellant)

was armed unsettled him as he had never experienced such a confrontation in his whole career. The appellant also stated that he accidentally slipped as he was retreating and this is how he ended up shooting the deceased. The appellant stood his ground and maintained that he had no intention to kill the deceased.

In his judgment, the learned judge rightly found that there was no eyewitness to the tragic incident as it was solely between the appellant and the deceased. The learned judge considered the various reasons advanced by the appellant for shooting the deceased and he concluded that he was an unreliable witness. The learned judge was of the view that the appellant, as an experienced Security Officer, failed to take precautions to avoid shooting the deceased. The learned judge found that the defence of self-defence was not available to the appellant as he could have retreated instead of firing at the deceased. In the same vein, the learned judge refused to accept that the shooting was accidental. He found that malice aforethought was established because the appellant shot at an unarmed person. The appellant was found guilty as charged, convicted and sentenced to the mandatory death sentence.

On behalf of the appellant, the learned Director of Legal Aid Board, Mr. Ngulube advanced one ground of appeal namely that the trial court erred in fact and law when it convicted the appellant of murder and when it found that the defences of accident and self-defence were not available to the appellant.

At the hearing of the appeal, Mr. Ngulube relied on his filed heads of argument. From the outset, Mr. Ngulube acknowledged that the issue for determination in this appeal is whether malice aforethought was established in view of the circumstances of this case. The learned Director opined that from the circumstances of this case, it cannot be concluded that the appellant had actual intention to kill the deceased. He contended that rather, the appellant's action was a reaction to something or someone or the conduct of the deceased rather than careless shooting or intended murder. It was submitted that the trial court did not consider the aspect of mistake at all which was a misdirection.

Counsel pointed out that the appellant was an Intelligence Officer who had the right to use the firearm when the situation so dictated. It was contended that the appellant did not shoot the deceased in cold blood and that in fact, the deceased was part of

the illegal enterprise of trading in mukula logs and his conduct before and after the warning shot left the appellant with no choice but to fire again.

Counsel argued that there was no reason or evidence for disbelieving the appellant about his intention with regard to the second shot. Counsel submitted that the defence of mistake, self-defence and accident were linked together. On the defence of mistake, the learned Director referred us to **Section 10 of the Penal Code.** In support of this argument, he also relied on the case of **R v. Buries**[1] where according to Counsel, it was held that the defence of mistake will only make the accused person's act innocent if he at least honestly believed that facts existed which would, if they truly existed, make his act not an offence against the law. Counsel submitted that the appellant honestly believed that the deceased could have been armed or may have been with people who were armed in the vehicle or those who fled from the truck could have been armed. He contended that looking at the circumstances of this case, the deceased behaved in a most unusual manner as it is strange for a man to be fearless and without panic upon seeing someone who is armed. It was

submitted that it is even more unusual, if after a warning shot is fired, the man does not stop but continues to advance. We were referred to the case of **Elisha Malume Tembo vs. The People**[2] where we held that:

> **In order for the appellant to succeed in justifying his shooting of the deceased it is necessary for his mistaken belief and his action to be reasonable.**

Counsel argued that in this case, the appellant held a bona fide and reasonable belief, in the circumstances in which he found himself, that his action of shooting the deceased was reasonable. Likening the appellant to the accused in the case of **R v Scully,**[3] Counsel submitted that the appellant shot once to warn and in firing the second shot, the appellant believed that his life was in actual danger, and was, therefore, justified in shooting the deceased. It was contended that in fact, it would have been a different story if he had shot multiple times or indeed if the incident happened during the day.

Counsel then turned to the defence of accident and self-defence under **Section 9(1) and Section 17 of the Penal Code** respectively. It was contended that the defence of accident and self-defence maybe mutually exclusive in the majority of cases

but that it may be that when someone is defending himself, an accident can happen. In this case, Counsel argued that the appellant intended to fire another warning shot but since he was retreating from the deceased and the ground was slippery, he lost his aim and the shot ended up in the chest of the deceased. Counsel submitted that the test of whether a defensive action was reasonable in the circumstances is not a purely objective test. That what is reasonable would depend on the nature of the attack, actual or threatened and the circumstances. We were referred to the case of **R v Whyte**[4] where, according to Counsel, it was held that an accused is not to be held blameworthy for doing what he honestly and instinctively thought was necessary. And it was submitted that the appellant did what he honestly and instinctively thought was necessary.

Counsel referred us to the case of **Mwiimbe vs. The People**[5] where we said:

> **" In our view the authorities make it abundantly clear that the facts of any particular case will show whether or not the situation which the accused found himself, including the nature of the attack upon himself or the gravity of imminent peril, was such that it was both reasonable and necessary to take the particular action which has caused death in order to preserve his own life or to prevent grave danger to himself."**

While Counsel conceded that there was no actual attack, he took the view that everything pointed to imminent peril as the deceased was making verbal confrontations while advancing towards the appellant. According to Counsel, when a warning shot is fired and the would-be assailant or attacker does not stop or kneel down or lie down to show surrender or lack of resistance to the challenge to stop, surely very little choice is left but to shoot to strike the person. It was contended that, there can be no criminal liability in such a shooting, and this is the situation the appellant found himself, adding that his action was reasonable to save his own life and the lives of his colleagues. Counsel took the view that the argument that the deceased was not armed was only an assumption and that the other assumption is that he may have had a gun concealed on his body or in the vehicle or other people may have been armed.

In conclusion, Counsel argued that the appellant was justified in the action that he took and implored us to allow the appeal, quash the conviction, set aside the death penalty and set the appellant at liberty.

Mrs. Phiri, the learned Deputy Chief State Advocate on behalf of the State, filed heads of argument in response. It was submitted that it was not in dispute that the appellant shot the deceased and made no effort to mitigate the consequences of his actions and the deceased died as a consequence thereof. Counsel argued that the appellant shot the deceased knowing that he was unarmed adding that the appellant was merely apprehensive about the fact that the deceased did not react to his orders in the manner he expected. It was contended that there was no basis for the appellant to assume that the deceased was armed when there was no retaliation from the deceased at the time the appellant fired the fatal shot. Counsel supported the finding by the learned judge that the appellant had the opportunity to retreat unharmed from the scene, if indeed he felt threatened by unseen forces as suggested.

On the issue of combining the defences of self-defence and accident, Mrs. Phiri submitted that the two are distinct. She referred us to the cases of **Joseph Mwandama vs. The People**[6] and **Lubendae vs. The People.**[7] According to the two cases, self-defence is as a result of a deliberate act by the accused to

preserve his life or grave harm to himself while an event occurs by accident if it is a consequence which is unintended, unforeseen or such that a person of ordinary prudence would not have taken precautions to prevent its occurrence.

Counsel submitted that in the case in *casu*, the appellant was fully aware that the ground was slippery and that it was night time. However, the appellant, a trained security officer of many years experience decided to directly point the gun in the direction of the deceased and discharged the gun. Counsel noted that in his evidence, the appellant did not say that the gun accidentally went off, which means, he fired the gun intentionally. Counsel dispelled the appellant's assertion that he fired the gun to scare the deceased. According to Counsel, if his story is to be believed, the appellant would have fired away from the direction of the deceased. On this point, Counsel referred us to the case of **Elisha Malume Tembo vs. The People,**[8] which has also been relied upon by Counsel for the appellant.

It was Counsel's submission that the appellant was not faced with any attack on his person and his claim that he was under verbal attack from the deceased cannot stand as there was

a witness who heard the orders the appellant issued to the deceased and no verbal assaults from the deceased were heard by the witness. Counsel submitted that there was no urgency in confronting the deceased as the tyres for the truck had been deflated and it was not feasible that the mukula logs would be moved from the truck. It was further submitted that if there was any danger, going by the appellant's testimony, he could have taken cover like the rest of his colleagues and could not have stood in full sight of oncoming danger as he did. Counsel submitted that the trial judge was on firm ground when he dismissed the appellant's story as a mere afterthought. Counsel prayed that we dismiss the appeal.

We have considered the evidence on record, the judgment of the trial court and the submissions by Counsel for the parties.

It is common cause that the appellant shot the deceased who subsequently died from injuries sustained from the gunshot wound. The issue at the heart of this appeal is whether the appellant acted unlawfully and with malice aforethought having regard to the circumstances of the case. In the lone ground of appeal, it was argued, *inter alia,* that the people who scampered

out of the truck laden with mukula logs could have been armed and could have been lurking within the area and could have attacked the appellant and his colleagues; that the deceased may have had a firearm concealed in his pocket; and that as the appellant was retreating away from the deceased who was charging at him, he slipped and ended up shooting the deceased in the thorax.

We note from the outset that although the lone ground of appeal attacks the alleged failure by the learned judge to avail the appellant the defence of accident and self-defence, the defence of mistake now raised before us by the learned Director was not raised in the court below. It is trite that issues that are not raised in the court below cannot be raised in this court. It was incumbent upon Counsel for the appellant in the court below to raise the defence. Further, in the case of **Simutenda vs. The People**[9] we held that:

> **(3) A court is not required to deal with every possible defence that may be open to an accused person unless there is some evidence to support the defence in question, i.e "evidence fit to be left to a jury."**

In our view, there was no evidence to support the defence of mistake. The argument by the learned Director that the learned

judge misdirected himself by not addressing his mind to the availability of the defence of mistake cannot be sustained.

We have carefully looked at the peculiar facts of this case and we agree with Counsel for the State and indeed with the learned judge in the court below that the defences of accident and self-defence were not available to the appellant. We see an appellant who, in his quest to defend himself, cast his net wide thereby showing clearly that he was fishing for a defence. The result is that the learned judge found that he was not a credible witness. And in turn, the learned Director had difficulty in arguing this appeal because the appellant's story was full of contradictions. He claimed that he slipped yet at the same time he said the deceased frightened him and he feared for his life and others so he fired at the deceased who he admitted was not armed as he lifted his hands when he ordered him to do so. In the case of **Lubendae vs. The People**[7] we held that:

> **(ii) An event occurs by accident if it is a consequence which is in fact unintended, unforeseen or such that a 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 a likely result of such act.**

In this case, the learned judge rightly rejected the defence of accident. The learned judge after considering the appellant's evidence came to the conclusion, looking at the circumstances prevailing that night, that the appellant failed to act as a prudent security officer.

With regard to the defence of self-defence, which the learned Director tied together with the defence of accident, arguing that in the process of the appellant defending himself an accident occurred, this is probably referring to the appellant's evidence that as the deceased advanced towards him, he backed away from him but he slipped and ended up shooting the deceased. The first question is: was the appellant defending himself and was he in imminent danger? We do not think so. The facts are clear that the deceased was advancing towards him unarmed and visibility was good as there was light from the deceased's vehicle. Mrs. Phiri the learned Deputy Chief State Advocate reminded us of the case of **Mwandama vs. The People**[6] where we had occasion to pronounce ourselves on these two defences. We said in that case, that:

> **"The essence of self-defence is that the accused in fact acts quite deliberately to preserve his own life or to prevent grave harm**

himself. ..... learned counsel's attempt to fuse self-defence and accident in this case could not be sustained. The submission made was that the appellant fired in self-defence but that he did not intend to shoot the deceased; he fired aimlessly to scare the deceased. In the same breath, it was submitted that the appellant reasonably feared that the deceased might shoot him and so he shot him first. These submissions only served to confuse issues."

Indeed, we find no reason to depart from our reasoning in the **Mwandama** case.[6] In this case, it is evident that the appellant had an opportunity to retreat and we agree with Mrs. Phiri that the appellant was merely apprehensive at the conduct of the deceased who did not exhibit fear at the sight of the appellant holding a firearm in front of him and this was after the warning shot was fired. Undoubtedly, being apprehensive is no excuse for shooting a defenceless person.

In his judgment, the learned trial judge had this to say in response to the argument that the appellant had no intention to kill the deceased when he shot at him:

"I agree with the arguments by Mr. Zimba and Mrs. Mhango that the defence of self-defence is not open to the accused. This position is compounded by the fact that it is not clear from the accused's evidence why he fired the firearm. In one breath he has said that he fired it accidentally as he moved back and slipped on the slippery terrain. In this regard, he says that he did not know 66that the firearm had fired until the bullet exited.

In another, he says that he fired the fire arm with intent to scare the deceased by firing in the air. Yet in another, there is a suggestion that the deceased scared him like no other person had done in his 28 years as a security officer and that of necessity he had to fire. These different and conflicting versions of why the firearm was discharged reveal glaring inconsistencies in the accused's evidence which lead me to conclude that he is not a reliable witness who can be believed. The simple facts show that he set out to shoot an unarmed person.....by way of conclusion, malice aforethought is therefore proved in accordance with Section 204 of the Penal Code."

We have no hesitation in agreeing with the learned judge's findings of fact. The deceased was not armed and while it is not disputed that there were people who had jumped out of the truck, it did not make sense for the appellant to shoot the deceased point blank. In fact the appellant behaved as if he was alone at the scene and yet he had gone there with two of his colleagues who were part of his reinforcement as he faced the deceased who was unarmed. Our view, looking at the conduct of the appellant is that he was merely trigger happy.

Looking at the circumstances of this case, we find nothing to justify the brutal killing of the deceased and we have not found any misdirection in the finding by the learned judge that the use of the firearm was unjustified and that therefore malice

aforethought was established. We find no merit in the lone ground of appeal. The appeal against conviction is dismissed.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J.K. KABUKA
SUPREME COURT JUDGE

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C. KAJIMANGA
SUPREME COURT JUDGE