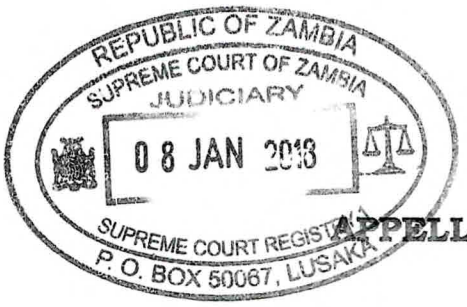
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 29/2017**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

NICHOLAS MALAYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe, and Chinyama, JJS
On 3rd October, 2017 and 22nd December, 2017

For the Appellant: Mr. M. Mankinka, Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. G. Nyalugwe, Deputy Chief State Advocate, National Prosecutions Authority

---

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Mbinga Nyambe vs. The People (2011) Z.R. 246**
2. **Bwalya vs. The People (1975) Z.R. 227**
3. **David Zulu vs. The People (1977) Z.R. 151**
4. **Wilson Masauso Zulu vs. Avondale Housing Project (1982) Z.R. 176**
5. **Lubendae vs. The People (1983) Z.R. 547**
6. **Dorothy Mutale and Richard Phiri vs. The People (1997) S.J. 51**
7. **John Tapula vs. The People Appeal No. 70 of 2015**

The appellant was tried and convicted of the offence of murder. It was alleged that on 30th June, 2012 in Kalulushi, he murdered James Chansa his brother-in-law.

The prosecution called five witnesses. Notably, Simon Moba (PW1) and Timothy Kabwebwe (PW3) were cousins to the deceased while Luka Kapama (PW2) was a nephew to the appellant and was also a nephew to the deceased through marriage .

The brief facts reveal that the deceased and the appellant left for the bush on a hunting expedition. It was while the two were in the bush that the deceased got shot in the head. The appellant covered him with his coat and some branches and left to inform family members. The relatives of the deceased received news that he had died in the bush. When they met the appellant, he told them that the deceased had died after shooting himself. The appellant led them on a two days journey to where he had left the deceased. Fortunately, the deceased was found alive and he explained that all he heard was a gunshot and then he suffered a blackout and when he gained consciousness, he discovered he had

been shot at the back of the head. According to the deceased, the firearm was with the appellant at the time that he heard the gunshot. The deceased told his relatives not to trouble the appellant and that he (the deceased) did not know what happened. The firearm which was found at the scene and which the appellant alleged that the deceased shot himself with was sent for forensic ballistic examination. The ballistic expert Superintendent Joseph Ng'uni (PW5) stated that the firearm which was an imitation of a shot gun locally made was capable of firing 12 bore rounds of ammunition. On examining the firearm, he noticed some dry cartridge residue an indication that the firearm had fired and that the bar stops was intact. PW5 ruled out the possibility that the deceased could have shot himself looking at the position of the gunshot wound and that had the deceased shot himself, the bar stop would have broken but the firearm in question had its bar stop intact.

The cause of death was a gunshot wound to the head.

In his defence, the appellant maintained that the deceased was the owner of the firearm and that he shot himself. It was the appellant's evidence that he did not know how to use the gun.

The learned trial judge convicted the appellant on the ground that the circumstantial evidence was cogent. She held that the deceased's statement to PW1, PW2 and PW3 qualified as *res gestae*; that the three witnesses were credible witnesses and ruled out the possibility of false implication. The learned trial judge accepted that PW1, PW2 and PW3 corroborated each other on what the deceased told them in the presence of the appellant; that the deceased could not have shot himself going by the evidence from the forensic ballistic expert and the arresting officer as the bar stop for the firearm was intact. The learned trial judge found that the appellant's testimony was inconsistent in that he said the deceased shot himself but later stated that he did not see the deceased shoot himself. She believed the evidence of PW1, PW2 and PW3 that the appellant did not dispute the deceased's version of what happened which is that at the time of the shooting, it was the appellant who had the firearm. She reasoned that, therefore, the appellant had the

opportunity to shoot the deceased and he should have foreseen that death would result from shooting the deceased in the head. The learned trial judge convicted the appellant and sentenced him to the mandatory death penalty.

In this appeal, the sole ground is that the trial court convicted the appellant on circumstantial evidence when the inference of guilt was not the only inference that could be drawn from the facts. In his filed heads of argument Mr. Mankinka learned Counsel for the appellant began by arguing that at trial it was the prosecution's contention that it was the appellant who shot the deceased while the defence argued otherwise. That the appellant's explanation was that the deceased could have shot himself accidentally and that this explanation could reasonably be true. In support of this argument, Counsel relied on the case of **Dorothy Mutale and Richard Phiri vs. The People**[6] where we held, *inter alia,* that:

(i) Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference.

It was contended that, therefore, an inference of guilt was not the only reasonable inference that could be drawn from the facts. The case of **Mbinga Nyambe vs. The People**[1] on the same principle was also cited by Counsel.

In sum, Counsel's contention is that the deceased did not state categorically that the appellant shot him. Further, that the sum total of the evidence from the deceased's relatives is that the possibility that the appellant may have shot himself accidentally was not ruled out. Counsel pointed out that PW2 stated that the deceased told them not to trouble the appellant which reveals that there was no ill-will between the appellant and the deceased prior, during and after the shooting ordeal. Counsel submitted that the evidence on record suggests that the area where the incident took place was a game management area where poaching is rife and there is a possibility that someone other than the appellant may have shot the deceased. It was contended that the appellant's conduct of helping the deceased after the shooting and alerting others is not consistent with a guilty person. In the final analysis, it was submitted that the trial court convicted the appellant based

on the inconsistencies in the appellant's testimony. Counsel submitted that the appellant could have been lying to save himself and the trial court fell in error by drawing an inference of guilt without fully addressing its mind to the fact that the lie told by the appellant was not conclusive evidence of his guilt. In support of this argument Counsel cited the case of **Bwalya vs. The People**[2] and **Kape vs. The People** where we held that:

> **The lie told by the accused, where it is reasonably possible that he is lying for a motive which is consistent with his innocence, does not lead inevitably to an inference of guilt, and does not remove the necessity to consider whether the explanation he gave to the police could reasonably be true.**

Counsel urged us to allow the appeal, set aside the conviction and acquit the appellant.

Counsel for the respondent fully supported the decision of the trial court. It was contended that in addition to the evidence of PW1, PW2, PW3 and PW4, there was evidence of something more from PW5 to the effect that the deceased did not shoot himself when he alluded to the fact that the bar stop was intact when it should have broken had the deceased shot himself. It was submitted that

as a consequence of his guilt, the appellant concealed the truth when he reported to the deceased's relatives that the deceased shot himself, yet the deceased was found alive and personally gave the correct account of the event to his relatives. Citing the case of **David Zulu vs. The People**[3] Counsel contended that the circumstantial evidence was so overwhelming such that it took the case out of the realm of conjecture to leave only an inference of guilt.

Counsel further submitted that the conviction of the appellant by the learned trial judge was based on the inconsistencies in his evidence as a whole and the learned judge found the prosecution evidence credible. That PW1 and PW3 who were cousins to the deceased had no motive to falsely implicate the appellant. Relying on the case of **Wilson Masauso Zulu vs. Avondale Housing Project**[4] Counsel contended that the findings of fact by the learned trial judge on the demeanour of the witnesses was not perverse or made in the absence of any relevant evidence.

Counsel for the State ruled out the possibility of accidental shooting of the appellant. It was submitted that there was evidence

that the deceased could not have shot himself and that although the area was a game management area, there is no evidence that someone else other than the appellant shot the deceased. Counsel relied on the case of **Lubendae vs. The People**[5] in which it was held, *inter alia*, that:

> **"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 the 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 to result from such act."**

It was submitted on behalf of the State that although there was no ill will between the deceased and the appellant and that they related well on the day of the shooting as confirmed by PW1, PW2, PW3, the deceased and the appellant, the appellant cannot take refuge in the assertion that the shooting was an accident. It was contended that the appellant being a man of ordinary prudence, sound and sober mind ought to have known and reasonably foreseen the likely consequences of his actions and that malice aforethought was established under Section 204 of the Penal Code.

Counsel contended that the learned trial judge gave proper consideration to all the relevant facts and attached sufficient weight to the evidence and, therefore, she cannot be faulted for returning a guilty verdict.

We have carefully considered the arguments advanced by Counsel for the parties on the lone ground of appeal.

The issues for our determination are two fold, that is, whether it was the appellant who shot the deceased and whether malice aforethought was established in this case. From the evidence, it is not in dispute that the scene of the shooting was a game management area and that at the time, the appellant and the deceased were only the two of them. This was confirmed by PW1, PW2 and PW3 who spoke to the deceased before he passed on. There was no suggestion that there were other people within the vicinity. Further, as far as the shooting is concerned, there is evidence that the firearm had discharged a bullet going by the evidence of the ballistic expert that when examined, the firearm had some powder residue. We have alluded to the finding of the ballistic expert that the deceased did not shoot himself. This leads to the

conclusion that someone else shot the deceased, the question is who shot the deceased. We are alive to the statement by the deceased to PW1, PW2 and PW3 that at the time of the shooting the firearm was in the hands of the appellant. Looking at the circumstances, the reasonable inference is that it is the appellant who shot the deceased. Therefore, we reject the submission by Counsel for the appellant that the deceased could have been shot by someone else other than the appellant.

Having settled the issue of who shot the deceased, we must determine whether the appellant shot the deceased with malice aforethought. It is not in dispute that the deceased was found alive at the scene of shooting and he was able to explain what he believed happened to him. According to his relatives, the deceased told them that they should not trouble the appellant. We agree with the learned trial judge that the deceased's statement qualified as *res gestae* in line with the case of **Edward Sinyama vs. The People** where we held that:

> **A statement is not ineligible as part of the res gestae if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has**

otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case.

In this case there was evidence from PW1, PW2 and PW3 that the deceased and the appellant did not quarrel neither did they fight and 'they had moved well' together. We believe that had the deceased and the appellant quarrelled or fought prior to the unfortunate incident, this fact would have been reported by the deceased to the witnesses. It is quite clear from the circumstances that the appellant panicked after the shooting and since the deceased initially passed out, he (the appellant) believed that he had died hence the report that he took to his relatives. We are mindful that there was no eye witness to the shooting of the deceased thereby necessitating consideration of circumstantial evidence especially in view of the appellant's own story that the deceased shot himself which has been discounted by the ballistic expert. And in our decision in **Kape vs. The People** we

acknowledged that an accused can lie to save himself but that the trial court must consider the explanation and weigh the evidence holistically nonetheless. In this case, the appellant and the deceased were in good terms and there was no reason or motive for the appellant to turn against him. Further, the conduct of the appellant where after the shooting he rushed to go and inform his relatives does not impute guilt knowledge. With this in mind, an inference of guilt of murder was not the only inference that could be drawn from the facts. In the case of **Dorothy Mutale and Richard Phiri vs. The People**[6], we held, *inter alia*, that:

> **(i) Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference.**

A thorough scrutiny of the evidence in this case leads to only one conclusion that there is a strong possibility that the appellant shot the deceased by accident.

We are mindful that Ms. Nyalugwe strongly argued that the defence of accident cannot succeed and cited the case of **Lubendae**

vs. The People[5]. Notably, the defence of accident failed in the case of **Lubendae.**[5] We take the view that the **Lubendae**[5] case can be distinguished from this case. In **Lubendae**[5] the evidence was to the effect that:

> **"....Four eye-witnesses saw the appellant pick up his semi-automatic assault rifle and cock it. In spite of pleas not to use the firearm, the appellant fired thrice at the deceased, killing him on the spot. ..."**

In that case, we stated that:

> **"...By cocking the rifle, following the altercation he had had with Charity, it is evident that the appellant either intended to kill a human being or cause grievous harm; or foresaw human death or grievous harm as a likely result of his act; further a reasonably prudent person in his position would have realised that death or grievous harm was a likely result of such an act. ..."**

In the case in *casu*, as earlier stated, there is no evidence of altercation or that the deceased heard the appellant cocking the firearm or that the deceased pleaded with the appellant not to use the firearm. All the deceased heard was a shot before he fell into unconsciousness. It is clear from the circumstances of the case that malice aforethought was not established by the prosecution.

Having made a finding that the shooting to death of the deceased was accidental, the conviction for the offence of murder cannot be sustained. In the circumstances, we find that this is a proper case for us to invoke Section 15 (1)(b) of the Supreme Court Act. We quash the conviction for the offence of murder and set aside the death sentence imposed by the lower court. Instead, we find the appellant guilty of manslaughter and we sentence him to five years imprisonment with hard labour with effect from the date of arrest. To this extent, the appeal is allowed.

.....
G. S. PHIRI
SUPREME COURT JUDGE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....
J. CHINYAMA
SUPREME COURT JUDGE