

**IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT LUSAKA**

**APPEAL NO. 58/2022**

*(Criminal Jurisdiction)*

**BETWEEN:**

**WU ZHIGANG**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: NGULUBE, MUZENGA AND CHEMBE, JJA.**

**On 27<sup>th</sup> March, 2024 and 10<sup>th</sup> April, 2024.**

**For the Appellant** : Mr. J. Phiri, Mr. D Banda, Messrs JMP Associates

**For the Respondent** : Mr. G. Zimba, Deputy Chief State Advocate, National Prosecution Authority

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## **J U D G M E N T**

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**NGULUBE, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *Yotam Manda vs The People* (1988-1989) ZR 129
2. *Gilbert Chileyia vs The People* (1981) ZR 33
3. *Alubisho vs The People* (1976) ZR 11
4. *Steven Mwaba vs The People* SCZ Appeal No. 184/2020
5. *Kambarage Mpundu Kaunda vs The People* (1990 - 1992) ZR 215
6. *Yokoniya Mwale vs The People* SCZ Appeal No. 285 of 2014
7. *Muchabi vs The People* (1973) ZR 193 (CA)

**Legislation referred to:**

1. *The Court of Appeal Act No. 7 of 2016*
2. *The Penal Code, Chapter 87 of the Laws of Zambia*

**1.0 INTRODUCTION**

- 1.1 The appellant was charged with and convicted of one count of the offence of Manslaughter contrary to **section 199 of the Penal Code** by Chawatama, J at Chipata High Court, on 21 December, 2022.
- 1.2 The particulars of the offence were that Wu Zhigang, on 5 July, 2022 at Lumezi in the Lumezi District of the Eastern Province of the Republic of Zambia, caused the death of Edward Manda. He denied the charge.

**2.0 EVIDENCE BEFORE THE LOWER COURT**

- 2.1 In support of their case, the prosecution called seven witnesses.
- 2.2 The evidence of PW1 Nelson Nyirenda was that on 1 July, 2022, he received information to the effect that there were Chinese nationals at the mining area in Lumezi who were discharging firearms and were threatening people. PW1 went to the mining area the next day and had a conversation with

the appellant on how dangerous it was to engage in the practice of discharging firearms in a place where there were many people. PW1 stated that the appellant assured him that this would not happen again.

- 2.3 On 3 July, 2022, PW1 went back to the mine in the morning and as he arrived there, he heard gunshots and realized that it was the appellant firing the shots once again. When he went closer, he saw that people were scampering in all directions. PW1 then saw Edward Manda who he had known for a long time, fall to the ground and he saw that Edward was bleeding. PW1 then went to confront the appellant and told him that he had shot someone. Edward Manda was taken to the hospital where he died a few days later. He had known Edward for about fifteen years.
- 2.4 The evidence of PW2, Mathews Mwale was that when he went to the mine on 3 July, 2022, he found a group of people, about one hundred in number and soon thereafter, he saw a Chinese man who began to shoot at the people who were in the pit. He later saw Edward fall down and then realized that he had been shot by the appellant. He subsequently died at the hospital. According to PW2, the appellant had quarreled with the deceased at the mine the previous day.

- 2.5 PW3, Johns Banda was the deceased's cousin. He was informed that his cousin Edward was shot at the mine and that he was admitted to Chipata General Hospital. He later died at the hospital.
- 2.6 PW4, Dr. Jere Newton Mutinta testified to the effect that on 3 July, 2022, Edward was admitted to Chipata General Hospital with an open femur fracture. He was treated at the hospital but later developed complications and died two day after he was admitted.
- 2.7 PW5, Sata Sinkonde's testimony was that sometime in early July, 2022, he visited a mine in Lundazi which was crowded as the local people had encroached there. A further check revealed that the group of people had no licence to mine in the area.
- 2.8 The evidence of PW6, the ballistics experts, Daniel Banda was that he received a projectile for examination from the Police in Eastern Province. Upon examining it, he discovered that the projectile was deformed and partly fragmented. He also examined two pistols, which he found to be in a sound mechanical condition. He stated that the projectile was deformed because it was fired at high speed.

- 2.9 PW7, Dr. Victor Telendy, the State Forensic Pathologist testified that he conducted a postmortem examination on the body of the deceased and found that the cause of death was complications due to Sepsis, as a result of the gunshot wound.
- 2.10 PW8, Masauso Mabiya was the dealing officer. He collected two pistols from the appellant which were sent to Lusaka for ballistic examination. After conducting investigations, he charged and arrested the appellant for the offence of Murder.
- 2.11 In his Defence, the appellant gave unsworn evidence to the effect that on the fateful day, people went to his mine and started working on the site, within his boundary, without his permission. He got his pistol and shot in the air to scare them off. He asked the manager to call the Police because the situation was tense, but the Police did not go to the mine. He fired in the air again but the people who were mining in his area did not seem concerned.
- 2.12 The people started charging towards him and his colleagues and he ran away. He later saw one person who appeared to have been injured being carried away. An hour later, the Police arrived and took away his pistol as well as the one that his colleague had. He was later charged and arrested for the



murder of the man who got injured at the mine and subsequently died.

### **3.0 CONSIDERATION OF THE MATTER BY THE LOWER COURT AND DECISION**

- 3.1 The lower court found that PW1 and PW2 were witnesses with a possible interest to serve and that their evidence needed to be corroborated.
- 3.2 The court further found that the appellant was shooting at the same time when the deceased was injured and suffered a gunshot wound. The court further found that two pistols were recovered from the appellant's camp.
- 3.3 The court went on to find that the deceased was admitted to hospital because of a gunshot wound and that this led to the complications that eventually cost him his life. The court came to the conclusion that the appellant shot at the deceased using a firearm. It was the court's finding that no reasonable and prudent person would fire at a crowd of people without considering the danger associated with such an act.
- 3.4 The court convicted the appellant of the offence of manslaughter and sentenced him to three years imprisonment with Hard Labour with effect from 21 December, 2022.

#### **4.0 THE APPEAL**

4.1 The appellant was dissatisfied with the conviction and sentence and appealed to this court, advancing three grounds of appeal couched as follows-

1. ***The lower court erred in law and fact when it failed to take into consideration evidence that amongst the two firearms that were handed over to the police, the firearm that was used in the shooting was not recovered from the appellant neither did the same belong to the appellant.***
2. ***The lower court erred in law and fact when it failed to take into consideration the testimony of PW4 which evidence pointed out medical negligence and a break in the chain of causation.***
3. ***The lower court erred when it convicted the appellant based on PW7's evidence when this testimony was contradictory in nature.***

4.2 In arguing ground one, the court's attention was drawn to the evidence of PW6, the Forensic Ballistic Expert, whose testimony was that-

***"I am convinced that the exhibit bullet was discharged from the exhibit firearm bearing serial number 450379 which is of the caliber 9 millimeter shot."***

- 4.3 The witness further testified that the exhibit fatal bullet was loaded and discharged from the exhibit firearm bearing serial number ACA 450279. It was argued that PW8's testimony was that the firearm that was recovered from the appellant bore the serial number 83809, while the one that was recovered from Lu Zhang-Chen bore the serial number 450279.
- 4.4 It was contended that the lower court misdirected itself when it concluded that the appellant had an opportunity to pick which gun to hand over to the Police as the one he used in the shooting. The court was of the view that the appellant had sufficient interest in both firearms.
- 4.5 According to Counsel, there was no evidence on record to the effect that the appellant had an opportunity to switch firearms nor was it established that the appellant had access to the firearm bearing serial number 450279.
- 4.6 It was contended that the lower court made a wrong inference from the set of facts that were before it and this court's attention was drawn to the case of ***Yotam Manda vs The People***<sup>1</sup> in this regard. According to Counsel, the lower court did not properly consider the facts surrounding the firearms and drew an inference of guilt which was not supported by the evidence.



- 4.7 It was also argued that there was dereliction of duty on the part of the Police as no fingerprints were lifted from the firearms to determine whether the appellant handled the said firearm. The court's attention was drawn to the case of ***Gilbert Chileya vs The People<sup>2</sup>***. We were urged to allow the first ground of appeal for the aforestated reasons.
- 4.8 Turning to grounds two and three which were argued together, it was submitted that based on the evidence of PW4, Dr Jere Newton Mutinta, the deceased received poor medical care and that this broke the chain of causation. It was argued that there was medical negligence in the manner the deceased was treated.
- 4.9 It was argued that there was inadequate health care for the patient and that this led to his death. It was also contended that the deceased's file went missing from the hospital and that therefore the court could not ascertain the care that the patient received. It was argued that the medical staff were negligent and that this led to the patient's death.
- 4.10 Counsel went on to attack the pathologist's (PW7) conclusion that the deceased died of Sepsis as this was not supported by any medical evidence. He maintained that the deceased was not diagnosed to have sepsis when he was alive and that the

pathologist made conclusions when he did not run any tests on the body of the deceased and based his conclusions from what he was told by the Police officers. We were urged to allow grounds two and three. The court was urged to quash the conviction and sentence and acquit the appellant.

## **5.0 THE STATE'S SUBMISSIONS IN RESPONSE TO THE APPELLANT'S HEADS OF ARGUMENT**

- 5.1 The State began by submitting that they were in full support of the conviction. It was submitted that the firearm which discharged the fatal shot on the material day was a Taurus Pistol bearing serial number 450279, exhibit P8 in the lower court, which was registered in the name of Lu Zhong-Chen.
- 5.2 It was argued that the appellant was seen firing a gun at the crime scene on the material day and that when confronted the appellant told PW1 that he wanted to go and see the person he had shot at the scene, moments after Edward Manda was shot. It was further argued that the trial court made a finding of fact that it was the appellant who shot at Edward Manda on the fateful day.
- 5.3 The prosecution submitted that the evidence of PW1 and PW2 was that the appellant was the only person who fired shots on

the material day, which led to Edward Manda suffering a gunshot wound. We were urged to dismiss the first ground of appeal for the aforestated reasons.

5.4 Responding to ground two, which attacked the lower court for failing to take into consideration the testimony of PW4, which pointed at medical negligence and a break in the chain of causation. It was submitted that the deceased was admitted to Chipata General Hospital because he suffered a gunshot wound which was a result of the appellant's careless shooting into the crowd on the fateful day. It was further submitted that the pathologist who conducted the postmortem examination concluded that the cause of death was sepsis due to gunshot wound.

5.5 It was contended that due to the pathologist's finding and his explanation that a gunshot wound usually develops an infection because of the bullet not being sterile, the issue of medical negligence does not arise. We were urged to dismiss this ground of appeal for lack of merit.

5.6 The prosecution urged the court to dismiss the appeal in its entirety for lack of merit.

## **6.0 THE HEARING**

6.1 At the hearing of the appeal, Mr. Phiri, on behalf of the appellant submitted that he would rely on the grounds of appeal and heads of argument filed. He went on to augment the said heads of argument but essentially, he repeated the contents of the heads of argument. The learned Deputy Chief State Advocate also relied on the heads of argument filed in response and briefly augmented his filed arguments.

6.2 Mr. Zimba also addressed the court on the State's appeal against sentence and submitted that the sentence of three years imprisonment with Hard Labour for the offence of Manslaughter was received by the State with a sense of shock. We were urged to tamper with the said sentence and set it aside. We were urged to sentence the appellant to an appropriate sentence, taking into consideration the circumstances of this case.

## **7.0 THE STATE'S APPEAL AGAINST SENTENCE**

7.1 The State filed a cross-appeal against sentence as it was dissatisfied with the sentence imposed on the appellant by the High Court.

7.2 On 27 December, 2022, the Director of Public Prosecutions appealed against the sentence advancing one ground of appeal couched as follows-

1. ***The learned trial judge erred in law to sentence the respondent to three (3) years imprisonment with hard labour for the offence of manslaughter despite there being aggravating circumstances in the case.***

7.3 The court's attention was drawn to the case of ***Alubisho vs The People***<sup>3</sup>. It was contended that the sentence of three years imprisonment with hard labor was inadequate and induced a sense of shock, in the circumstances of this case. It was contended that there are exceptional circumstances which would render it an injustice if the sentence is not enhanced.

7.4 It was submitted that at least three gun shots were heard and that each time gun shots were fired, people at the mine scampered. It was argued that the convict was not in danger as the people ran away each time gun shots were fired.

7.5 The court was urged to enhance the sentence of three years which was imposed on the respondent as it was totally inadequate. The case of ***Steven Mwaba vs The People***<sup>4</sup> was



cited where the court found a sentence of 7 years on a charge of manslaughter to be appropriate.

- 7.6 It was argued that the deceased was not armed and did not attack the appellant or his property. It was further submitted that the respondent was not in imminent danger nor was the fatal shot fired in an attempt to protect the respondent's life or property. It was submitted that there are exceptional circumstances that warrant the enhancement of the sentence. We were urged to allow the cross appeal for the aforesaid reasons.

## **8.0 DECISION OF THE COURT**

- 8.1 We have considered the record of appeal, the evidence adduced in the court below, the authorities cited and the arguments advanced by the respective learned counsel. The appellant has raised three grounds of appeal, the first being that the lower court failed to take into consideration the evidence that the firearm that was used in the shooting was not recovered from the appellant and did not belong to him.
- 8.2 The appellant's counsel relied heavily on the evidence of PW6, the Forensic ballistic expert whose testimony was that the exhibit bullet was discharged from the exhibit firearm which

bore the serial number 450379, and was of the Calibre 9 millimeter.

8.3 The learned Defence Counsel further drew the court's attention to the evidence of PW6, which was that the firearm that was recovered from the appellant bore the serial number 83809. It was emphasized that the firearm that bore the serial number 450279 was recovered from Lu Zhong Chen, and was not recovered from the appellant.

8.4 The learned Defence Counsel went on to contend that the appellant did not switch firearms with anyone and that there was no evidence that he had access to the firearm that bore the serial number 450279.

8.5 The evidence of PW1 and PW2 was what secured the conviction of the appellant. They stated that the appellant was the person who fired the fatal gunshot which led to the deceased suffering a gunshot wound on the thigh and resulted in his hospital admission and subsequent death.

8.6 PW1 was the deceased's friend while PW2's evidence was that he was present at the mine on the day the deceased was shot. He further testified that the appellant quarreled with the deceased at the mine the day before the shooting.

- 8.7 The lower court, in its judgment classified PW1 and PW2 as witnesses with a possible interest of their own to serve but went on to state that their evidence was still important and could not be trashed. The trial court stated that something more was needed to corroborate the evidence of PW1 and PW2 implicating the appellant that he was the one who shot the deceased.
- 8.8 The lower court found that there was something more than a possible motive that PW1 and PW2 wanted to falsely implicate the appellant. As regards the treatment of the evidence of PW1 and PW2 who were friends of the deceased, we must state that the consistent position of the court is that evidence of relatives and friends of the deceased should be treated with caution and circumspection since such witnesses may well have an interest of their own to serve or may be biased. In the case of ***Kambarage Mpundu Kaunda vs The People***<sup>5</sup>, the Supreme Court guided that as relatives and friends of the deceased may be witnesses with an interest to serve, it is incumbent upon a court in considering evidence from such witness to exclude the danger of false implication. In the case of ***Yokoniya Mwale vs The People***<sup>6</sup>, the Supreme Court guided that-

***“We are of the firm view that insisting on the position that the evidence of every friend or relative of the deceased or the victims must be corroborated is to take the principle in the case authorities on this point out of context.”***

8.9 Further, in the case of ***Muchabi vs The People***<sup>7</sup> the Supreme Court guided that-

***“A witness with an interest to serve must be treated as an accomplice and his evidence tested to see whether it was corroborated or whether there was a reason for believing it in the absence of corroboration.”***

8.10 *In casu*, we are of the view that since PW1 and PW2, having been classified as witnesses with a possible interest to serve, their evidence required corroboration on something more to support their respective testimonies which pointed at the appellant as the person who shot the deceased. The evidence of “something more” would then satisfy us that the danger of falsely implicating the appellant has been excluded.

8.11 We have considered the evidence on record and we do not find any evidence that corroborates the evidence of the two witnesses regarding the identity of the appellant as the person who caused the deceased’s death. As such, we do not find

corroborative evidence or evidence of something more which would rule out the danger of false implication.

8.12 Further, the evidence of the Forensic ballistic expert, was that the firearm that discharged was the one which was recovered from the appellant's colleague. The evidence on record does not point at the appellant as the person who discharged the firearm that shot the deceased.

8.13 The evidence of the Forensic ballistic expert therefore supports the defence's contention that the appellant is not the one who shot the deceased. That being the case, the evidence of PW1 and PW2 cannot be relied on and is accordingly discounted.

## **9.0 CONCLUSION**

9.1 In light of the foregoing, we find merit in the first ground of appeal and we allow it. The effect of ground one succeeding is that the appellant is not the one who shot the deceased. Effectively, this renders the second and third grounds of appeal otiose.

9.2 We find it unsafe to uphold the appellant's conviction as it was not supported by the evidence on record. Although the deceased was shot dead in gruesome circumstances, we cannot say that the appellant was the one who pulled the



trigger. That being the case, we allow the appeal and quash the conviction and set aside the sentence. The appellant stands acquitted and is set at liberty forthwith.

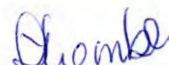
9.3 The State's appeal against sentence is accordingly dismissed for lack of merit.



P. C. M. NGULUBE  
**COURT OF APPEAL JUDGE**



K. MUZENGA  
**COURT OF APPEAL JUDGE**



Y. CHEMBE  
**COURT OF APPEAL JUDGE**