

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE**

(Criminal Jurisdiction)

BETWEEN:

OMAR MOHAMMED HASHI
AND
THE PEOPLE



Coram : Phiri, Muyovwe and Malila, JJS

On 11th August, 2015 and 14th May, 2020

For the Appellant: **Mr. M. Haimbe of Messrs Sinkamba Legal Practitioners**

For the Respondent: **Mrs. F. L. Shawa Siyunyi Director of Public Prosecutions.**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. Peter Yotam Haamenda vs The People (1977) ZR 184
2. The People vs Njovu (1968) ZR 132
3. Nelson Mpala and 3 others vs The People (2014) 1 ZR, 407,

Legislation referred to:

1. Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.

This is an appeal against the judgment of Mr. Justice C.F.R. Mchenga, (as he then was) delivered on 16th February, 2015 in which the appellant was convicted of the murder of his own house servant.

The particulars of the offence were that the appellant on the 13th of December, 2012 at Ndola in the Ndola District did murder Kabaso Holland contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

Three grounds were raised in this appeal. The first ground was that the learned trial Judge misdirected himself when he convicted the appellant without proof of malice aforethought.

The second ground was that the learned trial Judge misdirected himself when he convicted the appellant in the face of dereliction of duty by the prosecution in their failure to call two (2) witnesses; thereby creating reasonable doubt in the prosecution's case. The third and last ground was that the learned trial Judge misdirected himself at law and in fact when he failed to find that there were extenuating circumstances which should have mitigated the commission of the offence.

In support of the first ground, it was submitted that the only issue the prosecution proved beyond reasonable doubt was the fact that the appellant's firearm was the weapon that caused the deceased's death; but failed to prove malice aforethought on his part. It was argued that the only witness who was in close proximity to the crime scene was PW4 whose evidence was that the appellant and the deceased were engaged in an argument before she heard the gun shot without observing what transpired and the circumstances under which the shot was fired. On the other hand, the appellant's explanation was that he pulled out his firearm in order to compel the deceased to go to the Police Station after he suspected him of dealing in a prohibited narcotic substance called miraa which the deceased had been dealing in using the appellant's flat with assistance from the appellant's neighbour known as Awilo. According to the appellant, there was a struggle for the firearm before it went off while the deceased was on top of the appellant. It was the appellant's position that he did not intend to kill the deceased and, therefore, he could not have had malice aforethought.

In Support of the second ground, it was submitted that since there was no witness to the struggle and the shooting, there was a duty on

the Police to have investigated the events through forensic evidence which was material to the case, failure to which the court should have made a finding which was favourable to the appellant. It was argued that the Police should have lifted finger prints from the firearm in order to exclude any speculation on the truth and veracity of the appellant's story as there was a great possibility that the deceased's finger prints could have been on the firearm.

In support of this proposition the case of **Peter Yotam Haamenda vs The People** ⁽¹⁾ was cited. In that case, it was held that where an investigating agency fails to investigate and, as a consequence, the accused is prejudiced, that failure will operate in favour of the accused and may result in an acquittal because evidence that might have been in his favour was not adduced. It was submitted that the failure by the Police to obtain fingerprint evidence from the firearm which discharged the lethal bullet raised reasonable doubt in the prosecution's case. It was further argued that two persons named by PW5 and PW6 as Mercy Nsama and Awilo should have been called to testify by the prosecution as they were known to the Police and had critical evidence which was relevant to the crime scene.

In support of the third ground of the appeal, it was submitted that the learned trial Judge erred when he stated that there were no extenuating circumstances when there was evidence from the appellant that he suspected that the deceased was dealing in narcotic substances, which suspicion made him pull out the firearm as a result of the latter's aggression and refusal to go to the Police station. According to Mr. Haimbe, the appellant's story was substantially supported by PW4 to the extent that there was a quarrel; and therefore, that the appellant acted justifiably. It was argued that the appellant's explanation should not have been dismissed. Instead, this explanation should have been considered as establishing extenuating circumstances.

For the foregoing reasons we were urged to quash the conviction and set aside the sentence.

In response to the first and second ground of appeal, the learned Director of Public Prosecutions submitted that the appellant's conviction was well founded on proof beyond reasonable doubt and that the trial court was on firm ground. It was argued that the claim that the appellant was upset with the deceased's possession of miraa was not good enough to compel him to use his gun on the deceased and that

his use of the firearm was with a view to cause grievous harm; and his explanation could not reasonably be true.

It was submitted that it was illogical for the appellant to claim that he lost the struggle over the gun because the deceased would have found an opportune moment to escape or to seize the gun before he was shot. Our attention was drawn to the Police evidence to the effect that the deceased died while holding a plastic bag and it was argued that he could not have been struggling for the gun. It was further argued that the evidence established that the appellant pulled the safety catch of his firearm before pulling the trigger and that in doing so, he knew or ought to have known that he was going to cause injury or grievous harm to the deceased who was merely asking for his two months unpaid wages. Thus, it was submitted that malice aforethought was proved by the prosecution.

Regarding the allegation that the Police failed in their duty to diligently investigate this case and to call the persons named as Mercy and Awilo as witnesses, the learned Director of Public Prosecutions submitted that the learned trial Judge correctly found that there was no dereliction of duty on the part of the Police in their investigation. It

was submitted that the names of Mercy and Awilo were on the prosecution's list of witnesses and their statements were served on the appellant and his counsel; such that if their anticipated evidence added value to the defence, the appellant and his Counsel were at liberty to call them to the witness stand.

In response to ground three of the appeal in which it was suggested that the lower court should have found extenuating circumstances, the learned Director of Public Prosecutions submitted that the lower court was on firm ground to find otherwise because there was no evidence suggesting extenuating circumstances; and if the deceased was suspected of dealing in drugs, that did not justify his killing.

We have considered the three grounds of appeal carefully. We have also considered the submissions made by both sides as well as the evidence on the record of the appeal and the judgment of the lower court.

A careful study of the evidence on the record shows that the following facts were established.

The deceased was a domestic worker employed by the appellant. On the material day PW4, the house maid, was cleaning at the appellant's flat when the deceased approached the appellant and asked for his two months wages which were outstanding. According to PW4 there was an exchange of words between the appellant and the deceased followed by a gunshot and she saw the deceased's body. The Police later visited the scene of crime. The cause of death was recorded on the post-mortem examination report as a single bullet wound to the back of his head. The shooting took place in broad day light around 11:30hours.

After the shooting incident, the appellant booked a taxi cab driven by PW1 with instructions to take him to Sakania boarder. As PW1 drove the appellant around, he observed that he was loading bullets in his pistol. PW1 became suspicious and drove the taxi cab to a military post where soldiers led by PW2 apprehended him and recovered his pistol and the ammunition. The soldiers drove the appellant to the Police station in the company of PW1. The pistol and bullets were examined by PW3, the forensic ballistic expert, who issued a report which was admitted in evidence. The appellant was arrested and charged with the

offence of murder. The case was investigated by PW5. During the trial, two witnesses named Mercy and Awilo could not be traced by PW6.

In his defence, the appellant did not dispute the fact that his gun killed the deceased. He pleaded the defence of accident after a quarrel and struggle with the deceased.

With regard to the first ground of the appeal which assails the lower courts finding that the appellant had malice aforethought, we take counsel in the decision in the case of **The People vs Njovu** ⁽²⁾ in which it was held as follows:

"to establish malice aforethought, the Prosecution must prove either that the accused had actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone."

As we have already indicated, the appellant never denied that his gun killed the deceased. The deceased's body had a single bullet wound to the back of his head. There is no evidence on record to suggest that other than the deceased's demand for his unpaid wages, he was aggressive or provocative in any way; and he was unarmed. In our considered view, when the appellant prepared his pistol to fire and actually fired it while aimed at the back of the deceased's head, he had

the intention to kill. We do not hesitate to conclude that malice aforethought was established. In any event, the position of the wound and the appellant's attempt to escape from the Zambian jurisdiction through Sakania border post betrayed his explanation about a struggle and his claim that the shooting was accidental. These facts betrayed his claim to innocence. We find no merit in ground one of the appeal.

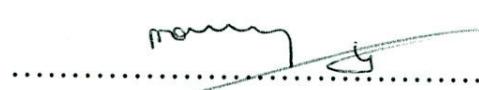
Regarding ground two of the appeal, we note from the record; in particular from the evidence of PW6, that a full and credible explanation was offered to the trial court as to why it was unnecessary to take fingerprints from a firearm whose ownership and use was not in dispute; and why the said Mercy and Awilo could not be brought to court to testify. The said Mercy and Awilo could simply not be traced from their last known contact details. In any event, there is no rule of evidence which obliges the prosecution to call all listed witnesses without fail. As correctly submitted by the DPP, the defence was at liberty to call those two persons if they saw value in them. We find no merit in ground two of the appeal.

With regard to the third and final ground of appeal; namely that the trial court should have found extenuating circumstances in the fact

that the deceased was suspected of dealing in drugs, we take counsel in the decision in the case of **Nelson Mpala and 3 others vs The People**⁽³⁾ in which it was held that the shooting of the deceased, albeit a suspect, cannot be excusable in any form. We therefore do not agree with the appellant's claim that extenuating circumstances were established. We find no merit in the third and final ground of appeal. The net result is that we dismiss the entire appeal.



G.S. Phiri

SUPREME COURT JUDGE
E. C. Muyowwe**SUPREME COURT JUDGE**
M. Malila**SUPREME COURT JUDGE**