

**IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 73/2023
HOLDEN AT KABWE
(Criminal Jurisdiction)**

BETWEEN:

THE PEOPLE

AND

GERSHOM MUTALE CHISHIMBA

APPELLANT

RESPONDENT



CORAM: NGULUBE, MUZENGA AND CHEMBE JJA

On 22nd May, 2024 and 16th August, 2024.

For the Appellant : Mrs. A Kennedy – Mwanza Principal State
Advocate, National Prosecution Authority

For the Respondent : Mr. O. Ngoma – Messrs Steven Osbourn
Advocates

JUDGMENT

CHEMBE JA delivered the judgment of the Court.

Cases referred to:

1. *Lubandae v The People* (1983) ZR 54
2. *R v Batterman* (1925) All ER 45
3. *Davies Jokie Kasote V The People* (1977) ZR 75
4. *Yokoniya Mwale v The People* SCZ Appeal No. 285/2014

5. *Davies Chiyengwa Mangoma v The People* SCZ Appeal No. 217/2015
6. *Dorothy Mutale and Another v The People* (1995-97) ZR 227
7. *Kambarage Kaunda v The People* (1990) ZR 215
8. *George Misupi v The People* (1978) ZR 271
9. *Senton vs Thornley* (1903) A.C. 443
10. *The People v Lawrence Mubanga* (1985) ZR 35
11. *Andrews v D.P.P.* [1957] 2 All E.R. 522

Legislation referred to:

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

Other Works referred to:

1. *Criminal Law in Zambia: Doctrine Theory and Practice* Simon E. Kulusika (Chribwa Publishers, Lusaka, 2020)

1.0 INTRODUCTION

1.1 This appeal emanates from the judgment of Sikazwe J dated 2nd May 2018 in which the Respondent was acquitted.

1.2 The Respondent was charged with two counts of manslaughter contrary to section 199 of the Penal Code. Particulars of offence were that on 27th December 2013, the Respondent unlawfully caused the death of Greenford Muchelenganga and Elias Chalwe.

2.0 EVIDENCE BEFORE THE TRIAL COURT

- 2.1 The prosecution adduced evidence that on 27th December 2013, the deceased, Greenford Muchelenganga (hereinafter referred to as the 1st deceased), set out with the Respondent to go bird hunting in the Kafue plains. The deceased carried his firearm whilst the Respondent also had his own firearm.
- 2.2 Before they reached the destination, they picked up PW1 Aaron Chibwe and the 2nd deceased, Elias Chalwe, to guide them to the location where the birds could be found.
- 2.3 They left the motor vehicle at Nakayiba fishing camp as the ground was wet and slippery. The quartet proceeded to the plain on foot.
- 2.4 At some point the Respondent and the 1st deceased loaded the firearms with bullets. The two deceased persons walked in front of the Respondent and PW1.
- 2.5 As they walked through the grass, the Respondent stepped into a hole and fell. His gun went off and the deceased persons were

shot. The 1st deceased sustained a big wound to the back of his thigh while the 2nd deceased sustained injuries to his back.

2.6 The Respondent and PW1 tried to render assistance to no avail.

They decided to go back to the village to seek help. When they returned to the scene they found that both men had died.

2.7 The matter was reported to Sibuyunji police station. The Respondent was detained and both guns were recovered together with the spent cartridges.

2.8 Postmortem examinations were conducted on the bodies of the deceased persons and the cause of death was found to be haemorrhagic shock due to gunshot wound for both.

2.9 The Respondent's defence was that his gun went off accidentally when he fell. He denied that he was negligent in the manner he handled his gun.

2.10 The trial Judge found that there was negligence on the part of the Respondent who failed to engage the safety catch of the gun. He however went on to hold that the gun discharged accidentally when the Respondent fell into a ditch and acquitted him.

3.0 THE APPEAL

3.1 Disenchanted with the decision of the trial Court, the Appellant launched this appeal fronting the following grounds:

1. *The trial Court erred in law when it acquitted the Respondent on a charge of manslaughter having found that the Respondent was culpably negligent in the manner he handled his firearm.*
2. *The trial Court erred in law when it acquitted the Respondent against the weight of evidence adduced by the prosecution.*

4.0 APPELLANT'S ARGUMENTS

4.1 The Appellant filed heads of argument on 20th May 2024. In support of the first ground of appeal, the Appellant contended that the trial Court having correctly found that the Respondent was negligent in the manner he handled the firearm, should have found him guilty of manslaughter. We were referred to section 199 of the Penal Code which defines an unlawful act or omission as an omission amounting to culpable negligence to discharge a duty to the preservation of life or health.

4.2 It was submitted that the Respondent's conduct fell short of the ambit of section 9 (1) of the Penal Code as he was not absolved of negligence. Reference was made to the case of **Lubandae v The People**¹ where the Supreme Court had occasion to consider the meaning of the defence of accident in section 9 (1) of the Penal Code. It was submitted that in the present case the Appellant should have foreseen that due to the terrain and the ground being slippery, he could fall. It was argued that he should have taken precaution by engaging the safety on the firearm.

4.3 We were referred to the case of **R v Batterman**² and **Archibold 35th Edition** for the definition of culpable negligence which was said to be gross negligence. The Appellant maintained that the Respondent should have been found guilty of manslaughter.

4.4 Regarding the second ground of appeal, the Appellant submitted that the trial Judge overlooked key evidence. The Appellant appeared to suggest that the trial Judge did not consider the evidence of PW1 and PW7. It was submitted that the trial Court overlooked the evidence of the forensic pathologist that the entry

wound on the 1st deceased was the front of the right leg which proved that he was shot from the front.

4.5 Reference was made to case of ***Davies Jokie Kasote V The People***³ where it was held that a finding of fact becomes a question of law when it is a finding not supported by evidence. The Appellant argued that the trial Court should have believed the prosecution witnesses and not the Respondent whose evidence was not supported.

4.6 A further submission by the Appellant was that the Court erred when it disregarded the evidence of PW1 and PW6 on the ground that they were related to the deceased contrary to the authorities of ***Yokoniya Mwale v The People***⁴ and ***Davies Chiyengwa Mangoma v The People***⁵. We were urged to allow the appeal.

5.0 RESPONDENT'S ARGUMENTS

5.1 In opposing the appeal, the Respondent argued that the trial Court did not make a finding that he was culpably negligent. He maintained that the evidence before the Court below was that he fell and the firearm went off accidentally against his will.

- 5.2 Relying on section 9 (1) of the Penal Code, the Respondent submitted that the circumstances under which the incident occurred showed that he could not be held criminally liable for the firearm having discharged or fired as it was accidental. He also referred to the case of **Lubandae v The People** (supra).
- 5.3 In relation to the 2nd ground of appeal, the Respondent submitted that the evidence of the pathologist that the 1st deceased was shot from the front was at variance with the evidence of PW1, PW6 and PW8 and the Court below was at liberty to draw an inference that was more favourable to the Appellant. The case of **Dorothy Mutale and Another v The People**⁶ was referred to in that regard.
- 5.4 The Respondent maintained that the sketch plan produced by the prosecution showed that the deceased were shot from the back. The Respondent supported the trial Judge's decision to disregard the evidence of PW2 and PW6 as they were witnesses with an interest to serve as decided in the cases of **Kambarage Kaunda v The People**⁷ and **George Misupi v The People**⁸. We were urged to dismiss the appeal.

6.0 CONSIDERATION AND DECISION

- 6.1 We have carefully considered the arguments by both sides together with the record of appeal. We will address both grounds of appeal together as they are related. The issue for determination is whether the Appellant adduced sufficient evidence to prove that the Respondent committed the offence of manslaughter by negligence.
- 6.2 The Respondent did not deny that he shot the deceased persons and caused their death. His defence was that it was an accident. The prosecution's position was that the Respondent was negligent or reckless in that he failed to secure the safety catch on the firearm which was loaded as the group walked through a wet slippery swampy plain.
- 6.3 There was no dispute that the Respondent loaded his gun and did not close the safety to prevent the gun from going off accidentally. However, there was no evidence by the prosecution that moving with a gun with the safety unsecured was negligent in the circumstances of the case.

6.4 Given that the Respondent raised the defence of accident, the issue before the Court below should have been whether there was any recklessness or negligence on the part of the Respondent to exclude this defence.

6.5 Section 9 (1) of the Penal Code provides for the defence of accident and states as follows!

“Subject to the express provisions of this code relating to negligent acts and omissions a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident.

6.6 For a defence of accident to hold it must be proved that the alleged act was unintentional, unexpected and unforeseen. The burden is on the prosecution to prove beyond a reasonable doubt that the Respondent's actions were not accidental. In the **Lubandae case** cited by both parties, the brief facts were that the Appellant, angered by the deceased's behavior, picked his semi- automatic assault rifle, cocked it and fired three times at the deceased, killing him. He then returned to his camp where he reported the incident leading to his arrest.

6.7 The Supreme Court held the following:

“It is trite law that, in any offence for which a particular mental element is required, it is a defence that, although the accused did the acts, which would be criminal if done with intent, they were done by accident.”

The Court referred to the definition of ‘accident’ by Lord Lindley in the case of ***Senton vs Thornley***⁹ as not a technical legal term with a clearly defined meaning.

The Supreme Court went further and stated that to hold that an event occurs by accident, within the meaning of section 9 of the Penal Code, has to be 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.

- 6.8 In our view the **Lubandae case** can be distinguished from the appeal before us as the facts are not similar. However, what is clear from the cited case is that the test to apply in the defence of accident is whether the respondent intended or could have foreseen the occurrence of the event. The Appellant’s position is that the Respondent should have foreseen that there was a possibility that the gun could go off if he fell on the slippery ground and should have kept the gun safety on. However, we have taken note the incident took place in the plains where wild animals roam free. It was

therefore in order for the hunters to be ready to fire suddenly. Further, we also note that the group was hunting for birds in the plains and needed to be ready to shoot the prey. We hold the view that there were no precautions which the Respondent could have taken to prevent the accident.

6.9 In our view, for the prosecution to successfully disprove or negate the defence of accident, it must be shown that the accused displayed gross negligence or recklessness. For example in this case if the prosecution demonstrated that the Respondent was pointing or aiming a loaded firearm with the safety catch off at the deceased persons when it accidentally went off. The Learned author of **‘Criminal law in Zambia: Doctrine Theory and Practice (Chribwa Publishers, 2020, Lusaka)** Simon E. Kulusika defined recklessness as unjustifiable risk taking.

6.10 In the case of ***The People v Lawrence Mubanga***¹⁰ where the accused fired at a fellow hunter whom he mistook for an animal, the trial judge held that recklessness suggested indifference to risk. In that case the accused had gone hunting with 5 other people. In the forest, they split into groups of two. As they were hunting in the evening, the accused saw a light near the camp and thought it was an animal. He fired in the direction of the light and killed his

colleague. His defence of misadventure was not accepted by the court. The trial judge reasoned that the accused was aware that there were other parties hunting who were scheduled to meet with them and should have exercised caution before firing the gun. He concluded that the accused had acted with gross negligence.

6.11 Lord Atkins in the case of ***Andrews v D.P.P.***¹¹ stated the following:

“In practice, it has generally been adopted by judges in charging Juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise. The principle to be observed is that cases of manslaughter in driving motor cars are but instances of general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied “recklessness” most nearly covers the case.”

In the present matter, the Appellant did not demonstrate that the circumstances under which the firearm discharged was not accidental or that the Respondent exhibited gross negligence. We

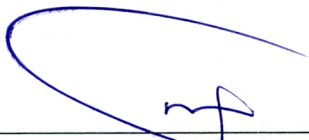
agree with the reasoning in the above judgments that to establish the offence of manslaughter by gross negligence, a high degree of negligence needs to be proved. In our view the failure to keep the safety of the firearm during a hunting expedition does not constitute negligence.

7.0 CONCLUSION

7.1 In view of the foregoing, we find no merit in both grounds of appeal. We accordingly uphold the judgment of the court below and dismiss the appeal in its entirety.



P.C.M. NGULUBE
COURT OF APPEAL JUDGE



K. MUZENGA
COURT OF APPEAL JUDGE



Y. CHEMBE
COURT OF APPEAL JUDGE