

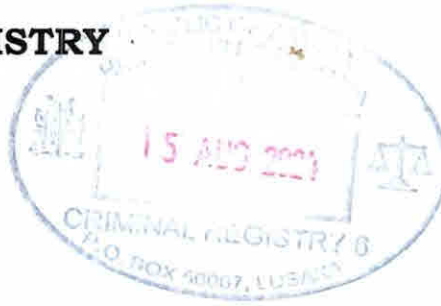
IN THE HIGH COURT FOR ZAMBIA

HP/312/2023

AT THE CRIMINAL REGISTRY

HOLDEN AT LUSAKA

(Criminal Jurisdiction)



BETWEEN:

THE PEOPLE

VS

MALICHOLY HANJASE

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE STATE: MR. F.M. SIKAZWE PRINCIPAL STATE ADVOCATE

FOR THE ACCUSED: MRS. T. H. BOWA OF LEGAL AID COUNSEL - LAB

JUDGMENT

Cases Referred To:

1. *Mwewa Murolo v The People* (2004) ZR 207
2. *Khupe Kafunda v The People* (2005) ZR. 31
3. *David Zulu v The People* (1977) ZR 151 (SC)
4. *Saidi Banda v the People* Appeal No. 114 of 2015
5. *Ezious Munkombwe and Others v The People* CAZ Appeal No. 7, 8,9 of 2017
6. *Kambarange Mpundu Kaunda v The People* (1990-1992) Z.R 215
7. *Borniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People* (1988-1989) Z.R. 163,
8. *Yokonia Mwale v the People* (Appeal No. 205/2014),

9. *Guardic Kameya Kavwama v The People* (Appeal No. 84/2015)
10. *Katukula Trywell v The People*, SCZ Judgement No. 32 of 2015
11. *Sinyama v the People* (1993-94) Z.R 16
12. *Samuel Mwaba Mutambalilo v the People* Appeal No. 47/2015

Legislation Referred To:

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

1. INTRODUCTION

1.1. The Accused person herein namely; **Malicholy Hanjase** (the Accused) stands charged with two counts of the offence of Murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.

1.2. COUNT ONE

1.3. The particulars of the offence are that **Malicholy Hanjase**, on the 1st day of May, 2023, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder **Owen Kanseke**.

1.4. COUNT TWO

1.5. The particulars of the offence are that **Malicholy Hanjase**, on the 2nd day of May, 2023, at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, did murder **Gabriel Phiri**.

2. PROSECUTION'S CASE

2.1 At trial, the prosecution's case was led by ten witnesses.

PW1, testified that on 1st May, 2023, she was asleep at her home with her husband Gabriel Phiri (the 2nd deceased) when her brother, Owen Kasenke (the 1st deceased) went to their place. That when she asked why he had gone over to their place at night, the 1st deceased responded that he had quarrelled with his girlfriend and that she had thrown his clothes outside. PW1 told the Court that the 1st deceased asked the 2nd deceased to accompany him to get his other clothes since he had only come with a bag which only had some of his clothes in it. She testified that the two deceased persons left together and she stayed up waiting for them to return but they did not.

2.2 PW1 further testified that around 03:00 hours, two unknown people went over to her place and asked whether the 2nd deceased resided there. She told the Court that she answered in the affirmative and told them she was his wife. That the two unknown people then showed her a picture of the 2nd deceased and asked if that was her husband and she again

answered in the affirmative. PW1 testified that it was at that point that the pair informed her that the 2nd deceased was shot and was found lying down at Linda Police Station before he was taken to Mount Makulu Clinic. PW1 testified that she and her other brother-in-law went to the Police Station and that it was her brother-in-law that spoke to the police. It was PW1's further testimony that the 2nd deceased died on 2nd May, 2023, while the 1st deceased died on 1st May, 2023.

2.3 Under cross-examination, PW1 testified that her husband, the 2nd deceased was a lorry boy for a company and that the 1st deceased was her brother, who was a bricklayer.

2.4 PW2, a business woman living in Linda Compound, testified that on 1st May, 2023, between 01:00 hours to 02:00 hours, while at her restaurant, an unknown man walked into her restaurant and asked whether she was the one selling there. That when she agreed, he introduced himself as a police officer and told her that after knocking off, he went to a bar where he met 4 people who attacked him and stole his wallet and phone. PW2 testified that the said man also told her that after he was attacked, he went back home to fetch his gun

and then went back to the bar. That he shot two people before he went to PW2's restaurant and asked her to go inform other people about the incident. PW2 testified further that the said man asked for her phone so he could call his phone but that she refused and he threatened to shoot her too. She went on to testify that he fired his gun in the air and something fell to the ground although he did not see what it was.

2.5 PW2 told the Court that it was dark and so she could not describe the man who went to her restaurant that night but that she was able to see that the man wore half a police uniform and a grey coat. PW2 testified that she was alone as there was a power cut but that the bars were open on the other side of the road.

2.6 The witness testified that she was called by Police and went to the station around 02: 00 hours and around 08:00 hours to go and give a statement. PW2 testified that she did not know the man and that she could not identify him because it was dark.

2.7 Under cross-examination, PW2 maintained that she did not know the person who went with a gun and that she did not

recognise him because it was dark. She testified that she told the police officers the same thing.

2.8 PW3, a business man, testified that he runs a liquor store and that on 1st May, 2023, he was at his liquor store around 02:00 hours, when a young man who usually drinks from his store walked up to him informing him that he had been slapped by a police officer. That as they were going out of his store to go hear why he was slapped, he heard a gun shot and was frightened. PW3 testified that he saw a man carrying a gun and that the said man was about 8 metres away from where he (PW3) was hiding. PW3 told the Court that him and the young man who was slapped then rushed to Linda Police Station to report what had happened. He stated that when they got there, they found a man lying on the ground bleeding from his stomach without a shirt on. That he reported to police that there was a man firing gun shots near his liquor store. PW3 testified that in the company of police officers, they went to the scene where the police picked up a cartridge and bullet. PW3 testified that the police questioned him the

following day but that he was not able to describe the person who was firing gunshots the previous night.

2.9 Under cross-examination, PW3 testified that he heard one gunshot and did not see the person that fired it. The witness stated that he also did not see the person who shot the person he found lying on the ground at the police station.

2.10 PW4, the girlfriend to the 1st deceased person, told the court that she used to live with the 1st deceased and that on 30th April, 2023, she and the 1st deceased had an altercation when he decided to get some of his clothes and left. PW4 testified that when he went back home the second time, he went with his brother-in-law to pick his remaining clothes. She testified that the two left and she locked herself inside the house but that after a short while, she heard 3-gun shots. That she learnt the following day, on 1st May, 2023, that the 1st deceased was shot at Chimupondo bar which is less than a kilometre from where they used to live together.

2.11 Under cross-examination, PW4 admitted that when she got home, she found a bag in the sitting room and that she then went to look for the 1st deceased at a place where kachasu is

brewed. PW4 testified that the 1st deceased was argumentative even with other people but not violent and that his talking could anger a person. PW4 testified that she did not see what transpired but just heard gun-shots.

2.12 PW5, the mother to the 2nd deceased, testified that on 1st May, 2023, she received a call around 03:00 hours from PW1, informing her that the 2nd deceased had been shot. That she went to the hospital later that morning and was allowed to see the 2nd deceased before he was taken into theatre. PW5 testified that the 2nd deceased narrated to her what had happened. She said he told her that the 1st deceased went to his house to ask if he could escort him to get his things from his house as his girlfriend had thrown them out of their house after a quarrel. PW5 testified that the 2nd deceased told her that him and the 1st deceased went between 22:00 hours and 23:00 hours as the 1st deceased was afraid that his property would be stolen if he did not collect it that night. That they managed to pick up the things which they found scattered outside and left the place. She stated that the 2nd deceased told her that as they were returning to his home

around Chimupondo bar, they saw someone who looked like a police officer and so they continued walking knowing that they were innocent. That when they got closer, they confirmed that he was a police officer and by-passed him. PW5 narrated that she was informed that they said police officer asked them to stand but they continued walking. That the next thing he heard was a gunshot and he did not know what happened to the 1st deceased but that he managed to crawl to the police station. PW5 told the Court that she tried to get more information but that the doctors did not allow her to. She gave evidence that other police officers however managed to talk to the 2nd deceased before he was taken to theatre. PW5 testified that they did not find a bullet on the 2nd deceased but that the large intestine was ruptured.

2.13 PW6, a teacher by profession, told the Court that on 1st May, 2023, he received a call from PW5 around 03:00 hours - 04:00 hours informing him that the 2nd deceased had been shot. PW6 told the Court that he went to PW1's house and together they went to the police station to get more information about what had happened. That the officers

informed him that the 2nd deceased informed them that he was with the 1st deceased when it happened although he did not know where the 1st deceased was. PW6 testified that he joined other officers to go look for the 1st deceased and they found him around 04:00 hours at Chimupondo bar in Linda. The witness gave evidence that the 1st deceased was found face down with gunshot wounds and not breathing. That when the police vehicle came to pick up the body, they found a bullet near the 1st deceased's wound. PW6 testified that the police recorded a statement from him.

2.14 Under cross-examination, PW6 stated that he did not know what happened to the bullet which was found at the scene. He also conceded that he did not see the 1st or 2nd deceased being shot. PW6 admitted that he did not know who shot the two deceased persons.

2.15 PW7, a Police Inspector, told the Court that at the material time he was based at Mulungushi Conference Centre. He testified that on 2nd May, 2023, the Accused person herein returned from guard duties where he went to guard the Speaker of the National Assembly. PW7 told the Court that

the Accused brought a firearm to be deposited with serial number 784157 AK47 rifle. The witness testified that when he counted the rounds of ammunition before depositing it, he discovered that the ammunition had reduced to 21 instead of the 29 which the Accused earlier got. That when he asked him why he had a short fall of 8 rounds, the Accused told him that he had fired by mistake while on duty. PW7 testified that he asked the Accused to write a report but that before he could even do that, officers from Lusaka Central and Chilanga Police Stations led by CIO Mutakwa picked up the Accused on allegations of murder and attempted murder. That they also picked up the firearm that the Accused used on the material day. PW7 identified the armoury book which shows the date on which the Accused got and returned the firearm and his signature. PW7 told the Court that the said armoury book as been in his custody. The armoury book was produced as part of PW7's evidence.

2.16 PW7 went on to show, from the armoury book, that the Accused got an AK47 serial no. 784157 with 29 ammunition on 21st April, 2023, at 07:30 hours and the Accused signed

against it. That the Accused brought back the firearm on 1st May, 2023, around 08:31 hours and PW7 recorded that 8 rounds were fired from the said rifle.

2.17 PW7 testified that on 29th April, 2023, he deployed the officer to guard the Speaker of the National Assembly at her residence in Makeni Bonaventure. The firearm and magazine were identified. PW7 also identified the Accused.

2.18 Under cross-examination, PW7 testified that the firearm in issue was in the custody of the Accused from 21st April, 2023, to 29th April, 2023. He conceded that officers are not allowed to keep a firearm with ammunition at home but that the Accused never went home during that period as he was in camp at Mulungushi Conference Centre military operation. That he never went home until 29th April, 2023.

2.19 PW8, a Police Inspector, testified that he is a trained scenes of crime officer and that on 1st May, 2023, he received a call informing him that there was a scene in Chilanga Linda compound which needed to be visited by a scenes of crime officer. PW8 testified that he carried with him a Panasonic camera with a 32 GB memory card. That the scene was near

a place called Chimupondo guest house where he found a lifeless body of a male and a lot of people surrounding the body. PW8 testified that he noticed assorted clothes near the body of the deceased as well as some blood near the body. The witness gave evidence that he also found two live ammunition and empty cartridges that suggested to him that it was scene that had to do with ballistic evidence. As such, he stated that he placed number tags on the two physical exhibits; namely the live ammunition and the empty cartridge. PW8 told the Court that he then conducted a physical search on the body of the deceased and discovered that he had two wounds on the body. That there was a small wound on the left shoulder of his upper hand, which he suspected was the entry point of the projectile and that the bigger wound was behind on the right side which he suspected to be the exit point.

2.20 PW8 went on to testify that while at the scene, he met PW6, who was one of the 1st responders to the scene who informed him that the lifeless body was identified as the 1st deceased. That PW6 informed him that the 1st deceased was in the

company of the 2nd deceased who was also suspected to have been shot and was receiving treatment at the hospital. PW8 went on to testify that he took photographs of the scene and submitted the ballistic exhibits for examination. He stated that no one could access his materials in his absence and that he prepared a photographic album produced under forensic (CID) date stamped 5th May, 2023. The same was produced as part of PW8's evidence.

2.21 Under cross-examination, PW8 testified that he picked up two live ammunition and an empty cartridge from the scene. PW8 explained how live ammunition could be discharged from an AK47. He explained that the pistol mechanism of a gun depends on the servicing by the armoury department. That if the spring of the magazine pushes the ammunition in such a way that if a gun is not set on automatic and if the safety catch is also loose it ejects even unexpanded ammunition therefore making it possible for live ammunition to be found at the scene. That it often happens in automatic and semi-automatic guns. When asked whether this could have happened on the material day, PW8 testified that he

would not know as he did not have a feel of the firearm or have a chance to examine it to know how effective it was. That a firearm should not eject live bullets. He answered in the affirmative that it was possible that the firearm could have malfunctioned or that it could have been as a result of over cocking.

2.22 PW9, a Police Inspector, based at Police Head Quarters told the Court that he is a forensic ballistics expert with a Master's degree in forensic sciences from Moscow University. That his duties include examining and analysing evidence relating to firearms, reconstructing scenes of crime where firearms have been used in the commission of the crime and to give evidence in courts of law. He stated that he has been working as a ballistic expert for three years.

2.23 In relation to this matter, PW9 testified that on 2nd May, 2023, PW8 submitted exhibits, which included 1 firearm bearing serial number 784157 with 23 live ammunition and two spent cartridge cases. PW9 told the Court that he conducted on the aforementioned exhibits starting with the firearm where he observed that the firearm is a Hungarian

made full automatic kalashnikov assault rifle which is designed to chamber and discharge cartridge ammunitions of calibre 7.62 by 39mm. That he conducted an experimental firing with the said exhibit firearm to ascertain its functionality and that during the said experimental process he picked up two cartridges which he used. PW9 testified that he then concluded that the said firearm was capable of expending cartridges of its calibre.

2.24 PW9 went on testify that he then examined the 23 live ammunition and observed that they were of calibre 7.62 by 39mm and were all live ammunition. He told the Court that they were designed to be loaded and discharged from the exhibit firearm and from other firearms of the same calibre. PW9 gave further evidence that he examined the two spent exhibit cartridge casings where he observed dents which signified firing impression marks and the opening of their flash holes from which he concluded that the two spent cartridge casings were components of cartridges of calibre 7.62x39mm which were expended or discharged from the firearm of the same calibre. PW9 gave evidence that he also

conducted a comparison analysis of the exhibit spend cartridge cases to ascertain their discharge source. That he compared them with the test cartridge casing which he obtained from the exhibit firearm using a microscope with a magnifying power of 10. PW9 testified that he observed that the exhibit cartridge casings were expended from the exhibit firearm bearing serial number 784157. He stated that he resolved his examinations by concluding that the two cartridge casings were indeed components of cartridges of calibre 7.62x39mm which were loaded and expended in the exhibit firearm. He testified further that the exhibited firearm and cartridges were dangerous military weapons capable of causing damage to property, injury and death to any animal or human being once loaded and discharged. That they are therefore restricted to the military, defence and security wings in their official duties. PW9 produced a forensic ballistic report as part of his evidence. The witness also identified the firearm and cartridges. He clarified that he initially received a firearm with 21 ammunition and received two that were retrieved at the scene to make it 23

ammunition. PW9 testified that he got two ammunition from the 23 that were submitted and used them to test the firearm and that 21 cartridges are now remaining. That in total, he had four spent cartridges; two exhibits and two test cartridges which were both in his custody and produced as part of his evidence. The witness was not cross-examined.

2.25 PW10, a detective inspector, testified that on 1st May, 2023, around 03:00 hours he received information from the inquiries office in Chilanga that there was a shooting incident in Linda Compound where two men were shot. He testified that one man was shot dead while the other was rushed to the University Teaching Hospital (UTH). PW10 testified that he rushed to the scene of crime and when he got there, he found PW8 carrying out investigations. That he also found a body of the 1st deceased identified as Owen Kanseke. Further that the 2nd deceased, who was identified as Gabriel Phiri, was seriously injured and being treated at UTH. PW10 testified that the scene investigations revealed that two live ammunitions of an AK 47 rifle were picked up and one empty

cartridge was also picked up. That another empty cartridge was also picked up at a secondary scene.

2.26 PW10 testified that he immediately opened up two dockets; namely one for murder and the other for attempted murder. That he instituted his own investigations and from the intelligence information received, he gathered that there was a police officer seen with an AK 47 rifle in the area where the incident happened. PW10 testified that further investigations revealed that the officer who was seen in the area was a paramilitary officer who was based at Mulungushi International Conference Centre. The witness told the Court that he went to Mulungushi International Conference Centre to get more information from the platoon commander. He gave evidence that he found PW7, who was one of the platoon commanders, who informed him that one of the officers deployed to guard the residence of the Speaker of the National Assembly was the Accused herein. That the Accused told PW7 that he had fired 8 rounds of live ammunition from the 29 rounds he was given and that he remained with 21 rounds. PW10 testified further that PW7 showed him the armoury book where all the

information was recorded. That the armoury book showed that the Accused herein was issued an AK 47 rifle with serial number 784157 and 29 rounds of ammunition. PW10 testified that the Accused was then brought in for an interview. PW10 went on to testify that when he asked the Accused about the shooting in Linda Compound, the Accused narrated to him that while he was in Linda Compound, he decided to go to a bar to drink some beer and that when he decided to go home in the night, he was attacked by a group of men who continued following him until he got home. That the Accused informed him that when he reached his home, he got an AK 47 rifle that was issued to him and started firing to scare away the criminals. PW10 testified that it was at that point that he decided to apprehend the Accused herein. PW10 testified that he went with the Accused to Lusaka Central Police Station and warned and cautioned him. That the Accused opted to remain silent. Further that the Accused was then detained and the AK 47 rifle, live ammunition as well as the magazine were taken for ballistic examination. PW10 testified further

that when he received information that the 2nd deceased had died, he substituted the offence of attempted murder with that of murder. When warned and cautioned again, the Accused opted to remain silent.

2.27 PW10 told the Court that post-mortem examinations were conducted which confirmed that both deceased persons died from gunshot wounds. That he examined the evidence from witnesses and found it credible. PW10 then formally charged and arrested the Accused herein with two counts of murder contrary to Section 200 of the Penal Code which he denied.

2.28 PW10 also gave evidence that there is a distance of about 300 metres from the house of the Accused and the scene of crime. He also testified that one empty cartridge was picked at the primary scene where the body of the 1st deceased was found while the second empty cartridge was picked at a restaurant where a lady was selling some food at night. That when he interviewed the said lady, she informed him that there was a man who went to her holding a gun and dressed in police uniform ordering her to give him her phone so he could make a call and that if she refused, he was going to

shoot her. That the said police officer also told her he had already shot two people where he was coming from. PW10 testified further that the lady informed him that the said police officer then fired in the air and kicked the food stuff she was selling.

2.29 PW10 identified the two post-mortem reports, the firearm, and the 21 live ammunition, which he tendered as part of his evidence. PW10 also identified the Accused herein.

2.30 Under cross-examination, PW10 testified that the Accused remained silent when he was warned and cautioned.

3.0 CASE FOR THE DEFENCE

3.1 At the close of the Prosecution's case, the Court found the Accused with a case to answer and put him on his defence. The Accused elected to give evidence on oath. DW1, the Accused herein, told the Court that he is a Police Constable under Zambia Police Military Battalion based at paramilitary headquarters in Lusaka. He also told the Court that he resides in Linda Compound.

3.2 In his defence, DW1 gave evidence that on 30th April, 2023, at around 19:00 hours, he was deployed to guard

the residence of the Speaker of the National Assembly. He told the Court that his shift started at 18:00 hours on 29th April, 2023, to about 06:00 hours the following day. DW1 narrated that when his shift ended, he was picked up and dropped off at Sangalala traffic lights to proceed home. That he got home, safely, took off his uniform and locked his firearm away, an AK 47 assault rifle. DW1 testified that he then left home and went to Situmbeko area in Lusaka West, which place he left between 18:00 hours and 19:00 hours when he could not wait any longer for the fertilizer programme he had gone for. DW1 testified that he got into town around 21:00 hours but because it was late, it was difficult for him to get a bus going directly to Linda compound. That because of that he was only getting home around 23:00 hours. DW1 testified that when he got home, he got the firearm and started walking to the taxi rank so that he could return the firearm to Mulungushi International Conference Centre. He stated that before he could reach the taxi rank, he saw five men following behind him and

before long, he felt someone grab his neck. The witness said more men came and tried to get his rifle while others searched him and got his phone and wallet. DW1 testified that his AK47 rifle went off immediately and the men scampered in different directions. That he remained with the firearm and decided to go back home.

3.3 DW1 testified that on 1st May, 2023, around 06:00 hours, he went to Mulungushi International Conference Centre to deposit the firearm as well as to report the attack to his commander. That before he could finish reporting the attack, police officers from Chilanga Police led by the CIO from Lusaka Central Police went into their camp to explain to the section commander, PW7, that there was a shooting incident in Linda Compound whose preliminary investigations led them to the Accused. DW1 testified that he was interviewed by one of the detectives and asked whether he knew about the shooting incident that occurred on 1st May, 2023, in Linda Compound. That he explained what had

happened and was then informed that the shooting incident resulted in death which he did not know.

3.4 DW1 told the Court that he was detained at Lusaka Central Police Station and then warned and cautioned. He denied the charges of murder and attempted murder. He testified that he did not see anyone being shot during the struggle. Further that he has never met the two deceased persons. That his phone, wallet and all the documents that were in his wallet have never been recovered. DW1 testified that he did not murder the two deceased persons.

3.5 Under cross-examination, DW1 admitted that he withdrew the AK 47 rifle with 29 rounds of ammunition from the armoury registry and that he deposited it with 21 rounds of ammunition. DW1 also admitted that he was the only one that used the firearm from the time he withdrew it up to the time he deposited it. DW1 went on to admit that on 30th April, 2023, around 23:00 hours, he went to pick up the firearm but to take it back to Mulungushi International Conference Centre. He

further agreed that it was during the struggle with the unknown 5 people that the assault rifle went off. The witness testified that the rifle only went off once. DW1 also admitted that the firearm has a safety mechanism and that at the time he left the firearm at home, it was put on safety mode such that even on an accidental pull, it would not go off. That when it is in safe mode, it cannot accidentally go off.

3.6 DW1 testified that he heard the testimonies pertaining to this case that spent cartridges were picked up near where the 1st deceased's body was found. Further that according to PW2 there were spent cartridges picked where she was selling food from. He stated that according to the testimonies given, the spent cartridges matched the firearm he had.

3.7 DW1 testified that he was attacked by five men even though he had an AK 47 rifle with him. He conceded that he did not report to any police station that he was a victim of an armed robbery and that he still wants the Court to believe that he was attacked. DW1 also testified

that he was not supposed to disembark at Sangalala traffic lights but go straight to Mulungushi International Conference Centre after his last shift to go deposit the firearm before going home. He however testified that going to Lusaka West was legal as his leave started on 1st May, 2023, and that his off days do not begin after he deposits his firearm. DW1 testified that he was attacked around 23:00 hours when he was taking back the firearm to Mulungushi International Conference Centre on 30th April, 2023. DW1 admitted that the body of the 1st deceased was found lying near the place where he was attacked by the five men. He testified that when taking back the firearm, he was not in uniform but civilian clothing. That when he knocked off from duty, he was in full combat but that when he was taking the firearm, he was in civilian clothing.

3.8 Under further cross-examination, DW1 testified that he was the one that reported the rounds of ammunition to PW7, the section commander. DW1 conceded that the rules are that he was supposed to deposit the firearm

where he withdrew it; that is to say at Mulungushi International Conference Centre and not at his home like he did and that he was supposed to deposit it the very day he knocked off on 30th April, 2023. DW1 testified that he decided to go to Lusaka West for his fertilizer programme even when he knew he was supposed to go deposit the firearm first as priority. That he did not think he would have enough time to go to Mulungushi International Conference Centre and then make it in time for his programme. He testified further that he did not cork the firearm during the time of his attack

3.9 Under re-examination, DW1 testified that he did not report the attack because all five men had scampered and that he decided to go back home because he felt unsafe.

4.0 SUBMISSIONS

4.1 No written submissions were submitted by both parties.

5.0 CONSIDERATION AND DECISION

5.1 I have carefully considered the evidence on record. The Accused person herein stands charged with two counts of the offence of murder, contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia which section provides as follows:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

5.2 In relation to malice aforethought, Section 204 of the Penal Code provides that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony....”

5.3 It is trite law that the prosecution must prove its case beyond all reasonable doubt. The Supreme Court in the case of **Mwewa Murono v The People (2004) ZR 207¹**

held as follows:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt.”

5.4 In the present case, the evidence before me shows that on the night of 1st of May, 2023, the two deceased persons, who were brothers in-law, were coming from the 1st deceased’s girlfriend’s house in Linda Compound, in Lusaka. On their way, the two deceased pursuant sustained gunshot wounds from unknown person(s) which led to the 1st deceased dying on the spot and the 2nd deceased dying in the University Teaching Hospital (UTH), the following day on 2nd May, 2023. Live ammunition was recovered at the crime scene, next to the 1st deceased’s body, and at a secondary scene. The 2nd deceased managed to crawl his way from the crime scene to Linda Police station. The Photographic album (P3) shows a gunshot wound on the 1st deceased’s body. As to the cause of death, the Post Mortem examination reports, P8 and P9 show gunshot wound to torso and gunshot wounds to abdomen respectively. In view of the

above evidence, I find as a fact that the two deceased persons died of gunshot wounds.

5.5 This takes me to the question of whether or not the Accused person is the one who was responsible for the death of the two deceased persons herein. A quick perusal of the evidence before me shows that there was no eye witness to the shooting. Circumstantial evidence is, however, apparent on the record. Before I delve into this evidence, I wish to highlight the principles that are applicable to circumstantial evidence as the law provides sufficient guidance on the topic. In the case of **Khupe Kafunda v The People (2005) ZR. 31²**, the Supreme Court dismissed the Appellant's appeal and affirmed conviction of the lower Court purely on circumstantial evidence even when there were no eyewitnesses to the offence. The Supreme Court observed as follows:

“there was no direct evidence and no eye witness to the incident that led to the death of the deceased. However, the circumstantial evidence was so

overwhelming and strongly connected the appellant to the commission of the offence.”

5.6 In addition, in the case of **David Zulu v The People**

(1977) ZR 151 (SC)³, the Supreme Court guided as

follows:

“it is incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such degree of cogency which can permit only an inference of guilt.”

5.7 Pursuant to the **David Zulu case**, cited above, and

Saidi Banda v the People Appeal No. 114 of 2015⁴,

the standard required is that the circumstantial evidence must take the case out of the realm of conjecture so that it attains a degree of cogency that only permits an inference of guilt.

5.8 Further, in the case of **Eziuous Munkombwe and Others**

v The People CAZ Appeal No. 7, 8,9 of 2017⁵, the

Court of Appeal guided that when considering a case anchored on circumstantial evidence, the strands of

evidence making up the case against the Appellant must be looked at in their totality and not individually.

5.9 In the present case the testimony of PW7 shows that on 2nd May, 2023, the Accused person herein (a police Constable by profession), when he returned from guard duties at the Speaker of the National Assembly's residence, brought a firearm to be deposited with serial number 784157 AK47 rifle. He testified that when he, however, counted the rounds of ammunition, the ammunition returned was 21 instead of 29 which the Accused earlier got. That when he (PW7) asked the Accused why he had a short fall of 8 rounds of ammunition and the Accused told him that he had fired by mistake whilst on duty.

5.10 The Accused person in his defence did not deny having had the said firearm on the night of 1st May, 2023. His version was that around 23:00 hours he got the said gun from his home in Linda and was headed to a taxi rank to book a taxi to Mulungushi International Conference Centre to take back the gun. The Accused

explained that 5 people surrounded him and attacked him whilst trying to grab the gun from him. That in the process, the gun was fired in the air.

5.11 From this evidence, I find as a fact that on the night of 1st May, 2023, the Accused person had an AK47 firearm in Linda Compound, the same area where the two deceased persons sustained gunshot wounds. I also find that gunshots were fired from the said firearm, as per the Accused's own testimony and PW7's testimony that the ammunitions that were returned by the Accused were fewer than the ones he obtained.

5.12 I now turn to the Accused's version that he was taking the gun back to Mulungushi Conference Centre at 23:00 hours on 1st May, 2023. The Accused's evidence showed that on 1st May, 2023, he knocked off from work around 06: 00 hours and went to his house with the gun. This was contrary to the requirements that officers were not allowed to go home with guns. He had the whole day to take the gun back but he did not. Rather, he conveniently decided to take it back at night as late

as 23:00 hours. Additionally, the Accused testified that five people wanted to grab the gun from him and that in the process the gun was accidentally fired. There is no evidence that the said alleged people were armed. I find the Accused's assertions illogical. It is worth questioning that 5 people who are not armed would surround someone who is armed and attempt to grab a gun from him. This is more so that the Accused was in police uniform. This Court's view is that the Accused's version is an afterthought and a concocted story which lacks merit. I therefore find the Accused's assertion that he was taking back the gun to the National Assembly at 23:00 hours and that he was surrounded by five people who wanted to grab the gun from him, as unsubstantiated and lacking merit. It is thus my finding that the Accused had voluntarily fired gunshots in Linda Compound on the material night.

5.13 This view is fortified by PW2's testimony that on the material night a man in half a police uniform who introduced himself as a police officer, and armed with a

gun entered her restaurant in the same area and even fired a gunshot in the air while at her restaurant and that he threatened to shoot her if she refused to give him her phone to use. Also, that the said man told her that when he knocked off from work, 5 people attacked him and stole his phone and wallet at a bar. That he went home to fetch his gun and went back to the same bar. In any case, PW2's testimony was that the said man told her that he had shot two people that night. Coincidentally, the two deceased persons had been shot that night in the same area. PW2 testified that she did not know or even identify the same man. I hold the view that PW2 had no reason to lie in the circumstances. PW3 and PW4 also confirmed of hearing gunshots. PW4 stated that she heard about 3 gunshots shortly after the two deceased persons had left her home. This coincidence, without any explanation is corroborative evidence. This evidence points to unidentified police officer having shot two people that night.

5.14 I find PW2's evidence convincing and a true reflection of the evidence. Looking at the behaviour of the said police officer that night, it corroborates PW2's version that the said police officer had been robbed of his money and phone, hence he went to his home to fetch a gun and went back to the said scene. This Court opines that the said police officer was on a manhunt for his assailants.

5.15 The testimony of PW5, the mother to the deceased, shows that when the 2nd deceased was about to be taken to the theatre the following day on 2nd May, 2023, the 2nd deceased explained to her that he was with the 1st deceased when a police officer stopped them near chimupondo bar. That they continued moving and the next thing he heard were gunshots. That he managed to crawl to the police station while he did not know what happened to the 1st deceased.

5.16 Before delving into this evidence, I need to resolve the issue of PW5 being a witness with a possible interest to serve as she is a blood relative to the deceased. It is trite law that the evidence of a blood relative should be

treated with utmost caution as they may be biased against the Accused person, or have a possible interest of their own to save. I am fortified by the case of **Kambarange Mpundu Kaunda v The People (1990-1992) Z.R 215⁶**. The evidence on record shows that PW1 and PW5 are blood relatives to the deceased, namely, wife and mother, which relationships would ordinarily place them in the category of witnesses with an interest to serve or possible bias.

5.17 The above notwithstanding, evidence of a blood relative can be received if it is cogent enough to rule out any element of falsehood or bias and whether the witness may have a motive to give false evidence is an issue of evidence depending on the circumstances of each case. I find solace in the cases of **Borniface Chanda Chola, Christopher Nyamande and Nelson Sichula v The People (1988-1989) Z.R. 163⁷**, **Yokonia Mwale v the People (Appeal No. 205/2014)⁸**, **Guardic Kameya**

**Kavwama v The People (Appeal No. 84/2015)⁹ and
Katukula Trywell v The People, SCZ Judgement No.
32 of 2015¹⁰.**

- 5.18 In the present case, having considered the circumstances of the case, I do not find any element of falsehood or bias on the part of PW5. I therefore find that she is not a witness with a possible interest to serve.
- 5.19 Another issue I need to resolve with regard to this piece of evidence is whether it is res gestae, and forms part of the exceptions to the rule against hearsay. It has been established in a plethora of cases such as **Sinyama v the People (1993-94) Z.R 16¹¹** and **Samuel Mwaba Mutambalilo v the People Appeal No. 47/2015¹²**, that in order for a statement to qualify as res gestae, it must be made in conditions of approximate though not exact contemporaneity by someone so intensely involved and in the throes of the event that there was

no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker.

5.20 The present case shows that the 2nd deceased was shot in the abdomen. Evidence of PW3 shows that when the 2nd deceased was found at the Police Station, he was just lying down without a shirt. At the point he made the said statement, he was about to enter the theatre room. All these factors, when put together, show that the said statement was made by the 2nd deceased in conditions of approximate contemporaneity when he was so intensely involved and in the throes of the event. Therefore, PW5's testimony qualifies as *res gestae* and is therefore admissible.

5.21 Having found as above, it follows that according to the testimony of PW5, the two deceased persons were shot by a Police officer, in Linda compound. The Ballistic Report, P6, and the testimony of PW8, the ballistic examination expert reveals that the live ammunition and empty cartridges that were recovered from the

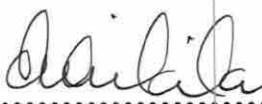
crime scene match the ones dischargeable by the exhibited firearm, P2, which is the firearm that was in the Accused's possession. The conclusion of the Ballistic expert's evidence is that the live ammunition recovered at the crime scene, were discharged from the exhibit firearm which the accused had on the date in question. Looking at P6 and all the circumstances of the case, I am persuaded that the live ammunition that were recovered at the crime scene on the date in question, were discharged by P2. This subsequently leads to the conclusion that the Accused herein is the one who shot the two deceased persons. As earlier found in this Judgement, the said shooting was not accidental but rather the Accused's persons attempt to stop the two deceased persons who kept moving. I hold the view that the Accused herein intended to shoot the two deceased persons. This is also compounded by the fact that the Accused, having been robbed of his phone and wallet, launched a manhunt for his assailants.

5.22 The totality of the circumstantial evidence therefore above, only point to the Accused's guilt. It has taken the case out of the realm of conjecture and attained such a degree of cogency which only permits an inference of guilt. It is this Court's view that the circumstantial evidence in this matter has met the required standard which permits the Court to safely convict on it.

5.23 I, therefore, find the Accused person herein guilty on both counts, of the offence of Murder contrary to Section 200 of the Penal Code Act, Chapter 87 of the Laws of Zambia and I accordingly convict him.

5.24 The Accused is informed of his right to appeal to the Court of Appeal.

Delivered at Lusaka thisth15.....day ofAugust....., 2024.


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ELITA P. MWIKISA
HIGH COURT JUDGE