IN THE COURT OF APPEAL OF ZAMBIA APPEAL/10/2018
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

B E T W E E N:

KEITH AKEKELWA MUKATA APPELLANT

AND

THE PEOPLE RESPONDENT

CORAM: Mchenga DJP, Sichinga and Majula, JJA

On 25th September 2018, 26th September 2018, 28th September 2018 and 23rd May 2019

For the Appellant: M. Mutemwa, SC, Mutemwa Chambers, K. Mwansa-Kabalata, Chalwe Kabalata Legal Practitioners, M. Katolo, Milner and Paul Legal Practitioners, K. Mweemba, Kieth Mweemba Advocates and W. Muhanga, Messrs AKM Legal Practitioners.

For the Respondent: M. Chipanta-Mwansa, Deputy Chief State Advocate, M.K. Chitundu, Deputy Chief State Advocate, S. Simwaka, Senior State Advocate, M. Hakasenke-Simuchimba, Senior State Advocate, M. K. Tembo, State Advocate, National Prosecutions Authority.

J U D G M E N T

Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Subramaniam v The Director of Public Prosecutions [1955] 1 W.L.R. 965

2. Sakala v The People [1980] Z.R. 205

3. Mwape v The People SCZ Appeal No. 132 of 2010

4. Inutu Etambuyu Suba v Indo Zambia Bank Limited SJZ No. 52 of 2017

5. Teddy Puta v Ambinwire Friday SJZ No. 43 of 2017

6. Geojago Robert Musengule and Amon Sibande v The People SCZ Judgment No. 19 of 2017

7. Abel Mkandawire and Others v The People SCZ Appeals No.06,07,08,09 of 2017

8. Donald Fumbelo v The People SCZ Appeal No. 476 of 2013

9. Rodgers Kunda v The People SCZ Appeal No. 18 of 2017

10. Wesley Mulungushi v Cathrine Bwale Mizi Chomba [2004] Z.R. 96

11. Attorney General v Marcus Kapamba Achiume [1983] Z.R. 1

12. Imusho v The People [1972] Z.R. 77

13. Attorney General v Peter Mvuka Ndhlovu [1986] Z.R. 12

14. Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership) Charles Haruperi [2005] Z.R. 78

15. Mwewa Murono v The People [2004] Z.R. 2017

16. Chabala v The People [1976] Z.R. 14

17. Saluwema v The People [1965] Z.R. 4

18. Saidi Banda v The People SJ 30 of 2015

19. Maseka v The People [1972] Z.R. 9

20. Teddy Muntanga and Another v The People CAZ Appeal No. 159 and 160 of 2017

21. Phiri and Others v The People [1973] Z.R. 47

22. Chansa v The People [1975] Z.R. 136

23. Chuba v The People (1976) Z.R. 334(Reprint)

24. Charles Lukolongo and Others v The People [1986] Z.R. 115

25. Kalebu Banda v The People [1977] Z.R. 227 (Reprint)

26. Gilbert Chileya v The People [1981] Z.R. 33

27. Peter Yotamu Haamenda v The People [1977] Z.R. 184

28. Lipepo and Others v The People [2015] Vol. 2 Z.R.

29. John Timothy and Feston Mwamba v The People [1977] Z.R. 394

30. Jack Maulla and Asukile Mwapuki v The People [1980] Z.R. 119

31. Madubula v The People [1993-94] Z.R. 91

32. Chimfwembe v The People SCZ/9/145/2013

33. Liswaniso v The People [1976] Z.R. 277

34. Sipalo Chibozu and Chibozu v The People [1981] Z.R. 28

35. The People v Mateyo Mujumaizi Jerusalem [2012] Z.R. 533

36. Mangomed Gasanalieu v The People [2010] 2 Z.R. 132

37. Lupupa v The People [1977] Z.R. 38

38. Nkhata and Four others v The Attorney General [1966] Z.R. 124

39. Chansa v Lusaka City Council [2007] Z.R. 256

40. Attorney General v Peter Mvaka Ndhlovu [1986] Z.R. 12

41. Bright Katontoka Mambwe v The People SCZ judgment No. 8 of 2014

42. Kalaluka Musole v The People [1963-64] Z and NRLR 173

43. Attorney General v Roy Clarke [2008] Vol. 1 Z.R. 38

44. Re: Liso [1969] Z.R. 6

45. Director of Public Prosecutions v Lukwosha [1966] Z.R.14

46. The People v Njobvu [1966] Z.R. 132

47. R v Forbes [2001] 1 All ER 686

48. Dorothy Mutale and Phiri v The People [1995-1997] Z.R. 277

49. David Zulu v The People [1977] Z.R. 204 (Reprint)

50. Joseph Mulenga and Another v The People [2008] 2 Z.R. 1

Legislation referred to:

1. **The Penal Code Chapter 87 of the Laws of Zambia**
2. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

Works referred to:

1. **Black's Law Dictionary, 9th Edition, Thomson Reuters**
2. **Cross on Evidence, Sixth Edition, Butterworths.**

Introduction

1. This appeal emanates from the judgment of the High Court, (Wanjelani J.), delivered on 28th February 2018. By that judgment, the appellant was convicted of the offence of murder and sentenced to suffer capital punishment.

2. In the main, the appeal considers whether, an inference of guilty is the only one that could have been drawn on the circumstantial evidence that was before the trial judge.

Charge before the trial court

3. The appellant, was charged with one count of the offence of murder contrary to **section 200 of the Penal Code.** The

particulars of the offence alleged that on the 6th of May 2017, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia, he murdered Namakambwa Kalilakwenda.

Evidence before the trial judge

4. In the early hours of 6th May 2017, Chola Collins Kabamba, a guard at a property close to the appellant's law firm, heard 3-gunshots. Immediately thereafter, he heard footsteps of people who appeared to be running away from the appellant's law firm. The 3-gunshots were also heard by Pavan Kumar, who was at his restaurant on the same road with the appellant's law firm.

5. When Pavan heard the gunshots, he called the police. He also peeped at the appellant's gate and noticed that it was closed. Not long thereafter, he heard the appellant calling out for help, saying his guard, Namakambwa Kalilakwenda, had been shot. It did not take long for the police to arrive.

6. One of the first police officers to arrive was Inspector Chilufya. He found the gate to the appellant's law firm open. He also found a group of people, who were unruly, in the premises. Lying in the drive way, inside the gate, was the body of the appellant's guard. There were also two cars parked in the driveway, a BMW and a Toyota Landcruiser. Close to the BMW, and about 18 meters from where the guard's body was, he picked what he described as a 9mm cartridge casing. He then attempted to open the BMW, but he failed. He asked the appellant for the keys and he was given keys that failed to open it.

7. He then checked around the yard, and in a flower bed, he found keys that opened the BMW. A search of that car, yielded, among other things, a pistol under a basket. It belonged to the appellant. He handed over the pistol, the cartridge casing, 7 cartridges and two magazines, to Detective Chief Inspector Moya. The guard's body was then taken to the hospital, while the appellant was taken to a police station.

8. Later that morning, Superintendent Shibalatani, a scenes of crime officer, in the company of the appellant, visited the appellant's law firm to reconstruct the scene of the crime. Also present, was Detective Chief Inspector Chibesa, a forensic ballistics officer.

9. The reconstruction of the scene involved the appellant showing them where the guard's body was found, where he parked the BMW and where he was on the two occasions when he discharged his pistol. He also showed him some reddish stuff, that appeared to be blood, near where the guard's body is said to have been and some suspected bullet marks on the wall and the gate. The superintendent also picked 2 cartridges casings. Photographs and measurements were taken of the distances in between various places in the premises.

10. The point at which the appellant said he was when he fired the first shot was 19 metres from the gate and 15.5 metres from where he said the guards body lay after the shooting. They also measured the distance between where the appellant said he was when he fired the two

shots from where he said he was when he fired the first shot, it was 1.5 metres apart. The two cartridge casings where picked 5 metres from where the appellant said he was when he fired the two shots, but they were 4.5 metres from where he said he was when he fired the first shot.

11. After the scene reconstruction, Superintendent Shibalatani handed over the two cartridge casings he picked for ballistics examinations.

12. On the same day, that is the 6th of May 2017, Detective Chief Inspector Moya, handed over the pistol, 2 magazines, a cartridge casing and 7 cartridges, recovered from the appellant's law firm by Inspector Chilufya, to Detective Chief Inspector Chibesa. Detective Chief Inspector Chibesa also received to two cartridge casings from Superintendent Shibalatani.

13. On 9th May 2017, Detective Chief Inspector Chibesa visited the appellant's law firm and examined the damaged gate and the marks on the wall. He saw blood splatter on the on the ground, inside the premises and near the gate. He also visited the mortuary, where he examined the

guard's body. The gunshot wound in the neck measured 9.92mm, while that in the shoulder, was 18.49mm in size. He subsequently prepared a report setting out his findings.

14. Among other things, he concluded that all the 3 cartridge casings he received, including the one Inspector Chilufya described as a being 9mm, where 10.2mm. He opined that they were all discharged from the appellant's pistol. In addition, it was his view that the wounds on the guard, were consistent with a person who had been shot with a firearm loading 10.2mm cartridges.

15. Detective Chief Inspector Chibesa was of the view that the marks on the gate and wall, were caused by bullets. It was also his view that the person who shot the guard was face to face with him, and shot at him from a distance of between 0 to 20 metres.

16. According to the arresting officer, Detective Chief Inspector Moya, on 6th May 2017, in the morning, he received information that there had been a shooting at

the appellant's premises. He confirmed being handed over a pistol, a cartridge casing, 2 magazines, 7 cartridges and a reed basket. Other than the reed basket, which he returned to a relative of the appellants' acquittance, he handed over all these articles to Detective Chief Inspector Chibesa.

17. Detective Chief Inspector Moya submitted the appellant's shirt for chemical examination but did not present the results to court. He admitted being informed by the appellant's lawyer, that there was word that some cartridge casings were picked outside the yard of the appellant's law firm, but denied that it was the case.

18. In his defence, the appellant told the court that on 5th May 2017, around midnight, he was at his law firm in the company of a lady he was jointly charged with in the court below. Whilst there, his guard informed him that there were 2 intruders at the servant's quarters. He called the Minister of Home Affairs and he informed of the presence of the intruders.

19. Not long thereafter, he decided to leave. The lady he was with was went ahead as he locked up. As he drove to the gate, he noticed that she was being held by an intruder. He jumped out of his car and run towards her but returned to his car where picked his pistol. The man who was holding the lady ran to the gate and he fired 2 warning shots in the air. He also noticed that there was another man holding the guard.

20. He then heard 2 shots that were fired from outside the gate and the two men ran away. In turn, he fired another warning shot in the air, after moving away from where he had been when he fired the first two shots. He then heard the guard cry out that he was in pain. He found him two metres from the gate and discovered that he had been shot. He called out for help and attempted to lift him, but failed.

21. Pavan Kumar came in and not long thereafter, the police arrived. At the time the police arrived, there were a number of people in the premises. A man wearing

dreadlocks, demanded his pistol, which he handed over. It was subsequently given to Inspector Chilufya. The keys for the BMW where recovered from his backpack. In due course, he was taken to the police station by Detective Chief Inspector Moya.

22. Later that morning, he was taken back to his law firm for the reconstruction of the scene. In the days that followed, while in detention, he was visited by his legal assistant, who told him that his cousin had overheard police officers discussing how they should deal with the cartridge casings they had picked outside his law firm. He said Detective Chief Inspector Moya confirmed the picking of the cartridge casings.

23. The appellant denied shooting the guard. He also denied concealing the pistol in the boot of the BMW. He said the keys for the BMW were found in a backpack that he handed over to the police.

24. Both Mr. Mutale SC and Mr. Bwalya, confirmed the appellant's story that Detective Chief Inspector Moya told them that he had received information that the

police had found cartridge casings outside the yard to the appellant's law firm. Mr. Bwalya, who was present when Mr. Mutale SC met Detective Chief Inspector Moya, produced notes that he took at the meeting.

25. Dr. Musakhanov, the forensic pathologist who conducted the post-mortem on the guard's body, was called as a defence witness. He opined that the cause of death was cardio respiratory arrest due to a bullet wound. He also observed that the entry point had a 0.5cm x 0.5cm wound, with a flame burn on the lower neck. The exit point was a 2cm x 1.5cm wound on the lower shoulder. It was also his opinion that the firearm was between 1.2m and 2m from the guard, when it was discharged.

26. The defence also called Thomas Fredrick Herminus Wolmarans, a South African ballistics expert. He visited the appellant's law firm and examined the gate and the wall. He also carried out a number of tests using a pistol similar to the appellant's. In addition, he went through the reports by the pathologist and Detective Chief Inspector Chibesa.

27. In his view, the guard was not face to face with the person who shot him; he was in a crouching position when he was shot. He was also of the view that flame burns could only be visible on the guard's body if the barrel of the pistol was between 5cm to 10cm away, when he was shot. That being the case, the appellant, who was about 19 metres from where the body was, could not have discharged the fatal shots.

28. Further, it was Mr. Wolmarans' view that it was not possible, in this case, to conclude that the guard was shot using a firearm loading a 10.2mm cartridge, by merely looking at the wound. As regards the marks on the wall and the gate, he ruled out the possibility that they were caused by gunshots.

29. Another witness called by the appellant was Boniface Bwembya, an Assistant Registrar, at the Health Professional Council of Zambia. His testimony was on the legality of Detective Chief Inspector Chibesa's examination of the guard's body at mortuary. It was his

view that only a medical officer can sign a medical report and ascertain the cause of death.

Trial judge's findings

30. The trial judge considered the conflicting evidence of Inspector Chilufya and the appellant, on where the appellant's pistol and the BMW car keys were found. She noted that when Inspector Chilufya testified that he recovered the BMW keys from the flower bed and the pistol from the boot of the BMW, it was not suggested to him that the keys were found in the backpack, while the pistol was surrendered by the man wearing dreadlocks. She considered whether there was any reason why Inspector Chilufya would have falsely claimed that the keys were found in the flower bed and the pistol in the car, but found none.

31. In the absence of evidence from the appellant, on why he would give false testimony, she found Inspector Chilufya's account credible and accepted it. She also concluded that the appellant's claim that the keys where

recovered from a backpack and that he handed over the pistol to a man wearing dreadlocks, were an afterthought.

32. The trial judge also found that it was not in dispute that the guard died from a gunshot wound. She reviewed the circumstances leading to his shooting. She also considered the appellant's evidence that intruders came into his premises, fired 2 shots and that he, in turn, fired 3 warning shots in the air. She took the view that if the intruders had fired two shots, Chola Collins Kabamba and Pavan Kumar, would not have only heard 3 shots. She found that the evidence of these two witnesses, that three shots were fired, was confirmed by the recovery of 3 cartridge casings in the appellant's premises.

33. Further, having rejected the evidence of the discovery of cartridge casings, outside the law firm, as being hearsay, she concluded that the finding of blood splatter on the inside of the gate, ruled out the possibility that the person who shot the guard was outside the gate. This evidence and the recovery of the

3 cartridge casings, confirmed that the guard was shot from within the yard of the appellant's law firm. She also found that the concealing of the pistol, after it was discharged, raised doubt on the claim that intruders had visited the premises.

34. The trial judge then considered whether the shots fired by the appellant are the ones that killed the guard. First of all, she found that the evidence of Detective Chief Inspector Chibesa and Mr. Wolmarans, was inconclusive on what caused the dent on the gate and wall. She also found that even if it was the case, the presence of those dents was not of any material importance to the case. Similarly, she found the failure to include the BMW in the scene reconstruction, as being immaterial.

35. She accepted Detective Chief Inspector Chibesa's evidence that the 3 cartridge casings picked in the appellant's law firm were all discharged from the appellant's pistol. She also considered the conflicting evidence of Detective Chief Inspector Chibesa and Mr.

Wolmarans, on the calibre of the firearm that caused the death of the guard. She found that she could not determine the issue on the basis of the wounds that he had suffered. Notwithstanding this finding, she was satisfied that the guard was face to face, with his assailant and in a crouching position when he was shot.

36. After reviewing all the evidence before her, the trial judge concluded that the guard was killed by the appellant's pistol. She then considered whether he had *malice aforethought* when he shot at the guard. She found that although the appellant's attempt to take the guard to the hospital, suggests that he may not have intended to kill him, he had *malice afterthought* because he was a firearms licence holder and he knew the consequences of discharging a firearm. He had statutory *malice aforethought*, as is set out in **section 204 of the Penal Code**.

37. The trial judge also found that there was dereliction of duty when the police failed to submit the appellant's T-shirt for chemical analysis and when they

allowed the scene to be contaminated. She also found that the police acted unprofessionally when they allowed photographs to be taken at the scene and uploaded online. Notwithstanding those findings, she found that the appellant suffered no prejudice, because the evidence against him was overwhelming. It led to only one inference, an inference of guilty; that he is the one who shot his guard, and he had *malice aforethought* at the time.

Grounds of appeal

38. Sixteen grounds were advanced in support of this appeal. We will not reproduce them verbatim, but suffice to say most of them replicate each other, with the same arguments being advanced in support of what have been presented as different grounds of appeal.

39. Although there is no provision in our Act or Rules, that limits the number of grounds of appeal or how long submissions in support of such grounds of appeal must be, it is not helpful to the courts or even litigants,

to split issues and file multiple grounds of appeal and replicated arguments, on the same issues. It only slows down the decision making process, as unnecessarily lengthy judgments, covering the multiplicated arguments, have to be prepared.

40. Because it is convenient, and to ensure clarity, we have recast, without stifling the thrust of the appeal, the 16 grounds filed in support of this appeal, into 6 grounds. The reformulated grounds, are as follows:

40.1. The erroneous rejection of Mr. Mutale SC and Mr. Bwalya's evidence, as being hearsay;

40.2. Findings of the fact that are not supported by evidence:

a) The concealing of the keys to the BMW and the pistol by the appellant;

b) The presence of blood splatter on the gate;

c) The guard being face to face with the person who shot him; and

d) The absence of intruders at the appellant's law firm at the time the guard was shot.

40.3. The erroneous placing of the burden of proof on the appellant;

40.4. The failure to adjudicate on important issues:

a) The presence of 9mm cartridge casing at the scene of the crime;

b) The presence of bullet holes on the wall and the gate;

c) The contamination of the scene;

d) The dereliction of duty by the police;

e) The downplaying of inconsistencies in the prosecution evidence;

f) The failure to call medical evidence and the discrepancies in the size of the gunshot wound; and

g) The failure to adjudicate on the demeanour and credibility of witnesses.

40.5. The erroneous finding that the appellant had *malice aforethought*; and

40.6. An inference of guilty, not being the only inference that could have been drawn on the that was before the trial judge.

Erroneous rejection of evidence alleged to be hearsay

41. The first ground of appeal is that the trial judge erroneously classified the testimony of Mr. Mutale SC and Mr. Bwalya, on the recovery of cartridge casings outside the appellant's law firm, as being hearsay.

42. In support of this ground of appeal, Mr. Muhanga referred to the case of **Subramaniam v The Director of Public Prosecutions**[1] and submitted that the mere fact that they repeated what they were told, did not warrant the classification of their testimony as being hearsay evidence.

43. Mr. Muhanga also submitted that the evidence of these two witnesses, who are lawyers of good standing, was supported by that of Detective Chief Inspector Moya, who confirmed the recovery of the cartridge casings. He then referred to the case of **Sakala v The People**[2] and submitted that their testimony should only have been rejected if it was found not to be credible.

44. In response to this argument, Mrs. Mwansa submitted that the evidence was rightly rejected for being hearsay. She pointed out that since the appellant sought to rely on the truthfulness of the claim that cartridge casings were picked from outside his premises, the statement was hearsay; she referred to the case of **Mwape v The People**[3], in support of her argument.

45. In the case of **Subramaniam v The Director of Public Prosecutions**[1], it was pointed out that **"the fact that the statement is made, quite apart from its truthfulness, is frequently relevant in considering the mental state and conduct thereafter as the witness or of some other person in whose presence the statement was made"**. In the court below, and in this court, Mr. Mutale SC and Mr. Bwalya's testimony, on the recovery of cartridge casings outside the appellant's premises, has been said to confirm the appellant's evidence that someone discharged a firearm from outside his law firm, after he had fired warning shots. It has also been referred to in support of the claim that the police supressed or concealed some

of the evidence, they recovered in the course of investigating this case; particular reference was made to the picking of a 9mm cartridge casings.

46. It cannot, in the circumstances, be said that the appellant, sought to produce the testimony of the two witness', on picking of the cartridge casings, solely for the purposes of showing that the statements were made. They actually sought to use the evidence to prove that 9mm cartridge casings where picked. They also sought to use the evidence to prove that someone fired from outside the appellant's law firm but the police suppressed that evidence.

47. Consequently, we find that the trial judge rightly excluded the evidence for being hearsay. Because they sought to introduce the evidence as proof of what was said, it does not fall in the exception set out in **Subramaniam v The Director of Public Prosecutions**[1]. In addition, the fact that the two witnesses, are persons of good standing, is immaterial to the admissibility of such evidence. Evidence, which is hearsay, cannot become

admissible merely because it was repeated by a credible person. This ground of appeal fails.

Findings of fact not supported by evidence

48. The second ground of appeal is that the trial judge made findings of fact that are not supported by the evidence.

Finding that the appellant concealed the pistol and car keys

49. The first finding of fact that is said not to be supported by the evidence, is the finding that the appellant concealed the pistol and the car keys.

50. First of all, Mr. Mutemwa SC, pointed out that Inspector Chilufya, the police officer who recovered the articles, told the court that he found the keys for the BMW in the flower bed and when he opened the car, he found the pistol in the boot. On the other hand, the appellant told the court that the keys where in a backpack, while he handed over the pistol to a man wearing dreadlocks.

51. State Counsel then argued that since the recovery of the keys and pistol was contentious, the trial judge should have resolved the conflict between the appellant and Inspector Chilufya, on the basis of their credibility. He referred to the cases of **Inutu Etambuyu Suba v Indo Zambia Bank Limited**[4] and **Teddy Puta v Ambinwire Friday**[5], in support of the argument.

52. State Counsel also argued that the trial judge should have accepted the appellant's evidence, that the keys where in a backpack and that the pistol was handed over to a man wearing dreadlocks, because he was a more credible witness than Inspector Chilufya. Inspector Chilufya had acted unprofessionally, when he failed to take the dying guard to the hospital and allowed members of the public to take photographs at the scene. The failure to advance reasons on why the appellant's explanation was not accepted, let alone, the admission of Inspector Chilufya's testimony, was a misdirection.

53. State Counsel then pointed out that in any case, the trial judge's finding that the keys for the BMW and

the pistol, where hidden, is not supported by the testimony of any witness. Inspector Chilufya, the police officer who testified about the recovery of the pistol, did not say that it was concealed.

54. In response to this ground of appeal, Mrs. Mwansa referred to the case of **Geojago Robert Musengule and Amon Sibande v The People**[6] and submitted that since the finding that the appellant concealed the firearm, was a finding of fact, we can only interfere with it in very limited circumstances. She then pointed out that the trial judge gave reasons why she found Inspector Chilufya's testimony more credible than that of the appellant.

55. Mrs. Mwansa also pointed out that when Inspector Chilufya was being cross examined, the story of the backpack and the dreadlocked man, was not suggested to him. She referred to the cases of **Abel Mkandawire and Others v The People**[7], **Donald Fumbelo v The People**[8] and **Rodgers Kunda v The People**[9], and submitted that these two issues, having not been suggested to the witness,

the trial judge was entitled to conclude that the appellant's reference to them, was an afterthought. These are the reasons why she found his testimony to be credible.

56. Our scrutiny of the record of appeal reveals that the trial judge, in her judgment, gave reasons why she accepted Inspector Chilufya's account of where he recovered the pistol, and not that by the appellant. She considered whether there was anything that could have motivated him to falsely claim that he found the pistol in the car or the keys in the flower bed, but did not find any. She also found that since the appellant's claim that the pistol was handed over to a dreadlocked man was not suggested to Inspector Chilufya in cross examination, it was an afterthought.

57. Coming to the argument that Inspector Chilufya never said that the pistol was concealed, **Black's Law Dictionary, 9th Edition**, defines a finding of fact as being **"a determination by a judge, jury, or administrative agency of a fact supported by the evidence**

in the record, usu. presented at the trial or hearing....."

In other words, it is a conclusion that a trier of fact, arrives at, after considering the evidence before her. It is not necessarily what one or another witness, tells the court.

58. While we agree with State Counsel's submission that Inspector Chilufya did not use the word "concealed", when he gave evidence on the recovery of the BMW keys and the pistol, it is our view that the trial judge was entitled to come to that conclusion, after considering the evidence before her. She accepted Inspector Chilufya's testimony that when he asked the appellant for the car keys, he gave him keys that could not open the car.

59. Inspector Chilufya eventually found the keys in the flower bed and when he opened the car, he found the pistol under a basket. Given that the appellant's claim that he had just fired the pistol, to ward off intruders, placing it under a basket, in a car, and throwing away

the keys, after locking the car, cannot amount to anything, other than hiding or concealing.

60. We also find that the trial judge gave reasons for finding that Inspector Chilufya was a credible witness. Further, the circumstances set out in the case of **Geojago Robert Musengule and Amon Sibande v The People**[6], in which an appellate court can set aside a finding of fact, have not been met in this case. The finding that the appellant concealed the pistol is not perverse, any trier of fact, properly assessing the evidence before her, would have arrived at the same conclusion. This argument fails.

Finding that there was blood splatter on the gate

61. The second finding of fact that is said not to be supported by the evidence, is the finding that there was blood splatter on the gate.

62. Mr. Mutemwa SC, submitted that Detective Chief Inspector Chibesa denied the presence of blood splatter on the gate. So did Superintendent Shibalatani, who said they found "some reddish substance that looked like

blood" near the gate. State Counsel then referred to the case of **Wesley Mulungushi v Cathrine Bwale Mizi Chomba**[10] and submitted that there was misdirection, when the trial judge found that there was blood splatter on the gate, in the absence of evidence supporting it.

63. In response to this argument, Mrs. Mwansa submitted that the finding was arrived at after the trial judge considered the evidence of Superintendent Shibalatani, Detective Chief Inspector Chibesa and Inspector Chilufya. Detective Chief Inspector Chibesa, in particular, mentioned the presence of blood splatter, inside the gate.

64. Mrs. Mwansa then referred to the case of **The Attorney General v Marcus Kampumba Achiume**[11] and submitted that the finding can only be set aside if it is perverse; was made in the absence of relevant evidence; there was a misapprehension of the facts; or could not have been reasonably made if a proper view of the evidence had been taken. It was not the case, in this matter.

65. We have examined the judgment and the record of appeal. In her judgment, the trial judge said the following on the issue, "....., **I find that the deceased was inside the gate at the time of the shooting, that he was shot from inside the gate is evidenced by the blood splatter on the inside of the gate and further** .....".

66. However, the testimony of Inspector Chilufya was that when he arrived at the appellant's law firm, he found the guard's body inside the premises, near the gate. He made no mention of seeing any blood splatter. In the case of Detective Chief Inspector Chibesa, he denied seeing any blood splatter on the gate, but said "it was on the ground but inside the gate". Superintendent Shibalatani said he saw some reddish stuff, that looked like blood, on the ground, at a place where the body was found.

67. From the evidence of these three police officers, it is clear that the blood splatter was not on the gate, but on the ground. In the case of **Imusho v The People**[12], the Court of Appeal held that:

> **"An appellate court will not interfere with a finding of fact if there was reasonable ground for it, but such finding will be set aside if it was made on a view of the facts which could not reasonably be entertained."**

The testimony of both Superintendent Shibalatani and Detective Chief Inspector Chibesa, points at blood splatter on the ground, but inside the appellant's premises.

68. In the circumstances, we accept State Counsel Mutemwa's submission that the finding that there was blood splatter on the gate, is not supported by the evidence. This argument succeeds and the finding is set aside.

69. Notwithstanding, we find that had the trial judge properly assessed the evidence before her, she would have come to the conclusion that the blood splatter seen by the witnesses, was within the appellant's premises, on the ground and near the gate.

Finding that the guard was face to face with the shooter

70. The third finding of fact, that has been criticised for not being supported by evidence, is the finding that the guard was face to face with the person who shot him.

71. Mrs. Kabalata pointed out that according to Dr. Musakhanov, the entry point of the bullet that killed the guard, was in the front of the neck, while the exit was at the back. In the case of Mr. Wolmarans, his evidence was that the path the bullet took is indicative of the fact that the guard was in a crouching position when he was shot; he disputed Detective Chief Inspector Chibesa's opinion that the guard was face to face with the person who shot him.

72. Mrs. then Kabalata referred to the case of **Sakala v The People**[2] and submitted that the trial judge should have given reasons for her preference of Detective Chief Inspector Chibesa's testimony to that of Dr. Musakhanov and Mr. Wolmarans, on the position in which the guard was when he was shot. Having failed to do so, we were urged, on the basis of the decision in the case of

Attorney General v Marcus Kapamba Achiume[11], to reverse the finding, because it is not supported by the evidence.

73. The online dictionary, **en.oxforddictionaries.com**, describes the phrase "face to face" as follows: "**(of two people) close together and facing each other**". Unless the phrase "face to face" is limited to two people who are standing and facing each other, which we think should not be the case, we do not see any conflict in the testimony of Detective Chief Inspector Chibesa, Dr. Musakhanov and Mr. Wolmarans, on the issue.

74. If one accepts Mr. Wolmarans' evidence that the guard was in a crouching position, which is supported by Dr. Musakhanov's evidence on the diagonal relationship between the entry and exit wounds, the person who shot the guard must have been in front of him. This is because the entry wound was in the front of the neck and not the back. Further, had the guard who was in a crouching position been looking down or straight on, the entry point would not have been in the neck but on top of the head. It is therefore more likely than not, that he was

looking up at the person who shot him. In our view, even if he was in a crouching position, they were face to face.

75. It follows that the trial judge's finding that the guard was face to face with the person who shot him, is not perverse. In our view, the finding is one that is supported by the evidence and we uphold it. This argument therefore fails.

Finding that there were no intruders at appellant's office

76. The fourth finding of fact that is said not to be supported by the evidence, is the finding that there were no intruders at the appellant's law firm on the morning his guard was shot.

77. Mr. Mutemwa SC, referred to the evidence of Chola Collins Kabanda who said he heard a person say "open the gate" before he heard the appellant call out that the guard had been shot. According to State Counsel, that evidence suggests that other than the appellant, some other person(s) was present. In addition, he pointed out

that the witness also said he heard footsteps of people running away and the only inference that can be drawn on that evidence, is that they were the intruders.

78. State Counsel then referred to the cases of **Attorney General v Peter Mvuka Ndhlovu**[13] and **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In Receivership) Charles Haruperi**[14] and submitted that although we are an appellate court, we can set aside this finding because it is not supported by the evidence.

79. In response to this ground of appeal, Mrs. Mwansa submitted that the trial judge rightly found that there were no intruders. The concealing of the pistol, after the shooting, raised doubt on the claim. Had they been present, the appellant would not have hidden it after the shooting.

80. The trial judge's finding that there were no intruders in the appellant's premises, at the time his guard was shot, must be considered in context. It was

premised on the appellant's claim that the guard was held hostage by an intruder who also discharged a firearm.

81. The appellant's evidence was that when he was driving out, he saw the lady he was with at the law firm being held by a man. He came out of the car and fired in the air, the man fled, and as he ran away, he saw his guard being held by another man. He fired another shot.

82. Although he did not say it, the appellant's evidence that the guard cried out after shots were fired from outside, suggested that it was the intruders and not him, who shot the guard. Chola Collins Kabamba's evidence that he heard people running is said to support the appellant's testimony that there were intruders.

83. However, Chola Collins Kabamba and Pavan Kumar's testimony was that only 3 shots were fired. Further, Detective Chief Inspector Chilufya's evidence that the 3 cartridge casings recovered from the appellant's law firm were fired from his pistol, rendered the appellant's

claim that two shots were fired by intruders questionable. If the intruders also fired, Chola Collins Kabamba and Pavan Kumar would have heard 5 shots and not the 3 shots they both heard. Further, Chola Collins Kabamba did not see the people he heard running and there is nothing to confirm that they were actually running out of the appellant's premises.

84. When discounting the appellants claim that there where intruders, the trial judge considered the concealing of the pistol. If he is to be believed that there were intruders, the appellant not only placed the pistol back in the car, he locked the car and threw away the keys, after firing waring shots. That conduct is most unusual given the pistol was licenced and according to the appellant, the law firm had been the subject of a recent intrusion.

85. In the face of this evidence, we find that the trial judge was entitled to doubt the appellant's claim that his law firm was invaded by intruders and find that it was not the case. The finding is not perverse because it

is one that can reasonably be made on the evidence that was before her. We uphold it. This argument therefore fails.

The placing of the burden of proof on the appellant

86. The third ground of appeal is that the trial judge erred when she placed the burden of proof on the appellant.

87. Mr. Muhanga referred to the case of **Mwewa Murono v The People**[15] and submitted that it was wrong for the trial judge to find that the appellant did not lead any evidence suggesting that Chola Collins Kabanda, Pavan Kumar and Inspector Chilufya, had a motive to falsely implicate him.

88. Mr. Muhanga also referred to the cases of **Chabala v The People**[16], **Saluwema v The People**[17], **Saidi Banda v The People**[18], **Maseka v The People**[19] and **Teddy Muntanga and Another v The People**[20] and submitted that where an accused person gives evidence, it is sufficient that his explanation is probable. There is no need for the

explanation to be proved beyond all reasonable doubt, he further argued.

89. In addition, Mr. Muhanga referred to the case of **Phiri and Others v The People**[21] and submitted that the prosecution, having failed to establish that the witnesses had no motive to falsely implicate the appellant, the trial judge should have resolved the issue in the appellant's favour. She should have found that they had a motive to falsely implicate him.

90. **Cross on Evidence, Sixth Edition**, at page 107, makes reference to the evidential burden, which is defined as follows:

> **"The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or none existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation".**

The burden of proof (evidential burden) and standard of proof where considered in the case **Mwewa Murono v The People**[15], and it was held, *inter alia*, that:

> **(i) 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.

(ii) The standard of proof must be beyond all reasonable doubt.

(iii) The accused bears the burden of adducing evidence in support of any defence after he has been found with a case to answer.

91. From the forgoing, it is clear that in a criminal case, the burden placed on the prosecution is to prove all the ingredients of the offence beyond all reasonable doubt. However, when it comes to evidence in support of an accused person's defence or any other assertion advanced by him, he bears the burden of leading evidence in support of such defence or assertion.

92. Evidence in support of an accused person's defence or assertion, can be led through the cross examination of prosecution witnesses or by calling of defence witnesses in support of it. The accused person, is not required to prove the defence or assertion beyond all reasonable doubt, it is sufficient that he places before the court, evidence that is enough for the court to

consider the availability of the defence or accept the assertion.

93. Other than when probably dealing with the testimony of a witness with a mental disability, accomplices and other witnesses with a possible interest of their own to serve, we are not aware of any rule of law that presupposes that a witness is untruthful or not credible, and consequently requires the prosecution to prove their credibility. It is our view, that witnesses are presumed to be credible until the contrary is proved, through either cross examination or the introduction of evidence that discredits their testimony.

94. Hence, we do not accept the appellant's submission that the prosecution should have established that Chola Collins Kabanda, Pavan Kumar and Inspector Chilufya, had no motive to falsely implicate the appellant and that having failed to do so, the trial judge should have found them not to be credible witnesses. Since it is the appellant who claims that they are not credible

witnesses, the burden lay on him, to place before the trial court, evidence in support of that claim.

95. In fact, the trial judge considered whether the taking of photographs at the scene and uploading them on social media, did affect the credibility of Inspector Chilufya's testimony. She found that it did not. Consequently, we find that the trial judge cannot be faulted for finding that the appellant failed to adduce evidence, on which she could have found that the witnesses where not credible. This ground of appeal fails.

Important issues not determined by the trial judge

96. The fourth ground of appeal is that the trial judge failed to determine a number of important issues.

The presence of 9mm cartridges at the scene

97. The first of the important issues the trial judge is said to have failed to determine is the presence of 9mm cartridge casing at the scene of the crime.

98. Mr. Muhanga pointed out that Inspector Chilufya testified that when he arrived at the appellant's premises, soon after he received information of the shooting, he picked a 9mm cartridge casing which he gave to Detective Chief Inspector Moya. He argued that from Detective Chief Inspector Chibesa's evidence, it is clear that the 9mm cartridge casing was not subjected to any examination, because all that he examined, were 10.2mm cartridge casings.

99. Mr. Muhanga then submitted that the trial judge should have resolved the presence of 9mm cartridge casings, because it is supported by Mr. Mutale SC and Mr Bwalya's testimony, that cartridge casings where picked outside the appellant's premises. In addition, we were invited to take judicial notice of the fact that Inspector Chilufya, being a senior police officer and an officer-in-charge of a police station, was trained in, and familiar with the calibre of the cartridge casing that he picked.

100. Counsel also referred to the case **Chansa v The People**[22] and submitted that since the ballistics expert did not examine the 9mm cartridge casing, his opinion that the fatal bullet was discharged from the appellant's pistol, should not have been accepted. On the authority of **Inutu Etambuyu Suba v Indo Zambia Bank Limited**[4], he argued that there was misdirection when the trial judge failed to resolve the presence of the 9mm cartridge casing.

101. In response to the argument that the police concealed the presence of 9mm cartridge casings, and the trial judge did not deal with the issue, Mrs. Mwansa submitted that she did. The trial judge considered the claim that the cartridge casings were casings from outside the law firm but found the evidence to be hearsay. She pointed out that the source of the information that cartridge casings were picked, was a relative of the appellant, who was not called as a witness.

102. Mrs. Mwansa referred to the cases of **Subramanian v Director of Public Prosecutions**[1], **Abel Mkandawire and Others v The People**[7] and **Mwape v The People**[3] and submitted that since the appellant intended to rely on the truthfulness of the claim that cartridge casings were picked outside his law firm, without calling the maker of the statement, the evidence was correctly excluded for being hearsay.

103. The two prosecution witnesses who talked about the picking of cartridge casings are, Inspector Chilufya and Superintendent Shibalatani. Superintendent Shibalatani did not mention the calibre of the two cartridge casings that he picked, suffice to say that he handed them over to Detective Chief Inspector Chibesa.

104. In the case of Inspector Chilufya, he said soon after he heard of the shooting, he went into the appellant's premises, where he picked a 9mm cartridge casing. He handed it over to Detective Chief Inspector Moya, who in turn handed it to Detective Chief Inspector Chibesa. Detective Chief Inspector Chibesa's evidence

was that when he examined the 3 cartridge casings, that is, two from Superintendent Shibalatani and one from Inspector Chilufya, he found that they were all of a 10.2mm calibre.

105. We were invited to take judicial notice of the fact that Inspector Chilufya, who was an officer in charge of a police station, was trained and familiar with the calibre of ammunition. In other words, we are being invited to find that the cartridge casing that Inspector Chilufya described as being a 9mm cartridge casing, was indeed a 9mm cartridge casing, because he knew what it was and could not have been mistaken.

106. The editors of **Halsbury's Laws of England, Third Edition, Volume 15**, at paragraph 615, have said the following on when a court can take judicial notice of a fact:

> **"Judicial notice is taken of various facts which are familiar to any judicial tribunal by their universal notoriety or regular recurrence in the ordinary course of nature or business."**

107. From the foregoing, it is clear that for us to take judicial notice of the fact that Inspector Chilufya was trained in, and is conversant with the calibre of ammunition, we must be familiar with that fact or it must be a fact of universal notoriety. Other than knowing that there are some police officers who are trained in ballistics, because they regularly appear before our courts, we are not aware of the extent or level of training that police officers, receive in that area. Neither is the level of training that police officers receive on firearms, a matter of public notoriety. We are therefore not in a position to take judicial notice of the fact that Inspector Chilufya was possessed of any expertise in ballistics.

108. Detective Chief Inspector Chibesa's evidence that the 3 cartridge casings he examined were all 10.2mm, was unchallenged. Given his expertise, we are satisfied that there was evidence before the trial judge that the cartridge casing that Inspector Chilufya described as 9mm was in fact a 10.2mm cartridge casing.

109. Further, we have already indicated that Mr. Mutale SC and Mr. Bwalya's evidence on the picking of other cartridge casings, was correctly excluded for being hearsay. Although the trial judge did not deal with the calibre of the cartridge casing picked by Inspector Chilufya, it is our view that had she done so, on the evidence that was before her, she would have still found that no 9mm cartridge casing was picked at the appellant's premises. This argument fails

Cause of dents on the gate and wall

110. The second issue that the trial judge is said not to have adjudicated on was Mr. Wolmarans' evidence that the dents on the gate and wall were not caused by gunshots.

111. This evidence tended to support the appellant's evidence that he fired in the air. Mrs. Kabalata pointed out that Mr. Wolmarans conducted empirical tests which raised doubts on the report by Detective Chief Inspector Chilufya that the gate and the wall were grazed by a

bullet. She argued that given that Mr. Wolmarans' finding that it was not the case, was not rebutted, and in the absence of any damage to the gate and wall, the trial judge should have found that the appellant did not fire into the wall or at the gate, but in the air.

112. In the case of **Chuba v The People**[23], Gardner, D.C.J., commenting on how the court should treat the evidence of a handwriting expert, said the following at page 330:

> **"The principle is that the opinion of a handwriting expert must not be substituted for the judgment of the court. It can only be a guide, albeit a very strong guide, to the court in arriving at its own conclusion on the evidence before it, and in this respect we would criticise the use of the wording by the handwriting expert that "these similarities indicate with a strong degree of certainty that the writer of the specimen writings in column (b) is one and the same person who wrote the disputed endorsements on the disputed cheque. It would be wrong to assume otherwise."**

113. It is our view, that the position taken by the Supreme Court in the case of **Chuba v The People**[23], with regard to handwriting experts, is applicable to the testimony of any witness who is an expert. Since the

evidence of a ballistics expert is an opinion, the court is still required to assess it, it cannot be received without reservation, as was suggested by Mrs. Kabalata.

114. We have examined the judgment and find that contrary to Mrs Kabalata's claim, the trial judge did in fact consider the question whether the damage seen on the wall and gate, was caused by gunshots. She found the evidence to be inconclusive. Since it was the prosecution who were claiming that the damage was caused by bullets, in effect, she found that they had failed to prove that it was the case.

115. Further, in the face of evidence that the guard was within the premises of the appellant's law firm when he was shot, and that only the appellant's pistol was discharged, we do not find any basis on which the trial judge would have concluded that the guard could not have been shot by the appellant, because he fired in the air. The pathologists evidence points at a downward diagonal trajectory of the bullet that killed the guard and this is indicative that the firearm was aimed downwards. That

evidence renders questionable, the appellant's claim that he fired in the air, in an upward direction. We find no merit in this argument.

Contamination of the scene

116. The third argument in support of the claim that the trial judge failed to adjudicate on contentions issues relates to the contamination of the scene.

117. Mr. Katolo pointed out that although the trial judge found that the police acted unprofessionally when they failed to stop members of the public from contaminating the scene, she did not go further to make a finding on the effect of that contamination. Had she done so, she would have found that the contamination raised doubts on the appellant's guilt.

118. In response to this argument, it was submitted that the trial judge did address her mind to the issue. Mrs. Mwansa submitted that contamination of the scene, which borders on dereliction of duty, will only operate in favour of an accused person and entitle him to an

acquittal, if the prosecution evidence is not overwhelming and fails to offset the presumptions that may be arrived at in favour of an accused person. She referred to the case of **Charles Lukolongo and Others v The People**[24] and submitted that after considering the evidence before her, the trial judge correctly found that the presumption was displaced by the overwhelming evidence.

119. The online dictionary, **en.oxforddictionaries.com**, defines contamination as, **"the action or state of making or being made impure by polluting or poisoning"**. In the case of a crime scene, contamination can be said to be the disturbance of the scene which results in the introduction or removal of evidence. It may jeopardise an accused person's case, by either introducing evidence that tends to incriminate him or removing evidence that could have exonerated him.

120. In this case, the trial judge found that the scene was contaminated because the police did not cordon off the premises. It enabled members of the public to enter

the place and some of them took photographs. Other than enter the premises, there is no evidence of anything that may have been introduced or removed, but the fact that their presence amounted to contamination, is common cause.

121. Contrary to Mr. Katolo's submission, the trial judge did actually address her mind to the effect of the contamination. She found that since the evidence against the appellant was overwhelming, he was not in way prejudiced.

122. As regards Mrs. Mwansa's submission that contamination of a crime scene borders on dereliction of duty, in the case of **Kalebu Banda v The People**[25] at page 233, Baron, DCJ, said the following on a dereliction of duty:

> "..., **when evidence has not been obtained in circumstances where there was a duty to do so - and a fortiori when it has been obtained and not laid before the court - and possible prejudice has resulted, then an assumption favourable to the accused must be made."**

Having just said contamination of a crime scene, is concerned with the introduction or removal of evidence, we do not think it borders on dereliction of duty, as suggested by Mrs Mwansa. However, we agree with her view that its effect on a case, is dependent on the prejudice that an accused person suffers.

123. In this matter, the case against the appellant was anchored on ballistics evidence, while his defence was centred on the claim he fired in the air and the fatal shot was fired by intruders. While it is possible that the crowd could have tampered with cartridge casings discharges by the intruders, that presumption is offset by the uncontroverted evidence of Chola Collins Kabamba and Pavan Kumar, that only 3 shots were fired. It is improbable that the members of the public could have picked the cartridge casings discharged by the intruders, because the evidence that we have just reviewed rules out the possibility that if they were any intruders, they discharged a firearm.

124. We are satisfied with the trial judge's finding that the appellant suffered no prejudice from the contamination of the scene. We find no merit in the argument.

Failure to find that there was dereliction of duty

125. The fourth argument in support of the claim that the trial judge failed to adjudicate on contentious issues relates to the failure to find that there was dereliction of duty when the police failed to investigate or produce in court, evidence on a number of specified issues.

126. The issues were listed as, when the police failed to investigate the presence of intruders; when the police failed to investigate who shot the guard; when the police failed to ascertain who was driving the BMW and the Toyota Landcruiser that where found in the drive way; when the police failed to properly reconstruct the scene; and when the police failed to bring crucial evidence to court, in particular the cartridge casings picked outside the appellant's premises.

127. The other instances pointing at dereliction of duty were identified as when the police failed to mention the BMW vehicle in scene reconstruction report by Superintendent Shibalatani; when the police failed to mention in the report by Superintendent Shibalatani that the appellant's shirt was taken for ballistics examination; when the police failed to present the appellant's shirt in court; when the police failed to take the guard to the hospital; and when the police failed to secure the scene and obtain evidence from the persons who were on the premises.

128. In addition, it was also pointed out that there was dereliction of duty when the police failed to conduct conclusive and thorough tests on the gate, the wall, and bullet holes; when the police failed to provide handover notes of exhibits by Inspector Chilufya; when the police failed to uplift any finger prints; when the police failed to take photographs from the BMW where the pistol was allegedly discovered; when the police failed to administer a warn and caution on the appellant; and when

the police only tendering 1 of the 3 photo albums of the scene.

129. Mr. Muhanga referred to the cases of **Teddy Muntanga and Enock Mpelembe v The People**[20], **Phiri and Others v The People**[21], **Gilbert Chileya v The People**[26], **Peter Yotamu Haamenda v The People**[27] and **Lipepo and Others v The People**[28] and submitted that the dereliction of duty, leads to a presumption in favour of the appellant. We were urged to acquit the appellant.

130. In response to this ground of appeal, Mrs. Mwansa submitted that the trial judge did address her mind to the issue of dereliction of duty. She referred to the case of **Charles Lukolongo and Others v The People**[24] and submitted that dereliction of duty will operate in favour of an accused person and entitle him to an acquittal, unless the prosecution evidence offsets such a presumption.

131. Mrs. Mwansa also referred to the cases of **Kalebu Banda v The People**[25] and **Lipepo and Others v The People**[28] and submitted that the extent of the presumption will

depend on the evidence before the court and where there is overwhelming evidence, the court can still convict notwithstanding the dereliction of duty. She submitted that after considering the evidence before her, the trial judge rightly found that the presumption was displaced by the overwhelming evidence.

132. Mrs. Mwansa distinguished the case of **Phiri and Others v The People**[21], that the appellant referred to in support of the argument that statements should have been recorded from the persons the police found at the scene. She argued that in this case, there were no eye witnesses and the police recorded statements from those present at the time, Chola Collins Kabanda and Pavan Kumar. The other people found at the scene, came after the incident.

133. As we said earlier on, when we referred to the case of **Kalebu Banda v The People**[25], dereliction of duty is concerned with the failure to investigate or to present to court, evidence collected in the course of investigations. In the case of **Charles Lukolongo and Others v The People**[24], Chomba J.S., delivering the

judgment of the Supreme Court, at page 126, observed as follows:

> **"Decided cases on the question of dereliction of duty show, inter alia, that where evidence available only to the police is not placed before the court, the court must presume that had such evidence been produced it would have favourable to the accused. The presumption is not necessarily fatal to the prosecution case because the word "favourable" has been construed to mean "in favour of" and nor to mean "conclusive". (See the case of Kalebu Banda v The People (6). In the case of John Timothy and Feston Mwaba v The People (6) it was also held that in cases of failure to take finger prints the presumption in favour of the accused will only be made if the article from which finger prints ought to have been taken had a surface on which finger prints could be detected. In the case of Kapuloshi and Others v The People (7) it was held that the presumption capable of being drawn in dereliction of duty cases is displaceable by a strong evidence to the contrary."**

134. It follows, that where it is properly found that there was dereliction of duty, the court must consider the presumptions that are favourable to the accused person as a result of the failure. The court cannot acquit an accused person merely because a case was poorly investigated or some of the evidence collected was not

presented to it. Much as there may be some failings in an investigation, it does happen that a case can still proved beyond all reasonable doubt.

135. In this case, the dereliction of duty complained of can be divided into two groups, matters not investigated and evidence collected during investigations, but not presented to court.

Issues not investigated

136. From the list set out by the appellant, the dereliction of duty, that has been associated with the failure to investigate, includes not investigating the presence of intruders; who shot the guard; who was driving the BMW and the Toyota Landcruiser that were found in the drive way; not properly reconstructing the scene; the failure to take the guard to the hospital; the failure to obtain evidence from the persons who were on the premises; the failure to conduct conclusive and thorough tests on the gate and the wall for bullet holes; the failure to uplift finger prints; the failure to take

photographs from the BMW where there pistol was allegedly discovered; and the failure to administer a warn and caution on the appellant.

137. We are at pains to understand the claim that there was dereliction of duty when the presence of intruders and the shooting of the guard were not investigated. Our understanding is that this is what this case is all about. It would appear that as far as the police are concerned, it is the appellant who shot the guard and there were no intruders. Whether they are right or wrong, is an issue that will be resolved when we deal with the question whether an inference of guilty is the only one that can be drawn on the evidence that was before the trial judge.

138. Coming to the failure to investigate who was driving the BMW and the Toyota Landcruiser that were found in the drive way, we agree with Mrs. Mwansa that all the prosecution was required to prove, are facts that are material to the case. The said motor vehicles belong to either the appellant or his acquaintance. There is

nothing to suggest that knowing who was driving either of them, was material to proving the charge the appellant was facing. As a result, we find that the failure raises no dereliction of duty.

139. We take the same view on the claim that there was dereliction of duty when the police failed to take the guard to the hospital. We do not see how it could have impacted on the investigations. The evidence of Inspector Chilufya establishes that guard was dead when he got to the appellant's law firm. Neither can we conceive any presumption that may be drawn in favour of the appellant as a result of the failure. It is not clear what would have been achieved or discovered, if he had been taken to the hospital immediately.

140. In his testimony, Superintendent Shibalatani told the trial judge that the scene reconstruction involved the appellant telling them where he was when he discharged his pistol, where the guard was at the time the intruders discharged their firearm and where the

cars were parked. They then took measurements and pictures.

141. Superintendent Shibalatani, Detective Chief Inspector Chilufya and the appellant, who were the main players in the scene reconstruction, all gave evidence during the trial and were cross examined at length. In the circumstances, we do not see the prejudice the appellant suffered, from what is being described as an "improperly conducted scene reconstruction".

142. In support of the argument that there was dereliction of duty when the police failed to obtain evidence from the persons who were on the premises, Mr. Muhanga referred to the case **Phiri and Others v The People**[21]. We agree with Mrs. Mwansa that the facts in that case, can be distinguished from the current case. In this case, the only persons known to have perceived what happened were Chola Collins Kabamba and Pavan Kumar. They heard and saw what happened after the gunshots, and were interviewed and testified in court.

143. There is nothing to suggest that the persons Inspector Chilufya found in the appellant's law firm either saw or perceived anything. Even if they did, this case is anchored so much on the ballistics evidence on the numbers of shots fired and the source of the cartridge casings picked.

144. As regards the failure to conduct conclusive and thorough tests on the gate and the wall for bullet holes. As we understand it, the argument is that such test would have established that the dents on the gate and wall were not caused by bullets. We have already indicated that since the trial judge found the evidence to be inconclusive, in effect, she found that the damage was not caused by bullets.

145. On the question of dereliction of duty on account of failing to lift fingerprints, the Supreme Court, in the case of **John Timothy and Feston Mwamba v The People**[29], held, *inter alia*, that:

> **"If there is a dereliction of duty on the part of the police in not testing an article for fingerprints there will, if the article has surface on which fingerprints**

> **could be detected, be a presumption in favour of the accused that there were fingerprints on the article which did not match the fingerprints of the accused."**

146. In this case, the appellant does not dispute being at his law firm at the time of the shooting. Further, the trial judge found that the scene was contaminated by members of the public who were given access to the scene. In the circumstances, the lifting of fingerprints would not have advanced this case in any way, because the possibility of finding fingerprints belonging to strangers, was more than probable.

147. The failure to take photographs from the BMW where the appellant's pistol was also said to have amounted to a dereliction of duty. In the case of **Jack Maulla and Asukile Mwapuki v The People**[30], the Supreme Court held, inter alia, that:

> **"There is no hard and fast rule that the police should always have the scene of crime and incriminating objects photographed although such photographs can at times be of immense help to a trial court."**

148. If follows, that it cannot be said that there was dereliction of duty, merely because photographs were not taken. We do acknowledge that in some cases, the failure to take photographs can affect the credibility of a witness's testimony. In this case, Inspector Chilufya was cross examined at length on the circumstances leading to the discovery of the pistol in the car. His testimony was also the subject of credibility consideration by the trial judge, who found it to be credible. We do not find any dereliction of duty in the circumstances.

149. Coming to the failure to administer a warn and caution on the appellant, there is no doubt that it is a good practice for the police to interview a person who is in their custody on suspicion that he has committed an offence. Such interview, may prove useful to the investigation as evidence exonerating him may be discovered at a very early stage. In this case, the appellant's explanation of what happened was revealed during the scene reconstruction. We therefore find that

he suffered no prejudice when no warn and caution statement was recorded from him.

Failure to present to court evidence collected

150. As regards dereliction of duty as a result of the failure to present evidence collected during the course of investigations, reference was made to the failure to present the cartridge casings picked outside the appellant's premises; the failure to present the results of the examination of the appellant's shirt; the failure to provide handover notes of exhibits by Inspector Chilufya and when the police only tendering 1 of the 3 photo albums of the scene.

151. On the failure to present the cartridge casings picked outside the appellant's premises. We have already held that the trial judge correctly found that the evidence pointing at the picking of cartridge casings outside the appellant's law firm was hearsay. As the record stands, there is no evidence that cartridge casings were picked outside the appellant's law firm and dereliction of duty, on that score, does not arise.

152. In his testimony, Detective Chief Inspector Moya, confirmed submitting the appellant's T-Shirt for ballistics examination. He did not give any plausible reason for the failure to present the results of the examination to court. The trial judge accepted that the failure amounted to dereliction of duty but went on to find that the appellant suffered no prejudice because he accepted discharging a pistol and attempting to lift the guard, who was bleeding.

153. In our view, the trial judge's finding that the appellant was not prejudiced was correct. Since the purpose of the examination was to find out if the T-Shirt had gunpowder residue and blood was on it, the appellant's admission that he discharged a pistol and attempted to lift the guard, takes the issue out of contention. In effect, the appellant does not dispute that there could have been gunpowder residue or blood on his T-Shirt, he gave an explanation of how those substances could have found themselves on his T-Shirt.

154. Coming to the failure to provide handover notes of exhibits by Inspector Chilufya and the police only tendering 1 of the 3 photo albums of the scene, as was held in the case of **John Timothy and Feston Mwamba v The People**[29], dereliction of duty only leads to a presumption favourable to an accused person, but such presumption can be offset by overwhelming evidence. The evidence collected by the police, which incriminated the appellant, was the cartridge casings picked at the scene and the ballistics examination conducted by Detective Chief Inspector Chibesa. This evidence was overwhelming, and we believe it offsets any presumption in his favour.

Downplaying of the inconsistencies in prosecution evidence

155. The fifth argument in support of the ground of appeal that the trial judge failed to adjudicate on contentious issues was that she downplayed the inconsistencies in the prosecution evidence.

156. Mr. Muhanga pointed out that the trial judge down played the importance of the scene reconstruction

despite it being important to the determination of whether the appellant had *malice aforethought*. The evidence of Detective Chief Inspector Chibesa, Superintendent Shibalatani and Mr. Wolmarans, on where the appellant was when he discharged the pistol and the flame burns observed on the guard's body, was also not considered.

157. The other discrepancies that are said to have been downplayed was the arrest of the appellant before the receipt of the post-mortem and the size of the gunshot wounds observed on the body of the guard. In the face of evidence that Detective Chief Inspector Chibesa examined the body without authority, an inference that he intended tamper with the body, should have been drawn, he argued.

158. Mr. Muhanga then submitted that the case of **Madubula v The People**[31], which the trial judge referred to, when dealing with inconsistencies in the prosecution evidence, was only applicable to instances where the discrepancies in the prosecution evidence were minor.

159. In response to this ground of appeal, Mrs. Mwansa referred to the case of **Chimfwembe v The People**[32] and submitted there is no need for the prosecutor to prove each and every detail on the circumstances surrounding the commission of the offence. She also submitted that the credibility of the prosecution evidence cannot not be affected by minor discrepancies. What the prosecution is required to prove, is evidence that goes to establish the particulars of offence.

160. Mrs. Mwansa then argued that the flawed scene of crime reconstruction and the arrest of the appellant before the receipt of the post-mortem report, had no bearing on the proof of the charges against the appellant. As regards Detective Chief Inspector Chibesa's examination of the body without authority, she referred to the cases of **Madubula v The People**[31] and **Chimfwembe v The People**[32] and submitted that the accused person was not prejudiced in anyway, because other than measuring, there is no evidence that they actually tampered with the body.

161. The first issue we will deal with is the arrest of the appellant before the receipt of the post mortem report. We do not see the significance of this irregularity, if one may call it that, given the provisions of **section 26(a) of the Criminal Procedure Code**. It allows a police officer to arrest any person whom he suspects, upon reasonable grounds, has committed a cognizable offence.

162. Other than point out that the offence of murder, an offence for which the appellant was arrested and subsequently charged with, is a cognisable offence, we do not see the need for considering whether it was proper or desirable for the appellant to be arrested before the post-mortem report. This is because a charge that has been proved beyond reasonable doubt, cannot, on appeal, be assailed on the ground that at the time the convict was arrested, the police did not have all the evidence that was subsequently used to prove the charge.

163. The same can be said about Detective Chief Inspector Chibesa's examination of the guard's body without authority. Given that the trial judge found that the evidence on the calibre of the fire arm that caused the injuries that were observed on the guard's body was inconclusive, we see no need to deal with the issue in any detail. Suffice to say that the mere fact Detective Chief Inspector Chibesa's examined the body was without authority, would not have rendered his evidence on the test inadmissible. In the case of **Liswaniso v The People**[33], the Supreme Court held that illegally obtained evidence, can, in certain circumstances, be admissible.

164. Examination of the reports and the testimonies of Superintendent Shibalatani and Detective Chief Inspector Chibesa, establish that what has been described as a "scene reconstruction" in this case, was no more than obtaining pictorial evidence of where the appellant was when he discharged his pistol, relative to where the body and cartridge casings were discovered.

165. As we see it, the scene reconstruction was all about giving pictorial support to the testimony of the witnesses. It also gave distances between where the various pieces of evidence were discovered or seen at the crime scene. Of importance, was the distance between the guard's body and where the appellant said he was when he discharged his firearm.

166. From the scene reconstruction, the appellant told the police that he was at points that where between 15 metres and 19 metres from where the guard was when he discharged his pistol. Mr. Wolmarans' opinion was that at that distance, the appellant's pistol could not have caused the flame burns that Dr. Musakhanov observed on the guard's body. Such flame burns could only have been caused if the pistol was discharged from a distance of between 5 and 10 cm. But according to Detective Chief Inspector Chibesa, the shooter was between 0 and 20 metres. The importance of this evidence is that it would have established whether the appellant could have fired the fatal bullet form where he said he was.

167. We have examined the judgment of the trial judge and note that she did not deal with the conflict in the evidence of Detective Chief Inspector Chibesa and that of Mr. Wolmarans on whether the appellant's pistol could have caused the flame burns that Dr. Musakhanov observed. She only dealt with the question whether the pistol could have caused the injury observed by Dr. Musakhanov and Detective Chief Inspector Chibesa.

168. The question that must now be answered is what is the effect of that failure? We will deal with the issue when we consider the ground of appeal dealing with whether an inference of guilty is the only one that could have been drawn on the evidence that was before the trial judge. This is because the issue cannot be resolved in isolation, it goes to the root of the charge.

Discrepancies in evidence on extent guard's gunshot wounds

169. The sixth argument in support of this ground of appeal that the trial judge failed to adjudicate on the discrepancies between Dr. Musakhanov and Detective Chief

Inspector Chibesa's evidence on the wounds suffered by the guard.

170. Mr. Muhanga referred to the case of **Sipalo Chibozu and Chibozu v The People**[34] and pointed out that it was desirable to call the doctor, where medical evidence is concerned. He also referred to the case of **Charles Lukolongo and Others v The People**[24] and **The People v Mateyo Mujumaizi Jerusalem**[36] and submitted that despite this being a complicated case, the prosecution chose not to call the pathologist. They left it to the appellant to do so.

171. In response to these arguments, Mrs. Mwansa referred to the cases of **Madubula v The People**[31] and **Chimfwembe v The People**[32] and submitted that the discrepancies in the evidence, on the size of the wounds suffered by the guard, fall in what can be classified as minor discrepancies. It is not in dispute that the guard was shot and, in any case, the trial judge did not make

any finding to the detriment of the appellant on the basis of the discrepancies.

172. Mrs. Mwansa also referred to the case of **Lipepo and Others v The People**[28] and submitted that in a quest to grant the appellant a speedy trial, the state decided to close the case without calling the pathologist because he was outside the country, on leave. She also referred to the case of **Mangomed Gasanalieu v The People**[36] and submitted that even if the pathologist had not been called, the trial judge would not have been bound by the pathologist's opinion in the post-mortem report. She was entitled to come to her own conclusion, which she did, when she found that some of the evidence he gave, was contradicted by what the other witnesses said.

173. The first issue we will deal with is the failure, by the prosecution, to call the pathologist. **Section 191A (1) of the Criminal Procedure Code** provides as follows:

> **"(1) The contents of any document purporting to be a report under the hand of a medical officer employed in the public service upon any matter relevant to the issue**

in any criminal proceedings shall be admitted in evidence in such proceedings to prove the matters stated therein:

Provided that-

(i) the court in which any such report is adduced in evidence may, in its discretion, cause the medical officer to be summoned to give oral evidence in such proceedings or may cause written interrogatories approved by the court to be submitted to him for reply, and such interrogatories and any reply thereto purporting to be a reply from such person shall likewise be admissible in evidence in such proceedings;

(ii) at the request of the accused, made not less than seven days before the trial, such witness shall be summoned to give oral evidence.

In the case of **Lupupa v The People**[37], it was held, per curiam, that:

"S.191 A of the Criminal Procedure Code was intended to obviate the necessity to call experts to prove purely formal matters, but should not be used as a substitute for verbal evidence when the actual content of the report goes to the very root of the charge; in any case where the evidence is more than purely formal the expert should be called."

Further, in the case of **Sipalo Chibozu and Chibozu v The People**[34], the desirability of calling the doctor who prepared the medical report was considered. The court held as follows:

> **"Medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable for the person who carried out the examination in question and prepared the report to give verbal evidence."**

174. Going by the decision in **Lupupa v The People**[37], it is clear that it is acceptable, in certain situations, for a trial court to receive medical evidence without calling the doctor who prepared it. It is particularly the case, if the medical evidence is not contentious. That being the case, the mere fact that the prosecutor does not call the doctor, cannot be condemned as being *mala fide*.

175. In any case, the record of proceedings shows that at the time he was scheduled to testify, the pathologist,

Dr. Musakhnov, was out of the country, on leave. Further, we do not see why issue is being raised with the matter because the appellant was allowed to call the Dr. Musakhanov and he turned up and testified. During his testimony, the appellant was allowed sufficient opportunity to examine the doctor. That being the case, we agree with Mrs. Mwansa that the prosecutions failure to call the pathologist is a non-issue because the appellant suffered no prejudice.

176. Coming to the failure by the trial judge to resolve the difference in the evidence of Dr. Musakhanov and Detective Chief Inspector Chibesa, on the extent or size of gunshot wounds the guard suffered, we equally agree with Mrs. Mwansa that the trial judge was not bound to agree with either or both of them. These two witnesses observed the wounds in different circumstances and measured them using different instruments. It was then open for the judge to decide who to believe. In our view, there mere fact that she did not accept the view of

either of them, does not mean that she failed to resolve the issue.

177. The evidence on the wound sizes was tendered in support of the claim, by Detective Chief Inspector Chibesa that it was caused by a 10.2mm cartridge. Mr. Wolmarans told the court that the size of the wound cannot be ordinarily used to determine the calibre of the bullet that caused it. Our understanding of the effect of the finding that the evidence was inconclusive, is that the trial judge found it impossible to attribute the wounds to a 10.2mm bullet. We find no merit in this arguement.

Demeanour and credibility of prosecution witnesses

178. The seventh argument in support of this ground of appeal is that the trial judge failed to properly adjudicate on the demeanour and credibility of the prosecution witnesses.

179. Mr. Mutemwa SC, pointed out that having found that Inspector Chilufya had not acted professionally when he

took photographs of the dying guard and the appellant's identity card, and did not produce handover notes for exhibits, the trial judge should have attached little credibility to his testimony. He referred to the cases of **Nkhata and Four others v The Attorney General**[38], **Chansa v Lusaka City Council**[39], **Attorney General v Peter Mvaka Ndhlovu**[40] and **Nkongolo Farms Limited v Zambia National Commercial Bank Limited, Kent Choice Limited (In receivership) Charles Haruperi**[14] and submitted that there was misdirection when the trial judge failed to assess the demeanour of Inspector Chilufya, whose evidence was contradicted by that of Detective Chief Inspector Chibesa.

180. In response to this ground of appeal, Mrs. Mwansa submitted that the trial judge, when dealing with the testimony of prosecution witnesses that incriminated the appellant, considered the possibility of them falsely implicating him, but ruled it out. She therefore did assess the credibility of the prosecution witnesses.

181. In this case, the appellant was in the main, implicated by the testimony of Chola Collins Kabamba, Pavan Kumar and Inspector Chilufya. Following the appellant's testimony, which was materially in conflict with these witnesses, the trial judge considered why these witnesses may have falsely implicated him. Having found no reason, she found their testimony on how many shots were fired that evening, and where the pistol was recovered from, credible, and accepted it.

182. The trial judge, having considered Inspector Chilufya's wrong doing, in the context of the other evidence that was before her, it is our view that she cannot be condemned for failing to properly evaluate the credibility of the witness. The same can be said about the other prosecution witnesses, she did evaluate the credibility of their testimony.

183. We have examined all the arguments in support of the claim that the trial judge did not adjudicate on all contentious issues and find that it was not the case.

With the exception of her not dealing the question whether had the appellant discharged the pistol from the position where he said he was, the guard would have suffered the flame burns seen by the pathologist, she dealt with all the other issues. We will deal with that failure when we deal with the question of whether an inference of guilty is the only one that can be drawn on the evidence that was before her.

Erroneous finding that appellant had *malice aforethought*

184. The sixth ground of appeal was that the trial judge erred when she found that *malice aforethought* was proved.

185. Mr. Muhanga referred to the cases of **Bright Katontoka Mambwe v The People**[41] and **Kalaluka Musole v The People**[42], and submitted that murder being an offence of specific intent, *malice aforethought* should have been proved. He argued that *malice aforethought*, an essential ingredient of a charge of murder, was not proved. Instead, the trial judge relied on the appellant's "post incident" conduct to impute malice. She found that he

had *malice aforethought* on the basis that he was a licenced firearm owner, who should have known the consequences of firing the pistol and that he hid the pistol after the shooting.

186. Mr. Muhanga also raised issue with the trial judge's use of the term "statutory malice aforethought". He referred to the cases of the **Attorney General v Roy Clarke**[43] and **In Re: Liso**[44], and submitted that it was wrong for the trial judge to find that "statutory malice aforethought" had been established, because the law makes no reference to such a term, in relation to a charge of murder.

187. In response to the argument that *malice aforethought* was not proved, Mrs. Mwansa referred to the cases of **Director of Public Prosecutions v Lukwosha**[45] and **The People v Njobvu**[46] and submitted that on a charge of murder, the prosecution can either prove actual intent to kill or the intention to cause grievous harm. Since direct evidence of intention is rarely available, courts

usually draw inferences of an accused person's intentions, from the evidence before it. The trial judge was, on the evidence before her, entitled to come to the conclusion that the appellant had *malice aforethought*, when he shot the guard.

188. The offence of murder is set out in **section 200 of the Penal Code**, which 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."**

Malice aforethought, is defined in **section 204 of the Penal Code**. The section 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;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

189. While we agree with Mr. Muhanga that **The Penal Code**, in relation to the offence of murder, makes no mention of the term "statutory malice aforethought", we have no difficulty with the trial judge using the term. **Section 204 of the Penal Code**, which defines what *malice aforethought* is, is in two parts. Part of subsection 2(a) of that provision, deals with *malice aforethought* that is proved by direct evidence of the actual intention to kill. The remainder of subsection 2(a) and subsections (b) (c)(d), deals with situations where in the absence of direct evidence of the intention to kill, the intention to kill can be inferred.

190. In effect, even if murder is an offence of specific intent, that is, the intention to kill, there is statutory provision, in **section 204 of the Penal Code**, of the circumstances when the intention to kill, in the

absence of direct evidence, can be inferred. In our view, there was nothing wrong with the trial judge referring to such intention, as "statutory malice aforethought", because being a creature of statute, that is what it is. As it turned out the appellant was found to have *malice aforethought* on the basis of **section 204(a) of the Penal Code**; he was found to have intended to cause grievous harm.

191. Reverting to the question whether *malice aforethought* was proved, some of the evidence the trial judge took into account was the fact that the appellant was the holder a firearms licence and therefore familiar with its use and the injury it could cause. She also took into account of the fact that he concealed the firearm after the shooting. These two facts where labelled as being extraneous by Mr. Muhanga.

192. As Mrs. Mwansa rightly submitted, direct evidence, of malice aforethought, is seldom available and in most cases, the court draws an inference of it, on the basis

of the evidence before it. In this case, although the guard was shot in the neck, there is no direct evidence that the appellant intended to kill him. The judge was therefore entitled to consider the question whether the appellant may have discharged the pistol, not knowing that it could cause injury and subsequently death.

193. The fact that the appellant had a licence for that pistol, was evidence that pointed at him knowing what a firearm can do. It was therefore not extraneous. Similarly, the concealing of the firearm was important to the question whether he discharged the firearm in the circumstances that he claimed. Would a man who had just fired a licenced pistol in the air, to scare away intruders from his premises, hide such a firearm? That evidence cannot be looked at in isolation and labelled as "post incident", it must be considered in the light of all the other evidence.

194. Having found that the possession of a firearm's licence and the concealing of the firearm, were not extraneous to the question of whether the appellant had

malice aforethought, we will deal with the question of whether *malice aforethought* was proved when we deal with the next ground of appeal, which is on whether an inference of guilty, is the only one that could be drawn. This is because in a charge of murder, an inference of guilty can only be drawn if *malice aforethought* has also been proved.

Inference of guilty not being the only inference

195. The last ground of appeal was that an inference of guilty, is not the only one that could have been drawn on the evidence that was before the trial judge.

196. Mr Muhanga argued that the trial judge having found that the guard was shot with a firearm whose calibre was unknown, the appellant should not have been convicted of the offence of murder. He referred to the case of **R v Forbes**[47] and submitted that since the appellant was linked to the offence by his pistol, a finding that the guard was killed by a firearm of an unknown calibre, should have led to an acquittal.

197. Mr. Muhanga also argued that the flame burns suffered by the guard, placed the appellant far beyond the distance from which he would have inflicted the gunshot wounds suffered by the guard. He pointed out that according to Dr. Musakhanov, the person who shot the guard was between 1.2 and 2 meters, while Mr. Wolmarans said the gun must have been between 5 to 10 cm.

198. Further, the evidence of Superintendent Shibalatani and Detective Chief Inspector Chibesa, placed the appellant between 15.5 and 19 meters from where the guard was when he discharged the pistol.

199. Mr. Muhanga submitted that in the face of evidence that the appellant was at a distance beyond which his pistol could have caused flame burns, it is possible that someone else shot the guard. He referred to the case of **Dorothy Mutale and Phiri v The People**[48] and submitted that the court should have drawn an inference

favourable to the appellant and found that someone else shot the guard.

200. Finally, Mr. Muhanga argued that the appellant's explanation that they were attacked, can reasonably be true. He referred to the case of **David Zulu v The People**[49] and submitted that in the face of that explanation, which can reasonably be true, an inference of guilty is not the only one that could be drawn on the evidence that was before the trial judge. He pointed out that the evidence of Chola Collins Kabamba, who heard people running away from the scene, immediately after the gunshots; the unchallenged evidence of Mr. Wolmarans, that there was another shooter; and the picking of 9mm cartridge casings by Inspector Chilufya, supported his explanation.

201. In response to the argument that an inference of guilty is not the only one that could have been drawn on the evidence that was before the trial judge, Mrs Mwansa submitted that the trial judge properly directed her mind to when a conviction on circumstantial evidence is

competent. She correctly came to the conclusion that the only inference that could be drawn on the evidence that was before her, was that it was the appellant who shot his guard and that he had *malice aforethought*.

202. Mrs. Mwansa also referred to the cases of **Joseph Mulenga and Another v The People**[50] and **Donald Fumbelo v The People**[8], and submitted that since Chola Collins Kabamba and Pavan Kumar's testimony on the number of gunshots that they heard was not contested, and there is evidence that the three cartridge casings that were picked, were discharged from the appellant's pistol, the only inference that can be drawn is that he is the one who shot the guard.

203. It is common cause, that the case against the appellant, is anchored on circumstantial evidence. In the case of **David Zulu v The People**[49], Chomba JS, delivering the judgment of the Supreme Court, observed as follows at page 204:

> **"It is palpably clear that the evidence available at the trial was circumstantial evidence. It is competent**

for a court to convict on such evidence as it is to convict on any other types of admissible evidence. However, there is one weakness peculiar to circumstantial evidence; that weakness is that by its very nature circumstantial evidence is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn."

The court went on to hold that:

"It is therefore 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 in our view must, in order to feel safe to convict, be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only of an inference of guilt."

204. It follows, that when assessing whether an inference of guilty is the only one that can be drawn on circumstantial evidence, one must look at all the pieces of evidence that prove the relevant facts. Since inferences are drawn on such proved facts, the holding in the case of **Dorothy Mutale and Another v The People**[48], must be borne in mind. In that case, Supreme Court held that:

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

205. Whether or not two or more inferences can be drawn from the evidence, can only be determined after evaluating all the evidence that was presented during the trial and the findings of fact made therefrom. It cannot be decided, by looking at a single proven or unproven fact.

206. Before we set out the facts proved by the evidence, it is necessary to comment on the picking of 9mm cartridge casings, that has repeatedly been referred to in this case. We have already indicated that the trial judge rightly found that the evidence of Mr. Mutale SC and Mr. Bwalya on the issue, was hearsay. We have also found that the cartridge casing described as 9mm by Inspector Chilufya, was actually a 10.2mm cartridge casing. As the facts proved stand, no 9mm cartridge casing was picked in this case.

207. Reverting to the relevant facts that were proved, it was proved that in the early hours of 6th May 2017, 3 shots were fired from within the appellant's premises. Soon after the shots were fired, the sound of people, who appeared to be running away from the appellant's law firm, was heard. No one saw those people, but not long thereafter, the appellant called out indicating that his guard had been shot. The guard was found dead and a post-mortem found that he had died from a gunshot wound.

208. The other facts proved are that soon after the shooting, the appellant's pistol was recovered from a motor vehicle, where it had been concealed. Three cartridge casings were also picked from the appellant's premises and ballistics examinations confirmed that they were all discharged his pistol. It is on this evidence that the trial judge found that the only inference that could be drawn, was the appellant shot and killed the guard, and was therefore guilty of the offence of murder.

209. It was argued that following the court's finding that the calibre of the firearm that caused the injuries the guard suffered was inconclusive, an inference of guilty was not the only one that could be drawn on the evidence. More so, in the face of the evidence from the scene reconstruction, that the appellant was at a distance from which his pistol could not have caused flame burns observed on the guard's body. The trial judge has been criticised for not considering this evidence.

210. The evidence of the distance at which the appellant was when he is said to have discharged his pistol was not arrived at by any investigative process. It was given by the appellant; it should therefore be considered in the light of the other evidence that was before the trial judge. As we see it, the question is whether had the trial judge considered it, she would have arrived at a different conclusion on whether the guard was injured by a bullet discharged by the appellant's pistol.

211. As the admitted evidence stands, the appellant was in the premises of his law firm at the time the guard

sustained fatal gunshot wounds. He is the only person who discharged a firearm shortly before the guard was found dead. Can it be said be said that the appellant could not have caused the fatal injuries the guard suffered because he was 19 meters away? We don't think so. Since no one else discharged a firearm, no one else other than the appellant could have shot the guard.

212. A review of the evidence establishes that no one else other than the appellant discharged a firearm in the premises where his guard was found fatally injured by a gunshot. Even if people were heard running away from the premises, those individuals did not discharge any firearm. Only the appellant discharged his pistol three times and this is confirmed by the three cartridge casings picked. What this evidence points at, is that even if one where to accept Mr. Wolmarans' evidence that the person who shot the guard could not have been more that 10cm away from him, is that the appellant's claim that he was 19 meters away, when he discharged his pistol, cannot be true.

213. We find that even if the trial judge did not deal with evidence on the distance at which the appellant claims he was when he fired his pistol, the other evidence before her still points at the appellant being the shooter. The other evidence actually points at the fact that he could not have been where he claims he was. The appellant was not in any way prejudiced by the trial judge's failure to deal with evidence of where he was because the other evidence before her totally excludes the possibility that someone, other than him discharged the fatal shot.

214. It is our view that the trial judge's finding that it is the appellant who shot the guard is unassailable. The question is, did he have *malice aforethought*? The appellant denied aiming at the guard, he claimed that he fired in the air. As we have previously indicated in this judgment, *malice aforethought* can be proved by direct evidence of the intention to kill or an intention to cause grievous harm; see **section 204 of the Penal Code**. In this case, there is no direct evidence of the

intention to kill and the trial judge relied on the fact that the appellant, a holder of a firearm's licence, should have known the effect of firing a pistol at a person.

215. We find that she cannot be faulted for arriving at that conclusion. From the evidence on record, it is apparent that the appellant was aware that the effect of firing a pistol at a person was that it could cause death or grievous harm. In our view, that is why he maintained that he fired in the air, even though the evidence indicates that it was not the case.

216. This being the case, we find that an inference of guilty is the only one that could have been drawn on the evidence that was before the trial judge. The last ground of appeal therefore fails.

Verdict

217. The only ground of appeal we have allowed is the one relating to the finding that there was blood splatter on

the gate. Even though we allowed that ground of appeal, we find that it is of no effect on the trial judge's finding that an inference of guilty is only one that could have been drawn on the evidence that was before her.

218. Consequently, we uphold the appellant's conviction on the charge of murder. We have also looked at the sentence, in the light of the evidence that was before the trial judge and we equally uphold the sentence. The evidence before the trial judge did not disclose any extenuating circumstances to warrant the imposition of a sentence other than the one that she imposed.

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

D.L.Y. Sichinga
COURT OF APPEAL JUDGE

B.M. Majula
COURT OF APPEAL JUDGE