

SCZ. Appeal No.465/2013

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

SOLOMON MUSONDA

AND

THE PEOPLE



APPELLANT

RESPONDENT

Coram: **Phiri, Muyovwe, JJS, and Lengalenga, A/g JS**

On 8th April, 2014 and 26th March, 2020

For the Appellant:

Mr. A. Ngulube, Director Legal Aid Board

For the Respondent:

Mrs. M. B. Nawa – Deputy Chief State Advocate

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Saluwema V The People (1965) Z.R. 5 (Ca)**
2. **Kambarange Mpundu Kaunda vs The People (1992/1995) ZR 215.**

Legislation referred to:

1. The Penal Code, Chapter 87 of the Laws of Zambia – Section 224(a)

When we heard this appeal. The Honourable Madam Lengalenga, J, sat with us. She is no longer a member of this Court. This is therefore the majority judgment.

This is an appeal against the judgment of the High Court delivered by M.S. Mulenga J, in which the appellant was convicted for the offence of causing grievous harm with intent to maim, disfigure or disable contrary to **Section 224(a) of the Penal Code, Chapter 87 of the Laws of Zambia.**

The particulars of offence are that the appellant on 1st June, 2010 at Serenje in the Serenje District of the Central Province of the Republic of Zambia, with intent to maim, disfigure or disable, did cause grievous harm to Jackson Musaka. The prosecution's case was anchored on eleven witnesses.

The brief facts are that PW1 was shot at with a gun by the appellant on 1st June, 2010. PW1's testimony was that on that day, the appellant went to chair a meeting in Lubembe and as he drove

back after the meeting, he was stopped by PW1 and his colleagues who were repairing the road. They asked him for money and when PW1 thought he was about to give them some money, the appellant took out a gun and fired in the air. PW1 and one of his colleagues ran away into the bush to hide. Shortly after the first shot, PW1 went back to where the appellant was standing but the appellant fired the second shot which struck and injured him. After the shooting, according to PW1, before he left the scene, the appellant went and held his hand as he lay on the ground. PW1 was shot on the head near the left ear. He was later admitted to Kabwe General Hospital where he was treated for his injuries.

PW2's evidence was that on the material day after the meeting addressed by the appellant ended between 17.00hours and 18.00 hours he heard a gunshot and ran in the direction of the sound. When PW2 got to the area he saw people returning from the bush where they had run to. While at the scene he saw the appellant fire a second shot in the direction of some young men and one of them fall down. According to PW2, the appellant went to where the victim lay and briefly held his hand before he got into his car and drove

away. This witness reported the incident to the police at the check-point and later accompanied them to the scene of crime to explain what he witnessed. The victim was later transferred from Serenje District Hospital to Kabwe General Hospital for treatment.

PW3's testimony was to the effect that on 1st June, 2010 he and other people were repairing the road at the time the appellant was visiting the Lubembe area. They placed shrubs on the road. He saw the appellant's Pajero motor vehicle approaching the area where they were and as it slowed down, he moved towards the vehicle so that he could talk to the appellant. Before he could do so, the appellant fired a gun shot and PW3's friends ran away. The appellant got out of the vehicle and grabbed PW3 and ordered him to remove the shrubs from the road. According to PW3, as he talked to him, the appellant fired a second shot which hit PW1. The appellant then went over to where PW1 fell and later went back to his vehicle and left.

PW4, a teacher at Lubembe School where the appellant addressed the meeting, confirmed that the appellant fired his gun

and someone who was hiding in the bush was hit. After the victim was shot, the appellant went over to the victim to examine him.

PW5, the victim's brother, testified that he saw the appellant fire the second gunshot which dropped his brother to the ground. He took his brother to the water pump and poured water on him because he had fainted. After the appellant drove off, PW5 reported the shooting to his mother and later to the Police.

PW6 who was in the appellant's vehicle at the time of the shooting, testified that the appellant fired two gunshots. After the first one, the youths who were repairing and blocking the road scampered into the bush. When they returned back to the road, the appellant fired a second gunshot which hit the victim.

In his defence, the brief summary of the appellant's testimony was that on 1st June, 2010 as he was driving from a meeting at Lubembe Basic School he was stopped by a group of youths who had erected a makeshift barrier on the road. One of them came to bang on the front of his vehicle and asked him to come out while allegedly threatening to kill him. He fired a warning shot to scare them so that

he could pass and everyone scampered from the scene except the one who was in front of the barrier. According to the appellant, that person became more violent after the first shot. He pointed the gun at him and told his colleagues to tie him up so that they could take him to the police. It was the appellant's further evidence that the person taunted him that he had a toy gun and could not shoot him and he called out to his colleagues to return and finish him off. It was at this point that the appellant fired the second shot in the air to disperse the people. He heard someone screaming. He went over to the victim and examined him but his colleagues urged him to leave the scene as they were in danger of being killed by the crowd. The appellant and his passengers left the scene and later called the area police Commanding Officer to report the incident. He also claimed to have informed the District Commissioner and asked him for an ambulance to help the victim.

The learned trial Judge believed the prosecution witnesses' story and found that the appellant used excessive force.

Upon conviction, the appellant was sentenced to 9 months imprisonment with hard labour with effect from the date of arrest. He appealed against conviction and sentence and advanced the following grounds:

1. **The trial court erred in law and in fact by failing to make a final assessment as to the truthfulness of the prosecution witnesses; albeit, it made a finding that the contradictions did not go to the root of the case.**
2. **The trial court erred in law and in fact by failing to find that the appellant's case was reasonably possible and that a reasonable doubt existed.**
3. **The sentence imposed on the appellant was excessive in view of the facts of the case.**

In support of ground one, it was submitted that the trial court should have proceeded further to consider the credibility of the witnesses; that whilst the prosecution witnesses tried to show that the appellant was the aggressor, he was the victim. It was submitted that he was approached in a threatening manner by about thirty (30) people who blocked the road with tree branches of various sizes. He feared for his life and that of his passengers and for the safety of his vehicle, so he first fired in the air to scare the mob. According to the

appellant, the second shot was directed where there appeared to be no one but unfortunately that is where PW1 was.

It was further argued that the prosecution witnesses who were at the scene at the material time had an interest of their own to serve as they were responsible for the events that led to the shooting of PW1; that the blocking of the road was not a peaceful mission as they would have merely flagged down the vehicle in order to ask for money for the works they did.

It was further submitted that the contradictions and inconsistencies in the prosecution witnesses' evidence were an indication of their attempt to conceal the true events of 1st June, 2010. We were urged to find that the trial court erred by not finding that the contradictions and inconsistencies went to the root of the prosecution's case.

In support of ground two, learned Counsel argued that the trial court fell into error by not carefully considering the appellant's evidence together with that of PW6, and all the circumstances surrounding the case so as to determine whether the appellant's

explanation was reasonably possible on the basis of the decision in the case of **Saluwema v The People**⁽¹⁾. It was contended, on behalf of the appellant, that he accidentally shot PW1 and that his intention was to scare the group.

The appellant's argument in respect of ground three is that the sentence was excessive, taking into consideration the mitigating factor that the victim (PW1) was compensated through a civil suit. Mr. Ngulube implored us to set aside the sentence and substitute it with a fine, discharge or a suspended sentence.

Mrs. Nawa, the Deputy Chief State Advocate, relied on her written submissions as well as their submissions filed at trial stage.

In response to the arguments with regard to ground one, she submitted that the trial court was on firm ground in analyzing the prosecution evidence and finding, as it did on the alleged contradictions and inconsistencies. She contended that PW1's evidence was clear and unchallenged in cross-examination, and was corroborated by that of other independent prosecution witnesses who saw him drop to the ground after being shot.

Counsel argued that the appellant intended to cause grievous harm by firing a gun in the direction of people who were unarmed. She submitted that there was no imminent danger to warrant his reaction and that he had an opportunity to retreat. She urged the Court to dismiss this ground of appeal.

In response to the arguments advanced in respect of ground two, it was argued that the learned trial judge was on firm ground when she found as she did, because the record shows that the learned trial judge directed her mind to the appellant's reasoning as reflected in the judgment. The appellant's reaction could not have been in self defence as it was excessive and unreasonable.

In response to ground three Mrs. Nawa argued that the sentence of nine (9) months imprisonment with hard labour was neither excessive nor shocking, considering that the subject offence attracts a maximum sentence of life imprisonment. She submitted further that considering the circumstances of this case, the sentence of nine (9) months imprisonment was proportional. She therefore, urged us

to uphold both the conviction and sentence and to dismiss the appeal.

We have considered the submissions by Counsel, the authority cited, the evidence on record and the judgment of the court below.

The thrust of this appeal questions the lower court's conclusion on the alleged ground that it failed to properly resolve the issue of the contradictions and inconsistencies in the appellant's favour; and that his defence could reasonably be possible although not probable, thereby creating a reasonable doubt in terms of our reasoning in the case of **Saluwema v The People**⁽¹⁾.

We perused the evidence on record in the court below. The facts that were not disputed are that when the appellant fired the first shot in the air, everyone scampered apart from PW3 and some returned later. When he fired a second shot, PW1 shouted and fell down and the appellant briefly examined him before jumping into his vehicle and driving off. It is clear from the evidence of the witnesses that the second shot was not fired in the air but in the direction of PW3 who ducked and PW1 who was behind was shot instead.

In our considered view when the appellant fired the first warning shot in the air and the people scampered into the bush except for PW3, he had an opportunity to retreat by driving off. He did not do this. PW6 who was in the appellant's motor vehicle did not observe any act of provocation by any of the youths at the scene. This conclusively meant that provocation was not available to the appellant as a defence.

When he fired the second shot in PW3's direction he did so without regard for human life. That action displayed a reckless and illegal use of a lethal firearm without any reasonable cause and without any due regard to human life and safety of others; and most importantly, without any real danger to his own life as was the finding in the case of **Kambarange Mpundu Kaunda vs The People**⁽²⁾

From the evidence adduced in the court below, we are satisfied with the reasoning of the learned trial judge in arriving at the decision to convict the appellant. We do not find any merit in ground one of the appeal.

With regard to ground two on the probability of the appellant's defence of self defence being reasonably possible, we are of the considered view that the method of retaliation was excessive since there was evidence that the people who confronted the appellant were not armed with any offensive weapons. They were only armed with twigs and fresh leaves. When the Appellant fired the first shot, as he claimed, the people scampered. Clearly, he created an opportunity to retreat and continue his journey. He did not do so and instead, he shot at them. We do not consider the Appellant's explanation to be reasonably possible in the sense of the holding in the **Saluwema** case. We therefore, find no merit in this ground and we dismiss it.

Finally, in ground three the appellant alleges that the sentence is excessive. At the onset we wish to point out that the subject offence carries a statutory maximum sentence of life imprisonment. Therefore, after considering the evidence on record and the gravity of the offence committed, and in particular, the severity of the appellant's recklessness in the use of his gun, we received the sentence of nine (9) months imprisonment with hard labour with a sense of shock. The circumstances surrounding the shooting of PW1

were too grave and warrant a stiffer punishment and not a reduction or discharge. No one should be allowed to consider himself or herself to be above the law just because he or she has the privilege to legally own a licensed gun. The appellant chose to fire his gun at a group of human beings who did not attack him and who were unarmed. This is the reason his mitigation must fail.

We accordingly set aside the sentence and substitute it with a more appropriate one of three (3) years imprisonment with hard labour.

The net result is that the appeal wholly fails and is dismissed.



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G.S. Phiri
SUPREME COURT JUDGE



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E. C. Muyovwe
SUPREME COURT JUDGE