

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION,
CIRCUIT COURT HELD AT KATIMA MULILO

JUDGMENT

Case No: CC 25/2022

THE STATE

v

FRANS ERWIN

ACCUSED

Neutral citation: *S v Erwin* (CC 25/2022) [2023] NAHCMDCR 522 (23 August 2023)

Coram: DAMASEB JP

Heard: 17, 18 and 21 August 2023

Delivered: 23 August 2023

Flynote: Criminal Procedure – Murder read with the provisions of the Combating of the Domestic Violence Act 4 of 2003 – Attempted murder – Assault with intent to cause grievous bodily harm – Defence – Self-defence – Even if he was not the initial aggressor – Revenge – Numerous discrepancies in the accused’s version – Accused failed to sustain his defence – State witnesses more credible than accused – Accused acquitted on count 1 but convicted on alternative count of negligent

discharge of firearm- Accused convicted on remainder of counts to which he pleaded not guilty.

Summary: The accused was indicted in the High Court on count 1 – attempted murder of Lushando Kopelo and an alternative count of negligent discharge of a firearm. Count 2 – the murder of Mwaka Dorothy Kopelo, count 3 – the attempted murder of Aldrin Kangamba, count 4 – assault with intent to cause grievous bodily harm on Aldrin Kangamba: count 5 – possession of a firearm without a licence and count 6 – possession of ammunition without being in lawful possession of an firearm capable of firing that ammunition.

The accused pleaded guilty to counts 5 and 6 and was accordingly convicted as charged on the guilty pleas.

The State called three eye witnesses, one the elder sister of the deceased, the other the deceased's neighbour and the deceased's brother. Ms Lushando, testified that she was called to the scene by her daughter alerting her of an alleged fight between the deceased and the accused. Upon her arrival she attempted to break up the fight and advised the accused to retreat with her outside. He obliged just to return inside where the deceased remained. She heard a bottle break and the accused emerge with a bloody face. As she stood in the doorway of the deceased's house the accused fired a bullet towards her feet and she moved out of the way. The accused entered the house wherein the deceased was and she heard two gun shots from inside the house and when she went inside she noticed that her sister had been shot and was unresponsive. The accused left the house and on his way out shot at Kangamba who tried to take the bag from the accused in an attempt to stop him from fleeing the scene.

The second witness was Kangamba, he testified that he was the neighbour of the deceased and the accused. He indicated that he sent for Lushando so they could come and break up the fight between the deceased and the accused. He corroborated the evidence of Lushando, in that he saw the accused return into the house where he heard three gun shots, he saw the accused fire a shot towards

Lushando's feet and that the accused fired a shot at him for trying to grab his bag and threw him with half a brick which he shielded with his bare hands.

The last witness was Bevin Kopelo, the deceased's brother, he largely corroborated the evidence of both Lushando and Kangamba. He testified that he heard five gun shots in total and saw the deceased throwing a brick at Kangamba.

The accused testified that the deceased attacked him first with a beer bottle causing him injuries to his forehead and arm. He testified that when he returned into the house the deceased was outside and followed him inside. The accused maintained that he did not shoot at Lushando or Kangamba. He maintains that the shots he fired were both directed to the ground in an attempt to scare the deceased as she was in pursuit of him with a broken bottle and to scare off Kangamba. He maintains that he fired at the deceased because he was afraid that she will hurt him again. It was his intention to shoot the deceased's hand which held the broken bottle but missed and shot her in the chest instead.

It is common cause that the accused fired the shot that killed the deceased. The only question is whether or not he acted in self-defence and not revenge.

The Court prefers version of State witnesses who proved credible and were not actuated by collusion against the accused. Accused version riddled with inconsistencies and not reasonably possibly true.

Held that, the accused fired only one shot at Lushando as shown in the picture produced in evidence. That shot was even on the State's version aimed at Lushando's feet. In absence of expert evidence that if it hit Lushando it could have caused death, Court not satisfied that accused intended to kill Lushando. Accused acquitted on count 1 but convicted on alternative count.

Held that, the proven facts establish that the accused was hell-bent on a further confrontation with the deceased. His re-entry was bound to elicit a violent reaction from the deceased. His aim was revenge. Accused found guilty of the murder of Mwaka Dorothy Kopelo on count 2.

Held that, the accused's version that he shot into the ground to scare off Kangamba not reasonably possibly true and accordingly convicted of his attempted murder under count 3.

Held further that, with regards to count 4, the accused says that Aldrin lifted a brick to attack him. Aldrin denies that version. Bevin confirms Aldrin's account that the accused was the aggressor. The accused accordingly found guilty as charged on count 4.

VERDICT

Accused is convicted as follows:

Count 1: Attempted Murder Lushando Kopelo: Not Guilty

Alternative count: contravening section 38(1)(1) of the arms and ammunition act, no 7 of 1996- negligent discharge of a firearm: Guilty

Count 2: Murder read with the provisions of section 21 of the Combating of Domestic Violence Act, 4 of 2003: Mwaka Dorothy Kopelo - Guilty

Count 3: Attempted Murder Aldrin Kangamba: Guilty

Count 4: Assault on Aldrin Kangamba with intent to cause grievous bodily harm: Guilty

Count 5: Contravening section 2 Read with Section 1, 38(2) and 39 of Act 7 of 1996, as amended – Possession of a firearm without a licence: Guilty

Count 6: Contravening Section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996, as amended – Posses ammunition without being in lawful possession of an firearm capable of firing that ammunition: Guilty

JUDGMENT

DAMASEB JP:

Introduction

[1] The accused is charged with the following counts:

'COUNT 1: ATTEMPTED MURDER

That the accused is guilty of the crime of Attempted Murder, in that:

[2] Upon or about the 12th day of February 2021 and at or near Macaravani East in the district of Katima Mulilo the accused did unlawfully assault Lushando Kopelo by shooting at her with a firearm with intent to murder her;

Alternatively

CONTRAVENING SECTION 38(1)(1) OF THE ARMS AND AMMUNITION ACT, NO 7 OF 1996- NEGLIGENT DISCHARGE OF A FIREARM

That the accused is guilty of contravening Section 38(1)(I) read with sections 1, 38 and 39 of Act 7 of 1996, as amended.

In that upon or about the 12th day of February 2021 and at or near Macaravani East in the district of Katima Mulilo the accused did wrongfully and unlawfully discharge a firearm, to wit: a cz9mm pistol and did thereby endanger the life or limb of another person, to wit: Lushando Kopelo and handled an arm in a negligent manner;

COUNT 2: MURDER READ WITH THE PROVISIONS OF SECTION 21 OF THE COMBATING OF DOMESTIC VIOLENCE ACT 4 OF 2003.

That the accused is guilty of the crime of murder, in that:

upon or about the 12th day of February 2021 and at or near Macaravani East, Katima Mulilo in the magisterial district of Katima Mulilo the accused did unlawfully and intentionally kill Mwaka Dorothy Kopelo, a 32 years old female, by shooting her with a firearm;

COUNT 3: ATTEMPTED MURDER

That the accused is guilty of the crime of Attempted Murder, in that:

Upon or about the 12th day of February 2021 and at or near Macaravani East in the district of Katima Mulilo the accused did unlawfully assault Aldrin Kangamba by shooting at him with a firearm with intent to murder him;

COUNT 4: ASSAULT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM

That the accused is guilty of the crime of Assault with intent to do grievous bodily harm, in that:

Upon or about the 12th day of February 2021 and at or near Macaravani East in the district of Katima Mulilo the said accused did wrongfully, unlawfully and maliciously assault Aldrin Kangamba by striking him with a stone on the face with intent to do the said Aldrin Kangamba, grievous bodily harm;

COUNT 5: CONTRAVENING SECTION 2 READ WITH SECTION 1, 38(2) AND 39 OF ACT 7 OF 1996, AS AMENDED-POSSESSION OF A FIREARM WITHOUT A LICENCE

That the accused is guilty of contravening section 2 read with Section 1, 38(2) and 39 of Act 7 of 1996, as amended, in that:

Upon or about the 12th day of February 2021 and at or near Macaravani East in the district of Katima Mulilo the accused did wrongfully and unlawfully have in his possession an arm, to wit: A CZ 9MM PISTOL without having a licence to possess such arm;

COUNT 6: CONTRAVENING SECTION 33 READ WITH SECTIONS 1, 38(2) AND 39 OF ACT 7 OF 1996, AS AMENDED- POSSESS AMMUNITION WITHOUT BEING IN LAWFUL POSSESSION OF A FIREARM CAPABLE OF FIRING THAT AMMUNITION

That the accused is guilty of contravening Section 33 read with Sections 1, 38(2) and 39 of Act 7 of 1996, as amended, in that:

Upon or about the 12th day of February 2021 and at or near Macaravani East in the district of Katima Mulilo the said accused did wrongfully and unlawfully possess ammunition, to wit: +- 5 BULLETS FOR A CZ 9MM PISTOL without being in lawful possession of an arm capable of firing that ammunition.'

[3] The summary of substantial facts in terms of s 144(3)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) states:

'Mwaka Dorothy Kopelo (the deceased) and Frans Erwin (the accused) were residing at Macaravani East, Katima Mulilo, Zambezi Region. They were involved in a domestic relationship ... although they were not married to each other, as contemplated section 3 of the Combating of Domestic Violence Act, 4 of 2003.2. On Friday afternoon the 12th of February 2021, the accused and the deceased were socializing together with one Aldrin Kangamba, under the trees within the compound of their houses at Macaravani East. There, they entertained themselves with music while consuming traditional brew and beer.

At about 18:30 the accused and the deceased went inside their house, leaving Mr Kangamba sitting outside. While outside, Mr Kangamba heard the accused and the deceased arguing while they were inside their house. He went into that house to see what was happening. He found the accused and the deceased fighting. He separated them and they stopped fighting but they continued arguing. Meanwhile, Mr Kangamba called Lushando Kopelo, the sister of the deceased who resides in the neighborhood to come and intervene. When Ms Lushando arrived, she convinced the accused to leave the room. He joined her and they went to sit outside the couple's house, while the deceased remained inside the house.

After a few minutes the accused stood up returned inside of their house where the deceased was. Soon after that Ms Lushando heard a sound of a shattering bottle. She ran into the couple's house to see what was going on, but at the door of the house, she met with the accused exiting from the house while bleeding from his forehead, complaining saying: you see my blood? Accused stood outside the house for a short while, while Ms Lushando stood at the door of the house. She then saw the accused removing a pistol from his waist, he cocked it and fired once at the door of the house where Ms Lushando was standing. She ran aside and the accused entered the house, where the deceased was at the time.

While inside the accused fired more shots, after which he emerged from the house carrying the pistol in his right hand and a bag on his left shoulder. The accused placed his bag on the ground momentarily. Mr Kangamba tried to pick it up to prevent the accused from fleeing. The accused saw him and fired a shot at him but missed because Mr Kangamba ducked. The accused also picked up a stone and threw it at Mr Kangamba, aiming at his head. Mr Kangamba covered his face with his hands and the stone struck him on the hands. The deceased died at the scene as a result of the injuries inflicted on her by the accused.

Accused ran away from the scene with the pistol he used to shoot the deceased. The accused is not a licensed firearm holder, thus was not in lawful possession of the pistol and the ammunition with which he committed the offences herein. On 18 February 2021 the accused reported himself to the police at Menias Brian Libuto police station, subsequent to which he was arrested.'

The plea

[4] The accused pleaded guilty to counts 5 and 6 in the indictment and after questioning him in terms of s 115(1)(b) and the State being satisfied that his explanations satisfied all the elements of the offences in the two counts, I entered guilty pleas in respect of counts 5 and 6.

[5] The accused pleaded not guilty to count 1 (and the alternative thereto), count 2, count 3 and count 4. His counsel then offered a plea explanation in terms of s 115(1) to indicate the basis of his defence, as follows:

'The accused denies firing at Lushando Kopelo. He fired into the ground to scare off the deceased who was about to stab him with a broken bottle. He only discharged the firearm to prevent the deceased from stabbing him. At no point did the accused discharge a firearm to endanger the life and limb of another or handle the firearm in a negligent manner. As to count 2, he denies that he had the intention to kill the deceased. The deceased initiated an unprovoked attack on the accused by stabbing him in the face. The accused retreated outside the house and the deceased followed him with a broken bottle leaving him no choice but to defend himself. As to count 3 he denied firing at the person named in the indictment. As to count 4 he preferred not to offer any plea explanation and puts the State to full proof of that count.'

[6] The accused through counsel made formal admissions in terms of s 220 of the CPA as follows:

'I have been advised by my legal representative that I am not obliged to assist the state in proving its case and do not have to make admissions. I, however, elect to make the following admissions and understand the implications and effect thereof as explained by my legal representative:

- (a) That the deceased is the person named and mentioned in the charge sheet; namely Dorothy Mwaka Kopelo.
- (b) That the deceased died on the 12th of February 2021 as a result of the injuries sustained when I shot her with a firearm at Makaravani West in the district of Katima Mulilo.
- (c) That the body of the deceased sustained no further injuries from the time on which the wounds were inflicted on 12th of February 2021 until a post mortem examination was conducted thereupon.
- (d) The admissibility and content of the national identification card of accused is not disputed.
- (e) That Dr. Bithoma Thoth Amisi conducted a post mortem examination on the body of the deceased on 16 February 2021 and recorded his findings on the report whose correctness is not disputed.
- (f) The admissibility and content of the affidavit in terms of Section 212(4) of Act 51 of 1977 by Dr. Bithoma Thotho Amisi is not disputed.
- (g) The admissibility and content of the identification of the corpse by Riberio Matengu Siluta dated 15/02/2021 is not disputed.
- (h) The admissibility and content of the sworn statement by Forensic Pathology Technician in terms of Section 212(4) by Luboni Vicus Simasiku Dated 25/02/2021 is not disputed.
- (i) The admissibility and content of the authority to hand over body and acknowledgement of receipt dated 16/02/2021 is not disputed.
- (j) The admissibility and content of the authority for the institution of a post morter examination dated 16/02/2021 is not disputed.
- (k) The admissibility and content of the sworn statement of next of kin by Riberio Matengu Siluta dated 15/02/2021 is not disputed.
- (l) The admissibility and content of the National Identity card of the deceased is not disputed.

- (m) The admissibility and content of the scene of crime and post mortem photo plan Katima Mulilo negative 37/2021 completed by Stefans Haushona dated 02/02/2022 is not disputed.
- (n) The admissibility and content of the affidavit in terms of Section 212(4) of Act 51 of 1977 (J88) in respect of the accused compiled by Dr. GM Zishumba dated 19/02/2021 is not disputed.

The Honourable Court may record these facts as admissions in terms of section 220 of Act 51 of 1977, which my legal representative has explained to me.'

[7] In other words, it became unnecessary for the State to prove the identity and death of the deceased including the cause of death. The admitted documents establish that the female person named in count 2 of the indictment is Mwaka Dorothy Kopelo who died on 12 February 2021. The injury to the body of the deceased was caused by a projectile that entered around her left breast and caused perforation of the left heart area, perforation of the spinal bone and perforation of the left lung. The cause of death is stated as '1. Traumatic haemothorax 2. Major laceration of heart with haemopericardium 3. Struck by projectile from rifle, shotgun or large firearm . . . '

[8] The following documents were also admitted in evidence with the accused's consent and marked as exhibits together with those admitted by the accused in terms of s 220 of the CPA:

- (a) The indictment together with the summary of substantial facts.
- (b) The State's pre-trial memorandum and the accused's reply thereto.
- (c) The accused's formal admissions in terms of s 220 of the CPA.

[9] The State is represented by Mr Itula while the accused is represented by Mr Chaka of the Directorate Legal Aid.

The State's Case

Lushando Kopelo

[10] The first witness for the prosecution was Ms Lushando Kopelo (hereafter Lushando) who is the deceased's older sister. She confirmed that the accused was the deceased's boyfriend at the time of her death. She recalled that at about 18h00 on 12 February 2021, whilst visiting a neighbor, her daughter came to tell her that her presence was needed at the deceased's home. Lushando's and the deceased's houses are in the same yard. When she entered the common yard, she heard the deceased and the accused 'fighting' in their house. Lushando entered the room which the deceased shared with the accused at the time. She made an effort to separate the fight between the two lovers. The deceased thereupon made a report to the witness that the accused had assaulted her for no reason. The deceased added words to the effect that the accused was 'laughing' at her for drinking tombo (a traditional alcoholic brew) and said he was going to leave her for another woman. According to the witness, to the suggestion that he was leaving the deceased for another woman, the accused recounted that he had been called by some people to go to them and that he wanted the deceased to give him his bag so that he leaves.

[11] Lushando testified that she then invited the deceased and the accused to sit down with her so that they can discuss the matter after which the accused would be free to leave. Only the accused followed her outside and the deceased remained inside her room. She and the accused sat down but he stood up at once and ran inside the room where the deceased was. The witness stood up and followed him. The witness proceeded up to the door of the deceased's room. The accused exited the room uttering words to the effect that the deceased struck him on the forehead with a bottle causing him to bleed. She could see blood on the accused's face.

[12] Lushando testified that while she was standing by the door of the deceased's room, the accused drew a firearm, cocked it and fired towards her. She moved away from the door and the bullet struck the door. The door was closed at the time and the deceased was inside. According to the witness, one Aldrin Kangamba was present when this happened. She further testified that when the accused shot at the door, she 'ran away' but saw him enter the deceased's room. She then heard two gun shots and prior to that the sound of a bottle breaking.

[13] According to Lushando, the two gun shots were in rapid succession. She added that Aldrin was outside the house. The accused then exited the house carrying a bag and took flight. Aldrin told him to stop but he in turn discharged a bullet in Aldrin's direction. The witness then entered her sister's room and found her lying on the ground unable to speak. The deceased had a swollen face and had blood on her clothes. When she exited the room, she saw people gathering.

[14] Lushando was asked by State's counsel to turn her attention to the accused's case as disclosed in his answer to the State's pre-trial memorandum and his plea explanation. When asked to respond to the accused's version that he acted in self-defence when the deceased charged at him with a broken bottle, she replied: 'How was he defending himself. We had already separated them when he went to get the gun'. Lushando was emphatic that the deceased did not attack the accused when he was standing at the door. She conceded that she had no knowledge whether the deceased attacked the accused when the accused and the deceased were alone inside the house.

[15] She also stated that at the moment that the accused fired shots, he was not under attack from the deceased. She added that in fact the door was shut and the deceased was inside the room. Lushando testified that neither she nor Aldrin at any stage attacked the accused. Lushando disputed the accused's version that he only fired shots into the ground to scare off the deceased. She repeated her version that the accused fired in her direction and shot at the door.

[16] The witness threw cold water on the accused's version that he was charged at by the deceased wielding a broken bottle (after she had already injured him) and wanting to stab him; and that he had no choice but to shoot the deceased in private defence. Lushando made clear that the deceased was inside her room, never came out and that the accused went inside the room and shot her. She conceded to hearing the breaking sound of a bottle when the accused was inside, preceding the gunshots.

[17] As to how the accused directed the shots against her, the witness testified that it was towards her legs. She was shown and confirmed a hole in the door as that fired by the accused when she was standing there by reference to exhibit Q.

[18] Under cross-examination by Mr Chaka for the accused, Lushando confirmed that when she entered the deceased's house, she found her and the accused fighting. She found out in the process that the accused wanted his bag from the deceased so that he could leave.

[19] Under further cross-examination Lushando was asked to and confirmed that she and Aldrin had managed to get the accused to leave the room after separating the fight. It was then put to her that since the bag was still inside the room, the accused entered the room to recover it so that he could leave. In a posture of honesty, she replied that she had no way of knowing what the accused's intention was but that she could not dispute it. When asked further whether the accused was armed when he entered the room (to remove his bag) the witness testified that she did not know if he was. She only saw the gun when he drew it from his waist area.

[20] Lushando was pressed on when she saw the gun for the first time. Her reply was that she saw it when the accused exited the house and stopped by the door and drew her attention to the injury on his forehead. She denied seeing an injury on the accused's arm. She was emphatic that after firing in her direction and striking the door, the accused entered the room. She did not see what then transpired inside the room. She and Aldrin were outside the room at the time.

[21] Mr Chaka for the accused put the following pertinent instructions to the witness. I add the relevant answers to the instructions:

'Q. When the accused went inside the room it was to recover his bag so that he leaves. The deceased picked up an empty bottle of beer she had earlier attacked him with and stabbed him on the arm.

A. I was not inside the room. I did not see anything.

Q. As he was retreating, the deceased came to him with a broken bottle and he had no option but to shoot the deceased.

A. What was happening inside the house I did not see? The accused came outside to show me injuries to the forehead while the deceased was inside the room.

Q. When the accused exited the house for the last time, you and he did not have a conversation.

A. We did not have any conversation when he exited. When he exited the second time was when I saw the injury on his forehead. He then went inside and then I heard two gunshots. He then came outside with a bag. He then went behind the house and left.

Count 1 Attempted murder: Lushando Kopelo

Q. The accused fired into the ground and not at you?

A. The bullet struck at the door where I was standing.

Q. You were shown a picture of the bullet entry on the door. It does not 'tally' with being aimed at your feet.

A. Yes

Count 3. Attempted murder: Aldrin Kangamba

Q. The accused denies ever attempting to take his life.

A. The firearm was pointed in the direction of Kangamba.

Q. He fired because Kangamba wanted to attack him with a brick, so he shot into the ground to ward off the attack by Kangamba. [This instruction was not foreshadowed in the plea explanation for this witness to have dealt with it in the examination-in-chief].

A. Kangamba did not have a brick in his hand. He only told the accused to stop because he was running away.

Count 4. Assault with intention to cause grievous bodily harm.

Q. Did you see the accused strike Kangamba with a brick in the face?

A. I was inside the home [I.O.W she did not see].'

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Aldrin Kangamba

[22] The next state witness was Aldrin Kangamba (Aldrin). He knows both the accused and the deceased who were lovers. On 12 February 2021 at about noon the two lovers came from Epupa with some cash. The duo bought alcohol and together with Lushando the four of them started drinking. At some point Lushando left to a neighbour's. An argument then broke out between the two lovers. He could not make out what it was about. That was in Lushando's absence. The deceased then entered her house. He and the accused had been outside before that. The accused followed the deceased inside. Aldrin went home but could hear the duo argue. He exited his place and saw a plastic cup being thrown out of the lovers' house.

[23] Aldrin went to their place and asked why they were arguing. He observed a swelling on the deceased's face. She had been assaulted. He tried to separate the two but without success. He said they were wrestling. He asked a child to call Lushando. When Lushando came he and she managed to separate the two lovers. He took the accused outside. Lushando joined them outside. The deceased who was still inside then also came outside. The accused announced that he wanted his bag so he could leave. The deceased then said she will ask the police to arrest him if he left. The witness could not tell why she said so.

[24] The deceased then entered her room followed by the accused. The accused came out with blood visible on his face. The accused reported that the deceased had assaulted him. Aldrin recollected that before the accused emerged 'they' heard a bottle break inside the room. He and Lushando were standing outside when the accused emerged and stood next to a big tree and started to cock the firearm.

[25] The witness testified that the accused removed the firearm from his waist area and fired the first bullet at Lushando then standing at the door of the deceased's house. Lushando then fell to the ground, the bullet having missed her. The bullet hit on the wall next to where Lushando stood. When Lushando fell, the accused pushed open the door and entered the house. Upon the accused entering, the witness heard the second gunshot inside the house and the deceased exclaim in anguish. Thereafter Aldrin heard the third gunshot, followed by the fourth. All inside the house.

[26] The witness stated that at the time that the accused fired at Lushando, the deceased was inside the house. The accused thereupon exited the house carrying a bag and went behind a tree where the witness and Lushando were. The accused put the bag on the ground whilst holding the firearm. It was then that the witness told the accused to stop and asked where he was going. Aldrin then bent to reach for the bag when the accused fired the 5th gunshot directed at him. Aldrin fell down having been missed by the gunshot. The accused then picked up a half brick to strike him on the head.

[27] Aldrin raised his two arms with the hands covering his head. The brick hit him on his right hand. Aldrin was injured as a result. He sustained an open wound. Aldrin amplified that he avoided the gunshot because he had at that moment bent towards the accused's bag. He was taken to the hospital where he got treatment for his injury by a nurse on duty.

[28] As to the accused's version that he shot at the deceased who was attacking him with a broken bottle, Aldrin testified that when the deceased was shot, she was inside the house. In fact when the accused fired at Lushando, the door was closed and the deceased was inside the house. When the accused emerged from shooting inside the house, Aldrin did not see the deceased.

[29] Aldrin also dismissed the suggestion by the accused that he fired shots into the ground, not at Lushando or Aldrin, in order to ward off the attack by the deceased. Aldrin reiterated his version that the accused had already shot the deceased inside the house when the 5th shot was directed at him (Aldrin). Aldrin

denied that the reason the accused shot at him was because he intended to attack the accused with a brick.

[30] Under cross-examination, Aldrin admitted that he, Lusando, the accused and the deceased had been drinking on the 12th of February 2021 but denied that he was drunk as a result. He could not say just what the accused and the deceased were arguing about when he heard the commotion inside their house. But when he entered the room he saw the deceased had a swelling around the ear. He did not see the accused assault the deceased in his presence.

[31] Mr Chaka for the accused put several of the accused's instructions to Aldrin. Aldrin confirmed that there was a moment that the accused came out of the house and showed him and Lushando an injury on the forehead and said it was caused by the deceased. Because he was outside the deceased's house at the time the shooting inside the house occurred, Aldrin was unable to confirm the accused's version that he had entered the house (when the shooting happened) to remove his bag in order to leave.

[32] Aldrin also disputed that the accused did not fire at Lushando but into the ground. He reiterated that the accused fired at Lushando towards her legs. He did not confirm Lushando's version that the accused fired at the door. His recollection is that he fired at the wall near where Lushando stood. He confirmed Lushando's version that she did not see the accused assault him (Aldrin). He said she could not because she had taken cover behind a tree at the time. He was pressed by Mr Chaka that the accused never assaulted him. Aldrin repeated that he was attacked by the accused. He also disputed that he picked up a brick to attack the accused.

Bevin Sakuwa Kopelo

[33] The last witness called by the State was Mr Bevin Sakuwa Kopelo (Bevin), a brother to both the deceased and Lushando. They were all neighbours at the time, including their mother. On 12 February 2021, Bevin had just returned from work just after 17h00. He then saw the accused with whom he shared pleasantries. The accused went his way and Bevin went to his mother's. Whilst sitting with his mother,

he heard gunshots coming from the direction of Lushando's house. He heard three gunshots. Some people asked him to go and check what was happening. As he made his way there, he heard another gunshot. As he approached the kitchen area, he saw Aldrin on the ground and saw the accused pick up a brick and hurl at Aldrin. The accused then picked up a bag, holding a firearm in one hand, and made off towards the 7th Adventist Church.

[34] Bevin testified that Aldrin was on the ground when the accused struck him on the hand as he sought to protect himself with his hands up in a defensive position. Bevin stated that he heard three gunshots whilst talking to his mother, the fourth when he entered the yard and a fifth when he approached the kitchen area.

[35] Under cross-examination he reiterated that he saw injuries to Aldrin's hand after he was struck by the accused. He said he saw blood on Aldrin's hand and that the man was taken to hospital by the police. He said that he did not see Aldrin at any point pick up a brick to strike at the accused.

[36] In answer to a question asked by the Court, Bevin confirmed that he entered the house and found the deceased lying inside. He called the police and the ambulance.

The defence's case

Frans Erwin

[37] The accused testified under oath. He confirmed that the deceased was his girlfriend. On the date cited in the indictment, the fight between him and the deceased was stopped by Lushando. (It appears the fight was inside the house because he says he and Lushando then went outside). He then re-entered the house to fetch his bag. When he entered, the deceased was sitting next to his bag. As he came close the deceased struck him with a bottle in his face and also stabbed him on his left arm. He screamed and went outside where he found Lushando and Aldrin. He said to Lushando 'See how your sister injured me'. Having thus reported to

Lushando, he removed the pistol from his waist, cocked it and shot into the ground outside the house.

[38] He denies shooting at Lushando. The reason he shot into the ground was that by so doing he thought the deceased (who was then inside the house) will take notice and surrender his bag to him. He then entered the house with the intent to fetch his bag. As he entered, the deceased stood up from the bed and 'approached' him very fast with a broken bottle. He then pointed the gun at her because he was 'scared she will come and get the firearm from me.' He then aimed to shoot the deceased on the hand in which she held the bottle. Unfortunately, he missed and shot her in the chest. The deceased fell down. He then took his bag (obviously without giving the deceased any assistance) and went outside.

[39] Outside he saw Aldrin standing close to his own house. Lushando was also standing close to her house. As he turned to go away, he heard Aldrin command him to stop. Aldrin held a brick in his hand. Scared that Aldrin might hit him with the brick, he fired one round into the ground. He then left. He denied firing at Aldrin or hitting him with a brick. Having scared off Aldrin, he took his bag and went.

[40] The accused denied shooting at the deceased with the intent to kill her. He only wanted to protect himself from being harmed by her with a bottle. As he put it 'If I did not, I might have been the deceased'. He also denied shooting at Lushando and said she had done nothing bad to him. The reason he shot in the ground when confronted by Aldrin was to scare him off. He never shot at him though. The accused therefore denied all the charges against him, including the alternative to count one.

[41] Under cross-examination the accused was asked to explain the contradictions between his versions given in Court and those that he gave in his replies to the State's pre-trial memorandum which were admitted in evidence without objection.

[42] The most important versions given on behalf of the accused during the pre-trial process which are in direct variance with the versions given in-chief are as follows:

- '14. The accused will state that the argument started outside the house and the deceased followed the accused into the house.
15. The accused will state that the deceased followed the accused into the house and was removed by Kangamba and Lushando.
16. The accused will state that the deceased was removed from the house by Kangamba and Lushando whilst the accused was busy packing his personal belongings the deceased came back into the house and attacked the accused by striking him on the forehead with a bottle.
17. The accused disputes re-entering the house as the Accused only exited the house once after being attacked by the deceased.
...
23. This is disputed. The Accused will state that nobody tried to stop him as he was walking away and further denies firing a shot at Mr Kangamba.'

[43] The version in the s 112 plea explanation which I already quoted was also put to the accused in cross-examination. He was then asked which version is the correct one and he said the one given in-chief. He added, for good measure, that the events happened a long time ago and that he might have forgotten some of the details.

[44] The accused was reminded by State counsel that the plea explanation was given in his presence and that he raised no concerns about its correctness.

[45] The accused repeated under cross-examination that after he shot the deceased, he took his bag and left. He insisted that he did not hit Aldrin and did not see him bleed or sustain a wound.

[46] Asked why, when the deceased allegedly charged at him, he did not shoot into the ground in the same way he did with Aldrin, the accused replied that Aldrin had not previously attacked him in the way the deceased did.

[47] The accused accepted under cross-examination that he was angry when the deceased first struck him with a bottle but did not shoot her in anger - but because he feared she would harm him again.

[48] He denied ever shooting at Lushando or Aldrin at a point in time when the two witnesses stood between him and the deceased's house.

Submissions

The State

[49] Mr Itula for the State submitted that the prosecution proved all four remaining counts against the accused. Counsel submitted that if there is any contradiction in the accounts given by the State witnesses, they are insignificant. Counsel also submitted that the State witnesses stood up to scrutiny under cross-examination and that their versions remain unshaken. Mr Itula further argued that the evidence shows that the State's three witnesses corroborate each other on the evidence that is material to the outcome of the case. Mr Itula submitted that the accused proved to be an unreliable witness as his versions shifted over time as demonstrated in cross-examination.

[50] On the attempted murder count in respect of Lushando, Mr Itula argued that the accused's denial of a bullet hole in the deceased's door is untenable. He submitted that the evidence of Lushando established existence of the hole in the door. Counsel submitted that the accused's version that he shot into the ground near Lushando to scare off the deceased is so improbable as to be reasonably possibly true because he was inside the house at the time of the shooting.

[51] As to the murder count, Mr Itula drew the Court's attention to the accused's shifting position, including, at times, disowning explanations given in reply to the State's pre-trial memorandum, and at times feigning ignorance of instructions given to the accused's counsel.

[52] Mr Itula submitted that the accused's version that he acted in private defence upon being attacked by the deceased inside the house is an afterthought as it is in direct contradiction to his earlier versions that the deceased followed him outside the house. Counsel added that the true reason for the accused re-entering and shooting at the deceased was to avenge her earlier assault on him and that he acted with direct intent and should be convicted as such. According to counsel, whatever threat the deceased might have posed was removed when the accused exited the house to inform Lushando and Aldrin on being assaulted by the deceased. At that stage he could have gone away. Mr Itula also argued that on the accused's own version, he cocked and fired into the ground to scare the deceased. Yet he re-entered the room armed. How could he expect the deceased not to be scared and to react defensively?

[53] As regards the firing and assault on Aldrin, Mr Itula submitted that the bullet fired was high enough to have killed Mr Aldrin if he did not bend to reach for the bag. The accused's denial of the injury caused by the brick is not true because the injuries were observed by Mr Bevin who had arrived much later after the events leading to the deceased's demise.

The Accused

[54] On behalf of the accused, Mr Chaka argued that the State bore the onus to disprove beyond reasonable doubt the accused's reliance on private defence. Counsel submitted that even if the accused is found not to have been truthful in one or other respect, that will not justify complete rejection of his version.

[55] Mr Chaka argued that the accused's evidence, which the States' witnesses cannot dispute, is that the deceased initiated the attack on him and that he shot at her to ward off the attack. It is said in that regard that the deceased approached the

accused as he entered the room to take his bag. Counsel submitted that a person acting in private defence is entitled to use all force necessary to repel an unlawful and imminent and incomplete attack directed at him or her even if fatal. According to counsel, the Court must accept the accused's version that when attacked by the deceased, the accused had not enough time or opportunity to retreat. He therefore lacked the intent to kill the deceased.

[56] Counsel submitted that the Court should similarly accept the accused's version (a) that he never shot at either Lushando or Aldrin and (b) in Lushando's case it was to scare the deceased and in Aldrin's case to scare him off as he was about to attack the accused with a brick.

[57] Mr Chaka concluded that the accused be acquitted on all four remaining counts including the alternative to count 1.

The Law

[58] Murder is the act of unlawfully and intentionally causing the death of another human being¹. In our law, there are three forms of intention (*dolus*): *dolus directus*; *dolus indirectus* and *dolus eventualis*². In the present case, the State relies on *dolus directus* and I confine the present discussion to it. Snyman writes of *directus*:

'Direct intention (*dolus directus*) comprises a person's directing his will towards achieving the prohibited result or towards performing the prohibited act. This result or act is his goal. He desires the act or result.'³

This form of intention comes closest to the everyday meaning of "intention". In this form of intention X is certain that he is committing the prohibited act or that he is causing the prohibited result. He does not regard the commission of the act or the causing of the result as a mere possibility. An example of this type of intention is where X, having a grudge against Y with whom his wife has fallen in love, awaits Y at Y's home and upon his arrival, shoots Y through the heart in order to kill him.⁴

¹ *Ndlovu* 1945 AD 369 373; *Valachia* 1945 AD 826 829.

² *CR Snyman Criminal Law 6th ed Lexis Nexis 2014 p 177 onwards.*

³ *Ferreira* 2004 2 SACR 454 (SCA) 475c-d; *Humphreys* 2013 2 SACR 1 (SCA) para 12.

⁴ *Ibid*, Snyman, p 177.

[59] In *S v Ngoya*⁵ 2006 (2) NR 643 (HC) I said at para [37]:

'I will now briefly summarise the legal principles governing private defence insofar as they are relevant to the facts of the present case. A person is perfectly entitled to act in private defence even if he was the original aggressor. If the person first attacked reacts by using disproportionate force, out of kilter with the danger or harm presented by the original aggressor, the victim of such an attack is entitled to a pre-emptive strike in order to avert imminent harm to him. The victim of an attack acts unlawfully if he attacks the aggressor when the attack on him is already over and the threat of injury discontinued. The victim of an attack may ward off an attack even by killing the attacker, even if it is not his life which is endangered, but a lesser interest such as his physical integrity. According to Snyman *Criminal Law* ed at 106:

“. . . (O)nly if there is an extreme discrepancy between the threatened and the . . . protected interest does the right to act in private defence fall away.”

Only if it is possible in the circumstances and in that way to avoid killing an attacker does the duty to flee, upon the victim of an attack, arise. The victim of an attack is, however, not required to expose himself to any danger by fleeing or using a less dangerous method in defence. If a victim of an attack, in response to a potentially fatal attack, uses an equally potentially fatal method in self-defence, the original aggressor does not act in true private defence by killing the victim in order to ward off the victim's defensive attack. Further, as stated by Snyman (*op cit*) at 112 (and I agree):

. . . (A) person who suffers a sudden attack cannot always be expected to weigh up . . . all the advantages and disadvantages of her defensive act and to act. '

Credibility findings

[60] The State's witnesses came across as honest and reliable. Where they did not know what actually happened they said so. Their accounts were not exaggerated or embellished to cast the accused in the worst light possible when that was quite easy to do. In fact, they portrayed him in a positive light where that was called for. For example, both Lushando and Aldrin were clear that when the accused exited the

⁵ *S v Ngoya* 2006 (2) NR 643 (HC).

first time after they had separated the fight, they both saw blood on his forehead. They both confirmed his version that the deceased had attacked him. They both gave an account which suggests that the deceased was unhappy about the accused leaving her. Their versions on that score lead to an inference in favour of the accused that, feeling rejected, the deceased could potentially be an aggressor. Lushando was generous in conceding that she heard a bottle break at some point while the accused and the deceased were inside the house. That account is corroborated by Aldrin and is consistent with the accused's version that the initial attacker could have been the deceased.

[61] There is a discrepancy in the number of gunshots that the accused actually discharged on the fateful day. In the light of what is now common cause, nothing turns on that, yet it demonstrates to me as trier of fact the absence of collusion on the part of the State's witnesses. Aldrin says he heard five gunshots in total. Lushando says she heard four. Bevin said he heard five, corroborating Aldrin.

[62] Another respect in which there was a potential for collusion among the State's witnesses is the shooting at Lushando and Aldrin, and the alleged assault by the accused on Aldrin. Lushando said the accused shot once at her when she stood in the deceased's house doorway, missing and striking at the door. Lushando could only recollect one shot fired at her when she stood in that doorway. Aldrin's recollection was that the shot was against the wall. Lushando said she never saw the accused hit Aldrin with a brick. Aldrin confirmed she could not have because that did not happen in her sight. If there was collusion the easiest thing would have been for Lushando to have said she saw that event.

[63] Bevin who arrived late on the scene also stated that he never saw the accused shoot at Aldrin. He only saw Aldrin hit with a brick by the accused. Again, there was a clear opportunity for Bevin to embellish his account and say he saw the accused fire at Aldrin. He did not.

[64] The conclusion I arrive at is that the State witnesses were honest and sought as best they could to present an unvarnished account of what they saw and heard on the 12th of February 2021.

[65] That stands in sharp contrast to the accused whose positions on critical events have changed over time as will further become obvious in my detailed evaluation of the evidence relative to each count. Suffice to say at this stage that when the accused replied to the State's plea-trial memorandum, he had the benefit of the State's disclosure of the summary of substantial facts and the witness statements. He therefore was fully apprised of what the State's witnesses are going to testify.

[66] When the accused sat down with his legal practitioner to craft a reply to the State's pre-trial memorandum, he had discovered to him the indictment, the summary of substantial facts and the witness statements. He therefore knew precisely what the State intended to prove against him and the sequence in which the eyewitnesses stated events unfolded. That in those circumstances he gave very different and mutually destructive versions about the same events damages his credibility as a witness.

[67] The version that the Accused gave in the reply to the pre-trial memorandum and which he repeated in the s 112 plea explanation is that he shot the deceased outside the house and that she then went inside the house. That version was completely contradicted by the accused himself under oath.

[68] The accused's version is that the shots Lushando and Aldrin say were directed at them were shots fired into the ground in order to scare off the deceased who was at that point in time charging at him with a broken bottle. For that version to hold, the deceased must have been outside the house. It was established on the unshaken evidence of Lushando and Aldrin that the deceased was inside the house when the shots rang out. Lushando and her brother found the deceased inside the house before she expired. From that the following inferences are inescapable.

[69] The accused's version that he shot into the ground to scare off the deceased is false and not reasonably possibly true. The versions of Lushando and Aldrine that shots were fired at them by the accused remain unchallenged by any other credible evidence. The accused's contrary assertion, displaced by the objective evidence of

where Lushando's body was found, is consistent with a guilty mind. He wanted to falsely attribute those shots as not being directed at two innocent people but at the deceased.

[70] The accused's version concerning shots fired at Aldrin have changed over time. In his answers to the state's pre-trial memo he said:

'23. This is disputed by the Accused. The Accused will state that nobody tried to stop him as he was walking away and further denies firing a shot at Mr. Kangamba.'

[71] In his section 115 plea explanation he elected not to offer any version which could have allowed counsel for the State to test it with Aldrin and Lushando who were the only eye witnesses. Under cross examination of the two witnesses he was emphatic in his instructions that he shot at Aldrin because the latter picked up a brick to attack him. The shifting stands of the accused is not consistent with that of a truthful person. On the material issues, I prefer the versions of Lushando and Aldrin to that of the accused.

Disposal

Count 1 – Attempted murder of Lushando

[72] Lushando's evidence is that the accused fired one shot at her whilst she was standing in the doorway of the deceased's house. She said the door was closed when the shots were fired at her. The photo (Exhibit Q) by reference to which she testified shows a hole consistent with a gunshot. It could only have been struck in that fashion if the door was closed as she said. Aldrin testified that a bullet fired at Lushando while she was standing in the doorway struck against the wall of the deceased's house, just next to the device put on the door for closing it. Now, both versions cannot be correct because on Lushando's own version (as confirmed by Mr Itula in his written submissions) only one shot was fired at Lushando.

[73] I have looked at Exhibit Q and compared it to the testimony of Lushando who said the accused fired towards her legs. The bullet hole that Lushando identified on

the door would be in a position just above the knee of a person of Lushando's height as I saw her in person in the witness stand. The evidence shows therefore that the accused aimed below the abdomen area of Lushando. Without expert evidence that that an injury to that part of Lushando's body with the calibre of the weapon we know the accused used, it is not open to me to conclude that had the bullet struck there it would probably cause Lushando's death. The State has therefore failed to prove count 1. The evidence is overwhelming that the accused discharged the firearm when he shot in the direction of Lushando. The alternative to count 1 is that he negligently discharged the firearm. That count has clearly been proved beyond reasonable doubt.

Count 2 – Murder: Mwaka Dorothy Kopelo

[74] As regards this count, the only issue is whether the accused, when he shot the deceased, did so without just cause. His version is that he acted in self-defence.

[75] According to the accused, the deceased was too close to him for him to either retreat by running away, to shoot in the air or in the ground instead of aiming at the deceased. There are two responses to this. The first is that he created the risk by re-entering the room when clearly it was unsafe to do so. The second is, as suggested by Mr Itula in oral argument - assuming that the deceased charged at him as he claims, she must have apprehended danger to her own safety because, recall, his own version is that he cocked the gun and shot in the ground to scare her, she knew he had a gun and then he re-enters the room with a gun in hand. How could he expect the deceased not to go on the offensive in those circumstances?

[76] On the version that the accused gives, the deceased was inside the room with him blocking her possible exit through the door. On his own version she, not he, was the helpless one. He could have turned back or at least make an attempt to, which he did not. So which ever possible scenario one considers, the private defense fails.

[77] When he returned to collect the bag, he had already been struck on the forehead. Why did he return to danger? Why did he not simply ask Lushando to recover the bag? It will be recalled that according to Lushando she invited the accused and the deceased to discuss the matter after which the accused could take

his bag and leave. When the Court asked why he did not take up Lushando's offer his answer was that in not doing so he made a mistake. He was not able to give a satisfactory answer what the urgency was for him to re-enter the house wherein he had just been attacked with a broken bottle.

[78] The proven facts establish that the accused was hell-bent on a further confrontation with the deceased. The inherent probability is that he made a re-entry to elicit a violent reaction from the deceased. He subjectively appreciated that as a probability. After all he had just been viciously attacked. If genuinely he entered the room to fetch his bag without the intention to engage in a further confrontation with the deceased, he could have simply asked Lushando to assist. Better still, he could walk away and in that way, lower the emotional temperature and later return with the assistance of the deceased's family who after all were neighbors.

[79] The accused's reluctance to choose any of the peaceful and perfectly reasonably attainable avenues raises the irresistible inference that he wanted to get even with the deceased. The nature of the entry wound – in the chest and piecing the heart and lung adds to the inference that he entered the room with one objective only – to kill.

[80] On the proven facts and the inherent probabilities arising therefrom, the inference is inescapable that the deceased was the initial aggressor. Two eye witnesses' testimony give the impression of a woman scorned. Her own sister in a mark of honesty recounted that the deceased felt the accused wanted to leave her for another woman because he laughed at her and said she drank tombo. Aldrin corroborated the possibility of a woman feeling spurned. He said the accused wanted to leave and was told by the deceased that she will get the police to arrest him. Aldrin discerned no rational explanation for that posture by the deceased. This evidence must be seen together with that by Lushando that when the accused entered the room at some stage she heard the sound of a bottle break where after the accused emerged with an injury to the forehead.

[81] The evidence therefore supports the probability that the deceased, feeling rejected, struck the accused with a bottle. But it does not end there. On the

unshaken evidence of Lushando, the accused re-entered the Lioness Den – ie the woman feeling rejected who had just viciously attacked him. His legal difficulty starts there. He had a clear opportunity to withdraw and to completely distance himself from the clear and present danger.

[82] Was the accused's re-entry for the innocent purpose of collecting the bag? The probabilities suggest otherwise. A reasonable person in his position would have distanced himself from the further risk of injury. It was when the accused made a re-entry that the two shots rang out. He clearly went back in for revenge and not to collect the bag.

[83] On the probabilities that emerge on the proven facts, there was no demonstrable urgency for the accused to re-enter the room to encounter the person he alleges to have caused him harm.

[84] The intent with which a person acted at a particular point in time can be inferred from his or her subsequent conduct. What we have here is a man who, fearing physical harm from the deceased, shot and disabled the threat. Instead of checking up on her and to assist her if possible, he took his bag and ran away. He only surrendered to the police on the 18th of February. That is not the mindset of a person who did not act with malice when he shot the deceased. He is guilty of murder under count 2.

Count 3 – Attempted murder of Aldrin Kangamba

[85] The accused denies that he shot at Aldrin. His version is that Aldrin commanded him to stop and to prevent that from happening he shot (once again as he did in relation to Lushando) into the ground to scare off Aldrin who picked up to attack him. Aldrin denies that version. He states that the accused actually shot at him and that he only evaded being struck when he bent to reach out for the accused's bag. Lushando corroborates Aldrin's version. According to her, the accused fired at Aldrin as he was about to reach the accused's bag.

[86] I find it improbable that a man who had just shot a woman because she threatened him with a bottle would not use the same firearm to inflict harm on a man

who was about to strike him with a brick. I am satisfied that the accused shot at Aldrin with his firearm and that Aldrin only lived to tell the tale because by chance he bent at the very moment to reach for the accused's bag. The accused is therefore guilty of the attempted murder of Aldrin Kangamba.

Count 4 – Assault with intent to cause grievous bodily harm

[87] The accused says that Aldrin lifted a brick to attack him. Aldrin denies that version. He says, when he fell to the ground after the accused's gunshot missed him, the accused picked up a brick and hurled it at him. Aldrin says he shielded his head with his arms and hands and was struck on his hand by the brick. He sustained open wounds which were treated at the hospital by a nurse. Bevin confirms Aldrin's account that the accused was the aggressor. Bevin also saw the injuries on Aldrin's hand and blood on Aldrin in the area of the body with which Aldrin shielded his head. I am satisfied that the State proved Count 4 against the accused.

Order

[88] The accused is convicted as follows:

1. Count 1: Attempted Murder of Lushando Kopelo: Not Guilty
2. Alternative count: contravening section 38(1)(1) of the arms and ammunition act, no 7 of 1996 – negligent discharge of a firearm: Guilty
3. Count 2: Murder read with the provisions of section 21 of the Combating of Domestic Violence Act, 4 of 2003: Mwaka Dorothy Kopelo: Guilty
4. Count 3: Attempted Murder of Aldrin Kangamba: Guilty
5. Count 4: Assault on Aldrin Kangamba with intent to cause grievous bodily harm: Guilty
6. Count 5: Contravening section 2 Read with Section 1, 38(2) and 39 of Act 7 of 1996, as amended – Possession of a firearm without a licence: Guilty

7. Count 6: Contravening Section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996, as amended – Posses ammunition without being in lawful possession of an firearm capable of firing that ammunition: Guilty

P.T. DAMASEB
Judge-President

APPEARANCES:

THE STATE: TT Itula
 Of Office of the Prosecutor-General

ACCUSED: M Chaka
 Instructed by the Directorate of Legal Aid

