IN THE SUPREME COURT OF ZAMBIA **SCZ APPEAL NO.107A/2000**
HOLDEN AT NDOLA/LUSAKA
(Civil Jurisdiction)

THE ATTORNEY-GENERAL
VS
ROBERT MUSOWOYA AND THREE OTHERS

Coram: **Sakala, AG. DCJ., Chirwa and Chibesakunda JJS**
6th March and 27th June, 2001.

For the Appellant: **Mr. R.O. Okafor, Principal State Advocate.**
For the Respondent: **Mr. I.C.T. Chali of Chali Chama and Company.**

JUDGMENT

Sakala, JS., delivered the Judgment of the Court.

Cases referred to:

1. *Nkhata & Four Others Vs The Attorney-General (1966) ZR 124.*
2. *The Attorney-General Vs The Administrator-General (Administrator ad Litem For the Estate of the late Warner Schulle) (1987) ZR1.*

This is an appeal against a judgment of the High Court entered in favour of the four respondents on liability. The High Court referred the matter of assessment of damages to the District Registrar.

The first respondent, the Administrator of the Estate of Dingiswayo George Musowoya, deceased, brought the action under the Fatal Accidents Acts 1846 to 1959 and the Law Reform (Miscellanous Provisions) Act, Cap. 74 on behalf of the widow and the children and on behalf of the estate of the deceased. The 2nd, 3rd and 4th respondents brought the action claiming damages arising out of personal injuries sustained by them on 21st June, 1995 when the said respondents were allegedly negligently shot and wounded by the police officers, the servants or agents of the state.

The deceased died on 23rd June, 1996 as a result of the wounds he sustained when he was shot at. Before he died he was hospitalised. The gun shot wounds never healed. He died of the same injuries a year after he was shot. He was married with three children. He was doing carpentry work before he died.

The evidence of the 2nd respondent was that on 21st June, 1995, in the evening, he was escorting the deceased to Kaloko compound with Dingiswayo George and Evaristo Mushibwe. They used his Fiat car. They entered Mushili road. As he was negotiating a corner, he heard gunshots from the left side of Kaloko turn-off. He stopped. Firing continued for five minutes. As a result of these gunshots, they were injured while in the vehicle. They were removed from the vehicle. It is then that he recognised that the people who had shot at them were police officers. According to the 2nd respondent, he was hit by three bullets. One remained in the thigh. He was in hospital for a month. The evidence of the 2nd respondent was also to the effect that the police officer never fired warning shots before shooting at them.

The 3rd respondent was in the same vehicle with the 2nd respondent. He was also shot at. He lost two fingers. He was admitted in hospital for a month and continued as outpatient for two months. He also testified that there were no warning shots before they were fired at.

The evidence on behalf of the appellant, was that on 21st June, 1995, DWs 1 and 2, police officers, were on duty with other officers. While on duty, they received reports that two motor vehicles had been stolen at gun point heading to Mushili

Commando road. They followed the road. At the junction of Mushili and Kaloko roads, they found one vehicle parked which answered the description of one of the reports as Registration number ACD 1012 Opel Cadet. In this vehicle were two people. They challenged them. A lady came out and started running despite firing a warning shot. She disappeared. A man, by the name of Elias Mwansa, was apprehended from the vehicle. Upon being interviewed, he revealed that he was with four others who had gone to buy fuel. A warn and caution Statement was later recorded from Mwansa. According to DW1, they moved away from the scene and parked their vehicle 300 meters away. They waited for Mwansa's friends to come. After few minutes, they saw a vehicle coming from town. Immediately it by passed them, Mwansa identified it as the vehicle being driven by his friends.

According to DW1, he shouted three to four times for the driver to stop but the driver continued. He then fired four warning shots but the driver increased the speed. He ordered his friend to fire at the tyres. As they were firing, they ran towards the vehicle which then stopped before where the stolen vehicle was parked. They challenged the people in the vehicle. But when he opened the door, he realised the people had been injured. Mwansa then said the people were not the ones he was with. DW1 denied being negligent in the performance of their duties as they followed the correct procedures. In cross examination he testified that the vehicle stopped at a distance of 25 meters.

After reviewing the evidence the learned trial judge observed that the appellant's case hinged on DW1's credibility as a witness who was an eye witness to the shooting incident. The learned trial judge accepted that it was not in dispute that the 2nd respondent's vehicle was not the one involved in the aggravated robbery. That one Elias Mwansa pointed at the respondent's vehicle by mistake. The court rejected DW1's evidence that after the vehicle by passed them it stopped at a distance 25 meters away from them. The court found that this was an incredibly short distance for a moving vehicle to accommodate all what DW1 said he did namely, shouting more than four times and firing warning shots. The learned trial judge accepted that the correct position was that immediately Mwansa pointed at the wrong vehicle, the police fired at it. The court concluded that the police did not follow the normal procedure in operations and that the police were negligent and liable for the shooting incident.

On behalf of the appellant, Mr. Okafor argued three grounds together, the first ground being the normal police procedure, the second being the evidence of DW1 and the third being the Warn and Caution Statement of Elias Mwansa. Mr. Okafor contended that the basic facts were not in dispute. He submitted that had the learned trial judge directed himself to the question that the shooting was solely caused by Mwansa who told the police that the approaching vehicle was being driven by thieves, he would not have made a finding of negligence.

In reply, Mr. Chali submitted that the learned trial judge's findings on negligence were justified in the circumstances of this case. He pointed out that the respondent's evidence established that there were no warning shots, before the car was spread with bullets and that even when the car stopped the shooting

continued. Mr. Chali submitted that from the evidence, it is clear that the officers laid an ambush. He pointed out that the evidence of DW1 was that they had hidden their vehicle they were using away from the stolen vehicle they had recovered. This was a private vehicle with private number plates with no warning of the presence of the police and the area was dark that police could not recognise the colour of the vehicle they shot at, let alone the people. Counsel submitted that the Warn and Caution Statement of one Mwansa was properly ignored. Counsel finally submitted that the issue of credibility was properly resolved.

Although the findings of the learned trial judge were all compressed in one paragraph, we are satisfied that the issue of credibility was uppermost in his mind.

The learned trial judge found that normal police procedure in operations of this nature was not followed. We infer from this finding, supported by the evidence on record, the court to be saying, that the officers did not mount the sort of roadblock to which members of the public are accustomed. Indeed, as pointed out by Mr. Chali, supported by the evidence on record, this was a case of an ambush by the police. The police did not give adequate warning. The learned trial judge made findings of fact. The findings which were made exclude the possibility of upholding any of the submissions by Mr. Okafor. A concise formulation of the grounds on which this court can reverse a trial judge's findings of fact is to be found in ***Nkhata and Four Others Vs. The Attorney-General (1)*** where our predecessor court held at page 125, that:-

A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:

(a) by reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) *in so far as the judge has relied on matter and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.*

In our considered view, the evidence which was accepted fully justified the short findings made and we have no doubt that none of the conditions quoted obtained here so as to enable this court to disturb those findings. We are satisfied that the evidence of the appellant does not represent any truth as it suggests that four shots were fired into the air while the remaining were fired at the tyres. Yet, the respondents evidence amply established that the deceased and the respondents were injured in this shooting incidence. The present case is on all four with the case of ***The Attorney-General Vs The Administrator-General(2) (Administrator Ad Litem For the Estate of the late Warner Schulle)*** where the issue was simply

one of giving proper and adequate notice of the presence of the police to motorists intending to use the road including the mounting of a proper roadblock. In that case, the officers failed to do that, so it is in the present case.

This appeal is therefore bound to fail. It is dismissed with costs to be taxed in default of agreement. We direct that the parties proceed to assessment of damages if they have not done so as ordered by the trial court.

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E.L. Sakala,

SUPREME COURT JUDGE.

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D.K. Chirwa,

SUPREME COURT JUDGE.

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L.P. Chibesakunda,

SUPREME COURT JUDGE.