**THE STATE**

**Versus**

**ESTHER MOYO**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr Matemba and Ms Baye

GWERU 28 JANUARY 2020

**Criminal Trial**

*M Ndlovu,* for the state

*T Komboni,* for the accused

 **MAKONESE J:** The accused is a female adult aged 54 years old. She appears in this court on a charge of murder. It is alleged that on the 18th March 2015 at Coolmoreen Farm Gweru accused unlawfully and intentionally caused the death of Rejoice Moyo a female aged 3 years by striking her all over the body with a switch or other similar object thereby causing her death. The accused denies the allegations of murder. She tenders a limited plea of guilty with respect to the lessor charge of culpable homicide. The state accepts the limited plea.

 The agreed facts are that accused was aged 48 years at the time of the commission of the offence. On 18th March 2015 and at around 0600 hours the deceased and her brother Ishmael Moyo were asleep when accused wake them up so that they could go and relieve themselves. The deceased messed her clothes. This infuriated the accused who took a switch and assaulted the deceased all over the body. The accused cried in agony as she was being assaulted. At around 0730 hours the deceased collapsed and died. She had succumbed to injuries sustained in the assault. The matter was reported to the police leading to the arrest of the accused. The body of the deceased was conveyed to United Bulawayo Hospital for a Post Mortem examination. A pathologist Doctor I Betancourt examined the remains of the deceased and concluded that the cause of death was:

1. subdural haematoma
2. skull fracture
3. severe head trauma due to beating injury

On marks of violence the doctor observed multiple bruises and abrasions on the back and thoracic and abdominal regions, on both legs and thighs. There were lacerations on the face and upper lip. An examination of the skull revealed a fracture on the parietal region and subdural haematoma on both parietal lobes.

A confirmed warned and cautioned statement recorded from the accused on the 21st March 2015 is in the following terms:

*“I admit that I assaulted the child a day before yesterday after she ate at a neighbour’s place.I assaulted her on the legs using a switch.”*

It is clear that accused admits assaulting the juvenile using a switch. Accused does not deny that the deceased died as a result of injuries sustained in the assault.

On the evidence placed before this court, we are satisfied that accused acted negligently in causing the death of the deceased. Accordingly, the accused is acquitted on the charge of murder. Accused is convicted of the lessor charge of culpable homicide.

**Sentence**

 The accused is 54 years old. She has been convicted of a serious offence. The court shall take into consideration the weighty mitigating features of the case as outlined by accused’s legal counsel. The accused is a first offender who has pleaded guilty to culpable homicide. The accused has shown genuine remorse and contrition. She has taken full responsibility for her conduct. She has not sought to deny the charges even when she was aware that state witnesses were not readily available in this matter. The court takes into account the fact that this case has taken an inordinate period of time before it was finalised. The delays are entirely not the fault of the accused person. The court will not however, lose sight of the fact that a juvenile aged 3 years lost her life. The accused acted violently against a young child. Even if the court were to accept that the accused acted out of anger and not sheer vengeance it is difficult to understand the accused’s conduct. The deceased was helpless. She was subjected to a brutal and sustained attack that left her with a skull fracture and subdural haematoma. There is clear evidence that excessive force was used in the assault. Parents stand in *loco parentis* to their children. The accused was expected to have protected the minor child and not to brutalise her. Accused’s conduct is most reprehensible. Had it not been that accused is elderly and suffers from high blood pressure, a custodial sentence would have been appropriate. See;*State* v *Agnes Chipika* HB 129/17 and *State* v *Sibanda*HB 67/15. The remarks I made in those cases are

relevant in the present case. However, as I mentioned in the case of *State* v *Mutopa* HB 127/17, nothing would be achieved by sending an elderly female first offender to prison. In *State* v *Agnes Chipika* and *State* v *Sibanda, (supra)* the accused persons were aged 36 years and 23 years respectively. The court found it appropriate to impose custodial sentences in those case after considering the ages of the accused. In this matter we find that an effective custodial sentence would be inappropriate.

 The sentence imposed in every case must fit the offence and the offender. The sentence must meet the ends of justice.

 In the result, and accordingly it is ordered as follows:

“Accused is sentenced to 36 months imprisonment of which 24 months imprisonment is suspended for 5 years on condition accused does not within the period commit an offence involving violence and for which upon conviction accused is sentenced to imprisonment without the option of a fine.

A further 12 months imprisonment is suspended on condition accused completes 420 hours community service at Batanai Old Peoples’ Home, Gweru on conditions set out by the Probation Officer.”

*National Prosecuting Authority*, state’s legal practitioners

*Dzimba, Jaravaza& Associates*, accused’s legal practitioner