

THE STATE
versus
CLEVER CHISAHWIRA

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 9, 10 & 13 February 2015

Assessors: 1. Mr T Gweme
2. Mr Mhandu

Criminal Trial

Ms F Muronda, for the State
T Chaguduma, for the Accused

MAWADZE J: The accused pleaded not guilty to the charge of contravening s 47 (1) of the Criminal Law (Codification and Reform) At [*Chapter 9:23*] which relates to murder.

The charge is that on 12 October 2001 at Katira homestead, Mashambanhaka Village, Chief Nyajina in Uzumba communal lands, the accused with intent to kill or realising there was a real risk or possibility that his conduct may cause death, murdered one SINOIA KATEMA by assaulting him all over the body using open hands, booted feet and wooden sticks causing injuries resulting in his death.

The now deceased was the biological father of the accused. He was about 60 years old. The now deceased was estranged from his wife Maruda Chisahwira who is also accused's mother. The now deceased stayed alone at the matrimonial home and his wife was staying nearby at the homestead of one of their sons. The accused had his own homestead.

As per Annexure A the summary of facts it is alleged that accused, on 12 October 2001 visited the now deceased at his homestead at about 2300 hours. The accused started to accuse the now deceased that he was allowing some evil spirits to affect the family. A quarrel ensued. Accused is alleged to have proceeded to assault the now deceased with open hands, booted feet and sticks throughout the night until the early hours of 13 October 2001 when the now deceased was unconscious. It is alleged that the assault took place in the presence of the now deceased's wife Maruda Chisahwira who is also accused's mother. It is further alleged that Maruda Chisahiwira was unable to assist the now deceased and that no other person came

to restrain the accused. The accused was arrested in the morning on 13 October 2001. The now deceased died in hospital in Harare 8 days later on 22 October 2001 from the injuries inflicted during the assault.

In his defence outline Annexure B the accused said on the day in question he and the now deceased visited a faith healer to consult and get help on family, that affected the accused after which they returned home, each going his separate way. The accused said he proceeded to church and at about 0200 hours the now deceased summoned him to his homestead. On arrival accused said he noticed the now deceased was drunk and accused decided to engage him in the presence of his wife and accused's mother Maruda Chisahwira whom he fetched from his brother's homestead. The accused said while inside the now deceased's hut in the presence of Maruda Chisahwira a quarrel ensued. The accused said the now deceased picked an axe intending to attack the accused but accused managed to wrestle it away and threw it out of the kitchen hut. Unperturbed, the accused said the now deceased took a spear with the intention of attacking the accused but accused managed to dispossess the now deceased of the spear which spear accused broke into two and threw the blade out of the kitchen hut. Accused said the now deceased went out of the kitchen hut to pick the axe and spear blade and accused followed him. The accused said as the now deceased tried to pick up the axe on the ground the accused hit the now deceased on his back with a spear handle which had remained in accused's hands. The accused said he proceeded to kick the now deceased with booted feet twice, that is once on the ribs and once on the chest. The now deceased could not pick the axe and remarked that accused had hurt him. The accused said the now deceased appeared unconscious but woke up unaided telling accused he was feeling cold. The accused said he made a fire to warm the now deceased and spent the whole night with him. The next morning accused said his mother was unable to cook porridge for the now deceased as there was no mealie meal and he decided to go with his mother to a certain home in the village to get some maize. The accused said on his way back member of the neighbourhood watch committee then arrested him.

The accused stated that he had no intention to kill the now deceased and that he did not realize that his actions would result in deceased's death. The accused pointed out that he had no premeditated motion of assaulting, let alone killing the now deceased. The accused said he acted in self-defence when the now deceased who was drunk decided to attack him unprovoked with an axe and spear. The accused said when he kicked the now deceased once on the chest and twice on the ribs he merely wanted to prevent him from picking up the axe

hence acted at the spur of the moment and in self-defence. The accused denied that he assaulted the now deceased throughout the night alleging that the injuries stated in the post mortem report are consistent with accused's version of events.

It is clear that this offence occurred on 12 October 2001 and accused was arrested the next day 13 October 2001 but the trial only resumed on 9 February 2015, after a period of 13 years. What emerged from accused's explanation in relation to this delay which was uncontroverted by the state is that after his arrest on 13 October 2001 accused spent 1 year and 7 months in custody on remand after which he was granted bail pending trial. The accused was then indicted in 2004 but the trial did not take off. Accused remained in custody for 3 years and was released on bail in 2007. The accused was only re-indicted 5 years later on 23 September 2014 after which the trial commenced on 9 February 2015. In brief, this is the history of the matter.

In support of this case the state relied on the evidence of Maruda Chisahwira who is the now deceased's wife and accused's mother, Phillimon Makuku, a neighbour to the now deceased and the investigating officer Assistant Inspector Andrew Makovera.

Exhibit 1 the post mortem report and exh 2 accused's confirmed warned and cautioned statement were produced by consent.

The cause of the now deceased's death is not in issue. As per exh 1 the post mortem report deceased died from chest injuries which included bruises and rib cage fractures and lungs contusion all arising from the assault. The now deceased's remains were examined at Harare Central Hospital on 29 October 2001 by a pathologist Dr S A Mapunda. The following observations and findings were made:

- (i) the now deceased was 60 years old and ill nourished
- (ii) surface wounds or injuries noted was the deformed rib cage with the crepitation of broken ribs bilaterally involving lower cage of the body i.e sound made by broken ribs.
- (iii) cynorosis of the body – which relates a condition in which the skin and mucous membrane take a bluish colour due to lack of enough oxygen in the blood.
- (iv) Oedema or congestion of the brain – swelling or excess fluids.
- (v) Injury on the right lung – there was bilateral fracture of the 7th, 8th and 9th ribs with contusion (bruises) of the lung which was oedematous, achymotic and congested.

- (vi) The cause of death is due to be chest injuries, i.e bruises, and rib fractures and lungs contusion.

It is not in dispute that the now deceased died from the injuries inflicted by the accused during the assault. There is therefore a nexus or causal link between the assault perpetrated by the accused and the now deceased's death.

It can be inferred from the nature of the injuries inflicted that the assault was not only very serious but clearly fatal. A lot of force was used as the now deceased's 3 ribs were broken and lungs damaged. The now deceased who had hitherto been in fairly good health could not recover from the assault. It is therefore clearly misplaced for Mr *Chagudura* for the accused to submit the assault was a minor one and that no serious injuries were inflicted. This flies in the face of the clear findings outlined in the post mortem report, which findings are not disputed.

The narrow issue which falls for determination in this case relates to the circumstances under which the accused assaulted the now deceased and whether the defence of self-defence is available to the accused.

The evidence of both Philemon Makuku and Assistant Inspector Andrew Makovera is not helpful in this regard. Briefly it can be summed up as follows;

Philemon Makuku, a next door neighbour to the now deceased disputed what is said in both the summary of evidence and his statement to the police, which is that he heard the commotion or noise at of the now deceased's homestead on this night in question and that the next morning he found the now deceased lying down. Instead he said he did not hear anything on the night in question as he was tired and fell asleep. He said the next morning on 13 October 2001 at about 0600hrs he passed through the now deceased's yard and was shocked to see the now deceased seated by the hut with legs stretched, head bowed down and arms on his legs. He noted the accused Maruda Chisahwira were seated close by. He said he noticed that the now deceased was injured as he was bleeding from the mouth. This prompted him to ask the accused what he had done to the now deceased and the accused confirmed to him that he, the accused, had assaulted the now deceased. Philemon Makuku said he did not involve himself in the matter or tried to assist the now deceased as he was rushing for a funeral and was also afraid the accused could assault him. All in all he said the now deceased was in bad state as he failed to raise up his head to look at him or to talk to him. He said the situation was terrifying as the accused and Maruda Chisahwira just seated there doing nothing.

Our assessment of Philemon Makuku is that he was a cagey witness who clearly was uninterested in assisting the court if that would give the impression of him involving himself in the affairs of the now deceased's family. He was not willing to answer simple questions or to explain inconsistencies between his statements and viva voce evidence. The impression we get is that he was rather an unwilling and disinterested witness. However, the value of his evidence is that the now deceased had been seriously injured when he saw him in the morning on 13 October 2001.

Assistant Inspector Andrew Makovera told the court that in the morning on 13 October 2001 at Mashambanhaka Business Centre, a member of the neighbourhood watch committee handed over to him the accused who was under arrest, and the now deceased who was badly injured and lying helpless in a wheel burrow. He told the court how the now deceased could not talk, was clearly in agony and was bleeding from both the nose and the mouth. The accused confirmed to him that he assaulted the now deceased. Assistant Inspector Andrew Makovera said two sticks allegedly used in the assault were handed over to him by the neighbourhood watch committee members and taken as exhibits. He was unable to produce them as they could not be located at the High Court. (May be because this is an old case.) He however described them as follows;

- i) A thin switch from a mulberry tree about 80cm long
- ii) A thick stick or log about 1 metre long and as thick as his forearm.

He said there was no axe or spear surrendered to him and the accused never mentioned to him those items. His evidence is unchallenged and we have no cause not to accept it.

The key witness in this matter is the now deceased's wife and the accused's mother Maruda Chisahwira. She is now very old woman who could not testify while standing. She also revealed that she has a very poor sight even prior to the incident in 2001.

Maruda Chisahwira (Maruda) told the court that at the material time she was estranged from the now deceased as she was staying at one of her son's homestead and the now deceased was staying alone at the matrimonial home.

Maruda explained that she did not enjoy good relations with the accused or the now deceased. She said both the now deceased and the accused were addicted to gambling and would gamble away all the little property she worked for. In relation to the accused she said the accused had previously burnt one of her huts (accused confirmed this and that he was

sentenced to 10 months imprisonment for arson). Generally she said the accused despite being her son always insulted, disobeyed and disrespected her.

In relation to the now deceased she said she was estranged from the now deceased whom she described as irresponsible, addicted to gambling, drunkard and of violent disposition. She said the now deceased would gamble away any household goods, was quarrelsome, always engaging in brawls at beer drinks. At one point she said the now deceased assaulted her with an axe on the head and she showed the court a healed scar on her front part of the head towards the forehead. She described the now deceased as an irresponsible and abusive husband.

Turning to the events of the day in question she said it was late at night when the accused came and knocked at her hut and came in and indicated that he would not leave her hut if she did not accede to his demands. She realised the accused was adamant and she decided to seek refuge at the now deceased's home. Instead, the accused chased after her until they got to the now deceased's home. On arrival she alerted the now deceased of the accused's presence and the deceased came out of his hut. The accused in his evidence admitted that he had to force Maruda to go to the now deceased's homestead. It is clear from Maruda's evidence that when the accused and Maruda arrived the now deceased had retired to bed and had to be alerted of the presence of the accused and Maruda. This contradicts the accused's version that it is the now deceased who had caused this gathering.

Maruda said when the now deceased came out of his hut the accused immediately confronted him asking him if he, the now deceased, had done what was required of him as had been advised by the prophets. Maruda said she was not privy to this as it was only the accused and the now deceased who had consulted the prophets. She said the now deceased replied that he had not been able to do so and the accused asked why. The now deceased explained that he was having financial constraints.

Maruda said this incensed the accused who started to assault the now deceased. She said the accused first used his hands but because of her poor eye sight she said she could not tell if it was open hands or clenched fists. Thereafter she said the accused would take switches from the nearby mulberry tree and continued to assault the now deceased. She said the assault was prolonged as the accused would rest and resume the assault.

Maruda said at no point did the now deceased fight back but remained seated. She said accused was very violent, shouting and when she tried to admonish him accused threatened to also assault her. Maruda said her attempts to leave or run away were foiled by

accused who threatened her and stood guard all night declaring that no one would leave the homestead. Maruda said this went on until dawn when she left on the pretext of taking a grandchild to the bus stop. She said accused still followed her and members of the Neighbourhood Watch Committee who had been alerted arrived and arrested the accused.

As regards the state of the now deceased after the assault she said at one point he was lying face down and she noted that he was bleeding from the nose and the mouth. She described the assault as severe and prolonged. Maruda said the sticks accused used were recovered and she saw a thin switch and the other as thick as her forearm. She denied that there was a fight but that accused just assaulted the now deceased.

Maruda was subjected to very lengthy cross examination dealing with her relations with accused, the extent of her poor eye sight and the nature of the assault. In our view she acquitted herself well as she was able to answer all the questions clearly and satisfactorily.

She was asked why she did not leave and seek help that night. In response she said accused prevented her ordering her to sit down and stay put or risk being assaulted too. She denied that accused came to fetch her to go to now deceased's home but that she got there fleeing from the accused. On what prompted the assault she reiterated that it is accused who confronted the now deceased as he came out of the hut asking if the now deceased had rectified their issue and that the now deceased's response that he had financial challenges invited the assault. She denied that there was a fight or that the now deceased tried to attack the accused. When it was put to her that the now deceased had an axe which he tried to use she was visibly surprised, retorting:-

“an axe, from where, there was no axe.”

Maruda was taken to task about her relations with the accused and whether this did not influence her to falsely incriminate the accused. She did not hide her disappointment with accused whom she said did not accept her reprimand as a mother and always disrespected her saying she was an outsider in the family. She also insisted that she had every reason to cause accused's arrest after he burnt her huts and refused to withdraw the charges. She said accused, for a long time had not respected her as his mother and that there was nothing she could do about it. Maruda denied that this caused her to lie against accused about the assault. She insisted that on the day in question accused was the aggressor and that the now deceased came out of his hut unarmed. She said she never saw an axe or spear but the sticks accused used to assault the now deceased. She flatly denied that that the accused acted in self-defence. Instead she said it is the now deceased who pleaded for mercy asking

to discuss the matter rather than being assaulted. Maruda said while she may have had problems with accused her son, she nonetheless told the court the truth of what happened.

Our analysis of Maruda's evidence is that she gave a simple coherent and straight forward account of her relations with both the accused and the now deceased and also the events of the night in question. Despite her advanced age she admirably withstood the lengthy cross examination and was alert.

Our impression of Maruda is that she is an old long suffering woman who was abused by both the now deceased husband and the disrespectful son being the accused. That was very clear in her demeanour but did not distract her from being truthful to the court. Her recollection of the events of the night in question after 13 years and at her age is amazing. It was clear that this incident traumatised her and should have remained etched in her mind.

Our assessment of Maruda is that she was a fair and balanced witness. She was candid with the court about her bad relations with both the accused and the now deceased and did not seek to minimise or exaggerate the vices of either of the two especially their violent conduct. In our view she properly conceded that she suffers from poor eye sight and in her testimony she limited herself to what she clearly saw indicating that she was compromised by both the darkness and the poor eye sight. We are not persuaded that we should disregard her evidence on account of her poor eye sight. The fact of the matter is that she was not blind but had or has poor eye sight.

We are satisfied that Maruda was able to meaningfully and without contradictions explain how the accused assaulted the now deceased, who the aggressor was and why, what was used to assault the now deceased and the injuries she noted on the now deceased, that is the bleeding from the nose and mouth. We find her to be an impressive and credible witness.

Maruda's evidence on what happened on the night in question finds corroboration from accused's confirmed warned and cautioned statement Exh 2. This is what accused said:-

"I admit the charge of murdering Sinoia Katema after I had assaulted him with a switch, then with fists and kicking. I assaulted Sinoia Katema who was my father after he had refused to perform some traditional rituals in order to have me cured from the problems which I was facing customarily. On the day I killed him we had come back from some apostolic sect church where we had gone to consult some prophets there, where we were told of what was troubling me customarily. My father refused to perform rituals to solve my problems then I assaulted him and this caused his death."

It is clear from this statement that accused confirms that he was the aggressor and explained how and why he assaulted the now deceased. This dovetails with the evidence of

Maruda. It's clear from this statement that the accused was not acting in self-defence as he now alleged. There is no mention of any possession of or attempted use of an axe or a spear by the now deceased in that statement. In the statement accused admitted assaulting the now deceased by using switches, fists and booted feet.

In his defence case the accused was unable to reconcile his defence outline and the confirmed warned and caution statement. It became clear to us that the new version narrated by the accused in his defence outline and evidence was an after-thought. On that basis we reject the accused's evidence.

In his evidence the accused confirmed that he believed that the now deceased was responsible for his misfortunes and also unwilling to help him. The accused said the now deceased had not taken care of his own mother (accused's grandmother) and had not even attended her funeral hence her spirit was haunting the accused. The accused said the now deceased was unwilling to perform rituals to appease his mother's spirit. This explains why accused assaulted him.

The accused's evidence on how the assault took place is not only poorly thought out but inconsistent. As already said there is no mention in his warned and cautioned statement that the now deceased was armed with a spear and axe or that the accused acted in self-defence as he later frantically tried to portray himself. This explains why Maruda and the Police did not recover any axe or spear and neither did accused surrender or mention those items to the Police.

In his evidence the accused downplayed how he said he assaulted the now deceased. The state case is that in accused used open hands, booted feet and wooden sticks all over the body. In his defence outline the accused said he first hit the now deceased once with a spear handle on the back and that thereafter he kicked him twice, that is once on the ribs and once on the chest. In his evidence in chief the accused changed his version. He said he first kicked the now deceased once on the ribs causing the now deceased to kneel down and thereafter hitting him twice on the back with a broken spear handle after which Maruda told him to stop and that he complied, and did not proceed to pluck a switch from the malberry tree as he had intended. He denied assaulting the now deceased on the chest. This differs from the warned and cautioned statement in which he said he assaulted the now deceased with clenched fists, by kicking him and also used switches or switch. Again the accused was unable to reconcile these versions on how exactly he assaulted the now deceased. The reason is that he is not being truthful.

The accused said at the time he kicked the now deceased in the ribs deceased cried out that he had been injured. The accused did not help him at all. He did not call for help from neighbours but decided to spend the night with the badly injured deceased outside in the cold until dawn. Even the next day the accused did not seek any help when the now deceased was bleeding from the nose and the mouth and could not talk. The accused offers no explanation for that conduct. We are inclined to accept Maruda's evidence that accused ensured that the now deceased did not receive any help.

The accused was unable to lay the factual basis for the defence of self-defence. Even if one was to accept accused's version that the now deceased had an axe and spear which version we reject, the accused said at the time he assaulted the now deceased he had disarmed the now deceased. The accused could therefore not have been acting in self-defence. In fact we reject accused's version. Our finding is that the accused did not act in self-defence as defined in s 253 of the Criminal Code [*Chapter 9:23*].

The next question to consider is whether the accused when he assaulted the now deceased he desired death or death was his aim or object which relates to actual intention OR he did realise that there was a real risk or possibility that his conduct may cause death but nonetheless continued to engage in that conduct despite the risk or possibility of death. Put differently the question is that the accused may not have desired to bring about death. Put differently the quiz is that the accused may not have desired to bring about death but did foresee it as a possibility when he assaulted the now deceased and was reckless as to whether death ensued. Did he have the subjective foresight as to the possibility of death but nonetheless exhibited recklessness. See *S v Mungwanda* 2002 (1) ZLR 574 (S) at 518 A-D- this relates legal intention or constructive intent.

Our finding is that the accused did not desire death and neither was his aim or object to cause death. The evidence shows that accused wanted to simply assault the now deceased as a punishment for refusing to perform the ritual accused wanted. He therefore lacked the actual intention to commit murder.

We are however satisfied that the accused did foresee the possibility that whilst he assaulted the now deceased in the manner he did death may result but was reckless as to whether it resulted or not. This can be inferred from the manner of the assault, the injuries inflicted and the accused's conduct after the assault. It is our finding that the accused assaulted a 60 year old man who was defenceless. The accused used his open hands or fists, booted feet, switches or sticks. It is clear the assault was over a prolonged period of time. A

lot of force was used as accused broke the now deceased's rib cage, that is three ribs. The now deceased's lungs were damaged. The now deceased bled internally with blood coming from the nose and mouth. The accused did not care to offer any help or call for help but instead kept the now deceased and Maruda prisoners overnight. We therefore have no difficulty in finding that the accused when he assaulted the now deceased realised that there was a real risk or possibility that such an assault may cause death but continued to engage in that conduct attacking the chest and the ribs despite the risk or the possibility.

Accordingly we find the accused guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

VERDICT : Guilty of murder as defined in s 47 (1) (b) of the Criminal Code [*Chapter 9:23*]

National Prosecuting Authority, counsel for the state
Atherstone and Cook, counsel for accused