

THE STATE
versus
MANUEL MWANWERE MAENDA

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 28, 30 October 2015 & 3, 4 November 2015

ASSESSORS : 1. Mr Rajah
 2. Mr Chipere

Murder

Mrs J Matsikidze, for State
T G Nenzou, for defence

HUNGWE J: The accused is charged with murder. At the time of the crime he was aged 29 years it being alleged that on 12 July 2014 at Village 35B, Magamba, Chief Saunyama, Nyanga, he, with actual intent or realising the real risk or possibility that death may result, stabbed Dunmore Matengeni with an Okapi knife thereby inflicting injuries from which this said Dunmore Matengeni died.

The accused, whilst admitting causing the death of the deceased, stated his defence outline that the death occurred whilst he was under an imminent attack from the deceased who had harassed him for quite a considerable time prior to the stabbing. He pleaded self-defence and implored this court to find him not guilty of the charge.

Most, if not all, of the facts surrounding the events leading to the stabbing of the deceased are not in dispute. They may be summarised as follows.

In 2004 deceased's father loaned a bovine to the accused as draught power. On 12 July 2014 the accused and the deceased were at a homestead attending to a beer drink. The accused had spent the better part of the previous night partaking of the local brew. The deceased joined the accused at some point during the beer drinking jaunt. Deceased then raised the issue of the loaned bovine. This led to a misunderstanding in which the deceased, who was at the time of his death 22 years old, demanded that the accused pays him

compensation for the beast by allocating a portion of his land to him or by pledging one of his daughter to the deceased.

Because the matter became heated, the accused decided to leave for his residence fearing that the argument might degenerate into a physical tussle or confrontation. The deceased had in his possession an axe and appeared drunk. The accused decided to find someone to provide an escort to him at his parent's home so as to deter the deceased, who appeared bent on pursuing the matter with him, from being belligerent. Upon arrival at his parents' home he secured the escort service of his brother's two young sons. He explained his predicament with the deceased to the young boys. True to his fears, the deceased followed him up to his parents homestead and persisted in his rowdy behaviour.

The accused made a hasty departure in the hope of shaking the troublesome deceased in the process. He went through a neighbour's residence. The deceased caught up with the trio and picked up the quarrel with deceased. The deceased threatened at this stage to physically deal with the accused. Accused left his parents' residence but when he got to a nearby field, the deceased slapped the accused. Accused pleaded with him to desist from his action as they were both drunk. When the children tried to restrain the deceased from his aggressive behaviour, he turned on them and threatened to unleash violence against them. They fled in terror as the deceased was armed with an axe.

What happened thereafter is a matter of some dispute. At this point the deceased, according to accused, grabbed accused by the collar of his shirt and swerved his axe and feigned an attack on him with the axe. Accused feared for his life. In order to ward off the imminent attack, the accused drew his knife and stabbed the deceased. Accused says he had aimed the stabbing blow to the hand that handled the axe but missed and struck him in the stomach area.

Questions put to accused during cross-examination by Ms *Matsikidze*, for the State, appeared to be aimed at discrediting the version given by the accused regarding how the stabbing took place. In our view the only eye witness to the event, who is now the accused, gave a reasonably possible explanation which the court cannot dismiss as false. Had the State been able to lead evidence in rebuttal of the defence version, then this line of cross-examination would have been quite justified. In the absence of any such evidence contradicting the accused, one must rely on the probabilities of the matter and decide whether the accused's version is reasonably possibly true. It was on that basis that we were unable to discount his version that we decided that the version has not been challenged and therefore

remains as the truth in the matter. The court therefore accepts it. That version is quite probable given the corroborative evidence led from the 15 years old David Maenda.

David Maenda confirmed to this court that the deceased had with him an axe and had assaulted their father. When they had tried to restrain him he turned on them and they fled in fear of the deceased.

When they were a short distance away they saw deceased fall to the ground and accused stab him once on the thigh. Deceased explained that the deceased tried to kick him despite the stabbing blow to the body.

Even if this was highly unlikely, we are of the considered view that the accused's defence of self-defence must be examined to determine whether he has met the requirements of the law.

The requirements for this defence are;

- (a) an unlawful attack
- (b) upon the accused or a third party where the accused intervened to protect that third party
- (c) the attack must here commence or be imminent;
- (d) the action taken must be necessary to arrest the attack; and
- (e) the means used to avert the attack must be reasonable.

In determining whether an accused has met the requirements for the defence of private defence it must always be borne in mind that the trial court must avoid taking an armchair approach in the assessment of the situation faced by the accused. It is easy, after the event and far from the dust of the conflict in which the accused was involved, to find possible ways and means through which the accused could possibly have averted the deceased's death. (*See S v Manyekete* HS -386-81.) The accused was faced with a drunk youngster who was a sheer pest on that fateful day. He cautioned him about the folly of raising emotional issues when they were both drunk and suggested that he approaches him on another day when he was sober and away from the crowd. He also decided to leave and indeed left the beer drink all in an effort to avoid the deceased. He secured the escort of young relatives hoping that their presence would act as a deterrent to the deceased. He tried to calm him down by telling him that he was going home. All these efforts did not pay off. Instead he was attacked by an axe wielding drunk and aggressive youngster. When he was attacked he was justified in taking appropriate self-defence measures. Unfortunately these measures put an end to a life.

In *S v Mporfu* 1969 (1) SA 334 the deceased attacked the accused with a knife. The accused threw a stone at deceased who was hit on the head and died. Accused plea of private defence was upheld.

In our view faced with an armed and persistent, aggressive and a drunken assailant, the accused was quite entitled to use the knife to put an end to the threat confronting him. As such the accused's action is not unlawful.

He is therefore found not guilty and acquitted.

National Prosecuting Authority, State's legal practitioners
Chibaya & Partners, accused's legal practitioners