

THE STATE  
versus  
FORTUNATE NSORO

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 22, 23 AND 25 February 2016

**Criminal Trial**

Assessors :Messrs Shenje and Barwe

E. Nyazamba, for the State  
J. Bakasa, for the accused

CHITAPI J: The accused was arraigned before this court on a charge of murder as defined in s 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], it being alleged against her that on 26 February 2015 at house number 18844 Unit L, Seke Chitungwiza, she, the accused acting with an intention to kill, unlawfully caused the death of one, Petros Mutasa, her husband thereat, by stabbing the said Petros Mutasa with knives thereby inflicting certain injuries from which he died on the same date.

When the matter was called on 22 February, 2016, the state counsel applied to have the matter stood down to 23 February 2016. He submitted two reasons for seeking the postponement. The first reason was that he needed to make arrangements for the court to sit at the Victim Friendly Court at Harare Magistrates Court. The principal and only eye witness to the stabbing of the deceased and indeed the commission of the offence was the couple's only child, aged 8 years at the time of the incident. Being a 9 year old juvenile as at the time of the accused's trial the child could not testify in open court, the practice now being that such witnesses are classified as vulnerable and are afforded the convenience of giving evidence in a friendly environment in which they testify away from the physical presence and direct eye contact of the accused ,members of the public and the court officials other than the trained court interpreter. Before this

court can remove to the Victim Friendly Court, there would be need for that court to be gazetted as a High Court sitting venue for purposes of the case. The second reason advanced for seeking the postponement was that both state and defence counsels required time to further reflect on the matter in the light of the defence outline filed on behalf of the accused. The defence counsel also required time to go through witness statements provided to him by the state counsel shortly before trial commenced. It was the request of both counsels that they be given an opportunity to also try and explore ways of curtaining the trial by attempting to agree on matters which could be agreed upon. As the grounds for the postponement as advanced were meritorious and agreed to by both counsels, the court granted the postponement and the trial commencement was deferred to 23 February, 2016.

Upon the resumption of proceedings on 23 February, 2016, the accused upon the charge being put to her indicated that she admitted to the charge. Mr *Bakasa* did not confirm the accused's admission to the charge as being in accordance with his instructions. He submitted that his instructions were that the accused admitted to causing the death of the deceased but without having the intention to bring about the deceased's death. He submitted that his instruction was to tender a plea of guilty to the crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In the light of the uncertainty surrounding the recording of the plea, the court directed that the two offences of murder as charged against the accused and put to her to which she had admitted to and that of culpable homicide be explained and contrasted for the benefit of the accused to understand the distinction. After the accused had confirmed that she understood the elements of the two offences and how they are distinguished, she then clarified that her plea of guilty was to the offence of culpable homicide and not murder. Mr *Bakasa* then confirmed the guilty plea as according with his brief or instructions by the accused. A plea of not guilty to the charge of murder was then recorded. Mr *Nyazamba* was asked whether the state was agreeing to the guilty plea to the offence of culpable homicide as tendered by the accused and he accepted the plea. In consequence of the state's acceptance to the tendered plea of guilty to culpable homicide (a competent verdict on a charge of murder), the court entered a guilty plea to culpable homicide.

Consequent upon the acceptance of the guilty plea, Mr *Nyazamba* moved the court to disregard the summary of the state case and to substitute it with an agreed statement of facts

which he read into the record with the consent of Mr *Bakasa*. The statement of agreed facts was accordingly admitted as exhibit 1. Mr *Bakasa* confirmed to the court that the accused understood and accepted the agreed facts as correct, that he had explained the essential elements of the charge of culpable homicide to which the accused had pleaded guilty and that the accused's plea was a genuine and informed admission of the offence and essential elements. Accordingly and as a sequel to the confirmations by Mr *Bakasa*, the court formally convicted the accused of contravening s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as it was entitled to in terms of the proviso to s271(2)(b) of the Criminal Procedure and Evidence Act[*Chapter 9:07*]. The court was satisfied that on the basis of agreed facts as aforesaid, the accused was guilty of the offence of culpable homicide and noted that the concession by Mr *Nyazamba* to agree to the lesser charge of culpable homicide was properly informed and given.

Having convicted the accused of culpable homicide as aforesaid, Mr *Nyazamba* submitted that the accused was a first offender. Mr *Bakasa* then addressed the court in mitigation and he tendered written submissions which he spoke to by emphasizing points made therein. Mr *Nyazamba* thereafter made his submissions in aggravation of sentence. The matter was postponed to 25 February, 2016 to afford the court time to consider the submissions and prepare its reasons for sentence. The following are the reasons for sentence ;

In considering and assessing the appropriate sentence the court takes into account what has been submitted by Mr *Bakasa* on the accused's behalf as well as the submissions made by Mr *Nyazamba* for the state.

A reading of the statement of agreed facts leaves the court in no doubt that the tragic death of the deceased arose from senseless considerations and could have been avoided if the accused had not allowed her emotions to override reason. The agreed facts without regurgitating them can be summarized as follows:

1. The accused (36 years old) and deceased (55 years) were wife and husband and were at home on the fateful day together with their only child , an 8 year old girl.

2. The couple was in their bedroom when around 1900hrs the deceased received a message on his mobile phone. The accused demanded to read the message but the deceased refused to let her read the message nor to divulge to her the contents of the message.
3. It is this refusal by the deceased to divulge the message contents or avail his phone to the accused which angered the deceased and culminated in a heated verbal exchange between the two.
4. The verbal exchange degenerated into a physical engagement with the deceased assaulting the accused with fists and kicking her. The assault was perpetrated upon the accused all over her body and was applied upon her indiscriminately.
5. The accused's reaction to the assault being perpetrated upon her was to run into the kitchen from where she armed herself with three kitchen knives. The kitchen knives all smeared with dried blood were produced as exh 3(a);(3b) and 3(c). Of the 3 knives, one is a bread knife, another one curved and the third one has a straight blade. Although the knives were not measured in their dimensions, this is not an omission of any great moment because what is not disputable is that one or another or all the knives were used to inflict wounds of such magnitude on the deceased as shall be described later. What is however important to record is that the wounds were of such severity that the deceased succumbed to them.
6. The deceased was not deterred by the accused's arming herself with the knives and persisted in the assault upon her persisted to which she reacted by randomly attacking the deceased with the knives and inflicting cuts and injuries on the deceased's body as detailed in the postmortem report exh 2, produced by consent. The injuries inflicted upon the deceased also appear from the photographs taken of the deceased's body. Nine photographs were produced in all by consent. They show that the injuries are gruesome, that is to say they are unpleasant and shocking to look at. There is also a lot of blood on and upon the deceased's body and on the tiled floor where the body of the deceased lay.
7. The accused got the better of the deceased as the deceased succumbed to the injuries inflicted upon him with the knives. Upon getting the better of the deceased, the accused went out of the house and made a report of what had happened to a neighbour,

Kraisheilah Shasha who mobilized other neighbors and proceeded to the accused and the deceased's house aiming to assist but found the deceased already dead.

Doctor Mapunda subsequently conducted a post-mortem examination on 28 February 2015 and compiled his report as already alluded to. He attributed the deceased's death to post hemorrhagic shock. The following are some highlights from a reading of the post mortem report.

- (i) Clothing: body remained in lower and upper attire which was blood soaked. The court noted this from the pictures.
- (ii) Old injuries: the body did not have any.
- (iii) There was no evidence of resuscitation attempts seen upon an external examination of the body. This would accord with the agreed facts which reveal that after the deceased had been incapacitated or after the accused had gotten the better of the deceased, she did not do anything further on the deceased but went out of the house to summon a neighbour.
- (iv) The body of the deceased had lacerations, bruises, abrasions, stab and cuts consistent with use of sharp force;
- (v) A head, face and neck examination did not reveal evidence of an injury due to blunt trauma. However on the right side of the neck, there was an obliquely running stab – cut wound of clean cut margins and sharp angles at the corners measuring 3.5 cm and gapping by 1.5 cm at the centre. The depth of the wound was severe enough to cut the jugular vein.
- (vi) On the anterior torso just below the right nipple, there was a stab wound measuring 2.0 cm x 0,8 cm. The wound was within the pectoral muscles and not penetrative.
- (vii) The elbow region had a deep incisional wound 0.6 cm x 1.5 cm.
- (viii) Pelvic walls within the right trigonal area had a stab wound 10 cm and gapping by 0.4 cm.

The doctor further commented on what he called “pertinent post mortem findings” as follows:

- (a) 4 stab wounds on the body
- (b) 4 incisional wounds on the right side of the body

- (c) Degree of force used – dependent on the characteristics of the weapon used, nature of movements of the victim at time of injury: mild, moderate to severe force used.
- (d) Nature of injuries – grievous to fatal
- (e) Weapon of causation – a pointed, bladed, sharp edged longish weapon.
- (f) Mechanism of death: loss of blood amounting to at least  $\frac{1}{3}$  of the blood (5 – 6 litres) - causes imminently circulatory failure and precipitates death – in minutes to seconds.
- (g) Proximate cause of death: hemorrhages and shock.

In summary therefore, the deceased lost a lot of blood due to the stab wounds and did not receive immediate and urgent medical attention which would have been required to stop the bleeding. The deceased lost 5 – 6 litres of blood and such amount of blood according to the post-mortem report accelerates death which can take place within minutes to seconds because the victim would not have enough blood to circulate to vital organs of the body. The nature of the injuries show that they were inflicted indiscriminately using mild to severe force. The injuries were multiple and as already indicated gruesome. The manner in which they were inflicted appears to be consistent with the accused not aiming for any particular part of the body but randomly aimed anywhere on the deceased's person without appreciating where the knife blows landed on his body. As has been ruled by the court, whilst death was not intended nor foreseeable by the accused, she certainly acted with a high degree of negligence in her conduct and failed to guard against the possibility that her actions might result in death. Stabbing a person in the neck with such force as would inflict a wound measuring 3.5 cm x 1.5 cm in depth, such depth being severe enough to result in the severing of the jugular vein shows a high degree of negligence. The use of inherently dangerous weapons in the form of knives to ward off the attack by the deceased was in itself negligent. No evidence was adduced before the court that the assault on the accused by the deceased could not have been avoided by the accused resorting to other forms of defence than to consciously proceed to the kitchen and to select knives as defensive weapons. Whilst accepting Mr *Nyazamba* 's concession to the accused's plea to a lesser charge of culpable homicide as already alluded to, the court accepts without reserve his submission that the accused had ample room and opportunity to escape from the assault by the deceased but chose to act unreasonably by standing her ground and arming herself with lethal weapons which she used indiscriminately.

The facts of this matter are borderline between culpable homicide as defined in s 49 (b) and murder with constructive intent as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act. In assessing the appropriate sentence, the court will therefore bear in mind that it is dealing with a very bad case of culpable homicide. Section 47 (1) (b) defines murder as:

“A person who causes the death of another person:

(a) -----

(b) realising that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility shall be guilty of murder”

By contrast s 49 (b) provides as follows:

“Any person who causes the death of another person –

(a) -----

(b) realising that death may result from his or her conduct and negligently failing to guard against that possibility shall be guilty of culpable homicide and liable to imprisonment for life or any shorter period or a fine up to or exceeding level fourteen or both.”

The distinction between the two is narrow in that with respect to a contravention of s 47 (1) (b) the test is subjective. The accused must have realized that his/her actions may cause death but despite the realization continued to engage in his/her unlawful; conduct which results in death. With respect to s 49 (b) the accused must be shown/proved to have realized that his/her actions may result in death but failed to ensure or guard against the possibility of death. The test is objective in that the court enquires as to what a reasonable person would have done in the circumstances. In *casu*, the accused armed herself with lethal weapons (knives) and in using them to defend herself against the assault perpetrated on her by the accused, just randomly stabbed the deceased without caring or guarding against the possibility that her actions would result in serious injury or death.

The court took note of the fact that the offence arose from a domestic dispute. The deceased refused to let the accused read a text message which the deceased had received on his phone. The accused got angry over the deceased’s refusal to divulge the message. In the court’s view the accused’s anger was not justified. Whatever message which the deceased received was not intended for the accused otherwise the deceased would have conveyed the message to her. The accused simply could not respect the deceased’s right to privacy. The court was not told as to why the accused demanded to read the message.

Section 57 (d) of the constitution provides that every person has the right to privacy of their communications. There is no law which provides that a husband or wife has a right to infringe on

the privacy of the other's communications. The accused's insistence that the deceased should divulge a communication made to him on his phone was in itself an infringement upon the right of the deceased to privacy of communication. The deceased was lawfully entitled to refuse to divulge the message he had received on his phone to the accused albeit the accused being his wife. In a way by insisting on the deceased that he divulges the message, the accused was the cause or torched the altercation which ended up with disastrous consequences.

It is the court's view that society should learn to respect privacy of communications. Many a time, the cellphone has been cause of 'matrimonial quarrels and domestic disputes because couples do not respect each other rights to communications made or received. A cellphone is materially a gadget which is intended to ease communications between persons. Almost every human being desires to own a cellphone in order to be able to communicate with others easily and with speed. There are various other uses to which a cellphone can be applied and the court will not debate them. A lot of cases come before the courts in which a spouse will have invaded the private communications of another by going through messages and other communications on the other spouse's phone. This practice should be deprecated. It amounts to investigating or eavesdropping on one another. Usually spouses who do this will be aiming to find evidence of wrongful conduct by the other. Eavesdropping on another's cellphone is evidence of lack of trust in that other person. Courts are flooded with cases where couples or spouses seek to prove wrongful conduct by the other using evidence in the form of messages retrieved from another spouse's phone. Such evidence unless obtained with the consent of the owner of the phone would have been illegally obtained in contravention of the rights of every person to the privacy of communication as guaranteed by s 57 of the constitution and evidential rules relating to admissibility of illegally obtained evidence should be applied. Whilst the consequences of such invasion of privacy are varied, they may end up as in this case in parties or spouses engaging in physical confrontation. Physical confrontation between persons is inherently dangerous as it results in injury if not death. An untrustworthy or promiscuous spouse will not be deterred from engaging in promiscuity because of the other spouse has access to the promiscuous's spouse's cellphone. Cellphones do not create or promote bad behavior *per se*. It is the person with or without a cellphone who is characteristically bad. People use the cellphone to further their ends. It is people who abuse cellphones. The court whilst accepting that the



argument between the accused and deceased arose from a misunderstanding involving a cellphone, will not blame the cellphone in this case but the accused.

The court will take into account that it is within human nature that people encounter situations which anger or provoke them. It is however important that people learn to control their emotions. In this case the accused was angered by the refusal of the deceased to divulge a message which deceased received on his phone. This is not the kind of conduct which should raise emotions to a point that a person as did the deceased should get angry. The court will nonetheless accept that just like every human being has his/her weaknesses, the accused became emotive over the deceased's refusal to divulge to her the message which he received on his phone.

The deceased with respect to the physical engagement of the parties was the aggressor. He used fists and also kicked the accused all over her body indiscriminately. Both the deceased and the accused did not keep their emotions under check. Whilst people as a fact will threaten each other and fight, the reaction of the party on the receiving end, and the court says so without adopting an armchair approach, must bear some relationship to the wrong perpetrated upon such party. The conduct of the accused in arming herself with dangerous weapons and using them indiscriminately was not commensurate with the violence which she was subjected to by the deceased. The reaction was not measured. The accused clearly snapped and lost self-control. The courts cannot condone this.

Sentencing is a delicate exercise. For the criminal justice system to retain its respect and perform its function, courts must operate on sound principles and avoid being swayed by personal feelings. The starting point is to bear in mind that every person has the right to life as guaranteed by s 48 (1) of the constitution. This court has a duty to protect the said right. The sanctity of human life should be respected by all and sundry. Therefore a person who unlawfully takes away another's life deserves to be adequately punished. Holmes J.A in *S v Rabie* 1975 (4) SA 855 @ 862 C stated:

"Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances of the case....." This principle is of universal application in a democracy where the rule of law is used as a cornerstone of good governance.

The public interest more so in cases of a serious nature is properly served by courts passing deterred sentences. The public must have some degree of satisfaction that offenders of serious crimes are adequately punished. Adequate punishment should not be of such severity as to be out of proportion to the offence nor should it be manifestly excessive. The court should act firmly, humanely, compassionately and bear in mind the human weaknesses and pressures of society which lead people to commit crime.

The court will also be guided by the words of Addleson J in *S v Harrison* 1970 SA 684 A at 686 where he stated”

“Justice must be done, but mercy not a sledgehammer is its concomitant.” The public on the other hand should not be left with a feeling that the offender has been harshly treated. The seriousness with which the Zimbabwean society views the crime of culpable homicide is to be understood with reference to the penalty section which gives the court a discretion to sentence an offender to a punishment ranging from a fine to life imprisonment or to both a term of imprisonment and a fine.

The court takes into account that the accused is a female first offender who pleaded guilty. Both the state and defence counsels have referred the court to decided cases based in domestic violence in support of their submissions in mitigation and aggravation. The cases have been considered but are distinguishable as the accused therein were not females and the deceased was not the aggressor with respect to the physical confrontations

. The accused pleaded guilty showing contrition. She also demonstrated her remorse not only by word of mouth but was witnessed by the court to be sobbing silently throughout the addresses by counsel. The court was satisfied that the accused genuinely regretted her transgressions.

Mr *Bakasa* submitted that committing the accused to prison would cause mental trauma upon the minor child of the deceased and the accused. The court noted that this was inevitable. The child was traumatized by the events of the day as she witnessed the accused stabbing the deceased and the deceased attacking the accused. Whilst the court sympathizes with the child’s predicament, it is hoped that on the other hand she will accept that crime does not pay and will herself appreciate that the law punishes crime. The submission by Mr *Bakasa* that imposing a custodial sentence upon the accused who is HIV positive will result in her CD 4 receding

because of harsh conditions obtaining in prison was adequately addressed by Mr *Nyazamba* when he submitted that prisoners receive medical care in prison and that being HIV positive was a condition and could be controlled. Indeed being HIV positive is not a death sentence because inroads have been made to control the condition, thank you to medical efforts. Even if the court's approach to the issue of the accused's HIV status is wrong. Section 76 (2) of the constitution obliges the State to allow and afford every person living with a chronic illness access to basic health care for such illness. Imprisonment does not extinguish or diminish such right.

Mr *Bakasa* also argued forcefully that the court should consider that this matter was a domestic dispute where emotions and tempers are usually inflamed. He quoted the cases of *S v Mkize* 1979 (1) SA 461; *S v Meyer* 1981 (3) SA11 and *S v Boars* HH 17/88. The general principle enunciated in the cases is noted. However, in those cases, there was evidence that the accused persons were under emotional stress or depression. In the present case no evidence was laid before the court to prove that the accused acted under emotional stress. Whilst it was submitted that the accused believed that it was the deceased who had infected her with HIV, there was no evidence laid before the court to show that the issue of the accused's status was at the centre of the conflict. What was at the centre of the conflict was the accused's unmitigated jealousy in wanting to know the identity of and/ or content of a message sent on the deceased's phone.

Even accepting that this matter be classified as a domestic violence case, the accused was the author of the altercation. She had no reason to insist upon seeing or knowing a message not intended for her. The courts have lamented the upsurge in cases of domestic violence and the court must play its part by adding its voice in disapproving of domestic violence by imposing exemplary sentences which hopefully will not only punish the offender but deter like minded would be offenders.

The court has considered the cases of *S v Sibanda* HB 91/12; *S v Mambodo* HH 89/12; *S v Lovemore Zuhu* HB 88/12 cited by Mr *Nyazamba* and noted that they are distinguishable on the facts. The submission by Mr *Bakasa* that the court should consider imposing a sentence of community service would trivialize a serious offence and such a sentence would be disturbingly disproportionate to the offence committed by the accused and an affront to society's sense of justice. It is the kind of sentence which would lead to the public losing confidence in the criminal

justice system. An appropriate sentence in this case is one that should not create an impression in the minds of good thinking members of the society that courts condone such conduct as was exhibited by the accused.

Taking into account all the objective circumstances surrounding the commission of the offence, the subjective and personal circumstances of the accused person including the fact that the deceased's death will torment her for the rest of her life and bearing in mind the principles of sentencing in general and in particular in cases of this nature as well as judiciously exercising the court's discretion with regards to sentencing, it is inevitable that the accused deserves to be sentenced to a custodial sentence. Part of the sentence will be suspended on condition of good behavior and also as a salutary gesture to temper justice with mercy and ensure that for a long period even after serving the prison term the accused will keep her emotions in check. The court in suspending a portion of the sentence has resolved to do so mindful of the sentiments of the courts that where an accused is to undergo a very lengthy sentence nothing is to be gained by suspending a portion thereof see *S v Kanhukamwe* 1987 (1) ZLR 158, *Attorney General v Paweni Trading Corp (Pvt) Ltd*, 1990 (1) ZLR 24. *S v Talent Makonora & Anor* HH 42/11. The court seeks to distinguish this case from the cited cases on the facts and the length of the sentence which it will impose *vis – a vis* what was imposed in the cited cases.

The accused is sentenced as follows:

10 years imprisonment of which 2 years imprisonment shall be suspended for 5 years on condition that the accused shall not within that period commit any offence involving the loss of human life as defined in ss 47 or 49 of the Criminal Law Codification and Reform Act.

The state counsel has applied that the court makes an order in terms of s 61(1) (a) of The Criminal Procedure Act [Chapter 9:07] that the exhibits produced in the trial, namely, the 3 knives exhs 3(a) and (3b) and (3c) be returned to the accused. The defence counsel consented to the application. When the court pointed out whether the knives should not be forfeited to the state in terms of s62 of the same Act, the prosecutor sought to give the court a lecture on the challenges faced by the state in holding exhibits with the exhibit rooms being full. I therefore accede to the request and order that the knives be returned to the accused.

*National Prosecuting Authority*, state's legal practitioners

*Nyamayaro, Makanza & Bakasa*, accused's legal practitioners