

THE STATE  
versus  
CASPER NDIRAYA

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 12, 13 January and 1 June 2016

Assessors 1. Mr Barwa  
2. Mr Gonzo

### **Criminal Trial**

A. *Masamha*, for the State  
B. *Carr*, for the accused

MAWADZE J: We are disappointed that the state counsel has undertaken to submit written closing submission by 20 January 2016 and the defence counsel was to file their submissions on 28 January 2016 but by 27 January 2016 the state counsel had not filed any submissions. Mr Carr for the accused as per the letter dated 26 January 2016 advised the court of this position and copied the letter to the trial prosecutor. The trial prosecutor did not respond to the letter or file his closing submissions. We are grateful to Mr Carr who then filed his closing written submissions on 28 January 2016 without the benefit of submissions by the state counsel. The conduct of the trial prosecutor deserves censure and we believe Mr Masamha as an officer of this court should accord this court and fellow counsel uttermost respect.

The accused is charged with murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 14 January 2012 at Kabonile farm in Mt Pleasant Heights, Harare the accused unlawfully and intentionally caused the death of STANLEY ZIKI by stabbing him with a knife causing serious injuries from which he died.

It is common cause that on 14 January 2012 the accused and the deceased were drinking beer at Kabonile farm compound in Mt Pleasant Heights Harare with other patrons.

It is also not in issue that an altercation or misunderstanding arose between the accused and the deceased. What is in dispute is the cause of the misunderstanding. It is alleged that it could have been because deceased drank accused's beer or that it was over accused's girlfriend whom accused said the deceased has proposed love for on behalf of his friend. The State alleges that as a result a fight ensued between the accused and the deceased. In the process it is not in dispute that accused pulled out an okapi knife from his trousers pocket and stabbed the deceased. What has been put in issue is the number of times accused stabbed the deceased, whether once or twice. It is common cause that deceased died on the spot as a result of the stab wound on the back. The accused fled the scene but was apprehended by FUNGAI MUDIMU and PATRICK CHIDEMO who took him to ZRP Marlborough where accused surrendered the okapi knife. The deceased's body was later examined and the cause of death was said to be haemorrhage, shock due to stab wound inflicted during the assault.

In his defence outline the accused said what caused the misunderstanding was that deceased slapped the accused after drinking accused's beer which culminated in a fight. The accused said he was over powered during the fight as deceased choke held him from behind. In the process accused said he impulsively stabbed the deceased with a knife which accused pulled out of his pocket in order to force the deceased to release him from the chokehold. The accused said he simply retaliated by stabbing the deceased once to protect himself from the attack with no intention of killing the deceased. The accused said the deceased was taller and bigger hence the accused was no match for the deceased. The accused said he fled from the scene fearing retaliation by the deceased and his friends. Accused said when FUNGAI MUDIMU stopped him and advised him that the deceased had died he voluntarily went to the Police station with FUNGAI MUDIMU and surrendered the knife. The accused also alleged that he acted in the manner he did because he was intoxicated and was being overpowered. The accused denies that he had actual or constructive intent to kill the deceased.

The following exhibits were produced by the state during the trial:

Exhibit 1: It is a post mortem report compiled by Dr Gabriel Aguero who examined the deceased on 17 January 2012. The evidence of Dr Gabriel Aguero was also admitted in terms of s 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The findings by Dr Gabriel Aguero are not in issue and are as follows:

- (i) deceased had a penetrating wound on the 7<sup>th</sup> rib on the left back side measuring about 7 cm.
- (ii) deceased's left lung was perforated and was bleeding

- (iii) there was 1000 ml of blood in deceased's thorax.
- (iv) that the cause of deceased's death was haemorrhagic shock due to the stab wound in the deceased's back secondary to assault.

As already pointed out our finding is that the deceased died as a result of being fatally stabbed with an okapi knife by the accused.

The okapi knife in question was produced as exh 2 and its blade is 10 cm long.

The accused's confirmed warned and cautioned statement is exh 3 and in that statement the accused had this to say:

"I admit the allegations that I killed the deceased but I had no intention to kill him. I keep my knife in my pocket for self-defence at my work place. I work as security guard at the place I reside. What happened was that I was fighting with the now deceased who overpowered me. I then took out the knife from my pocket and stabbed him once on his back. That is all I wish to say."

The evidence of PHELLEMON CHIURIRI was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He is a member of the ZRP and his role in this matter was to identify deceased's body to Dr Gabriel Aguerro who carried out the post mortem.

The testimony of Inspector PFIDZAI NYANDORO is largely common cause.

He received the report of the stabbing of the deceased and attended to the scene of crime where he examined the deceased's body. He told the court that the deceased had two stab wounds, being a smaller one on the back and an apparently fatal one which was bigger and on the back near the ribs. He said deceased was lying headlong on an open space and that accused was brought to the police station by FUNGAI MUDIMU and PATRICK CHIDEMO.

Our view is that nothing turns on the evidence of Inspector PFIDZAI NYANDORO whose evidence we have no reason not to accept. The only issue raised by the defence is whether deceased had one or two stab wounds. The post mortem exh 1 seems to refer to one 7cm long stab wound but Inspector PFIDZAI NYANDORO refers to two stab wounds although the fatal one was the bigger stab wound. In our view this apparent contradiction is inconsequential to the deceased's death.

In our view the only narrow issue we have to resolve relates to the circumstances the accused stabbed the deceased. This can be resolved by looking at the evidence of the accused and the eye witnesses to the attack FUNGAI MUDIMU and MICHAEL KUNATSA.

The evidence of PATRICK CHIDEMO a member of the neighbourhood watch committee is not relevant on this issue. He did not witness the attack and only arrived at Kabonile bar when deceased had been stabbed and accused was fleeing. He chased after the accused and together with FUNGAI MUDIMU took accused to the Police.

We now turn to the material evidence.

MICHAEL KUNATSA (Kunatsa)

Kunatsa was the deceased's friend and he knows accused as a neighbour. He said the previous night he had been drinking beer with the deceased the whole night and that they both never retired to bed. He said the next morning on 14 January 2012 at about 0500hrs he and the deceased proceeded to Kabonile bar to continue drinking. Kunatsa admitted that at the time this incident happened at about 3 pm both he and the deceased were excessively drunk although he said deceased was more drunk.

Kunatsa said accused came to Kabonile bar at 0800hrs and briefly left the bar and came back at 1200hrs. Kunatsa said accused and deceased quarrelled when accused alleged that the deceased had looked for a boyfriend to propose love to accused's girlfriend. He said he thought accused and deceased were joking. He said the quarrel degenerated into a scuffle as accused assaulted deceased resulting in the two exchanging blows and that accused seemed to be losing the fight when the two stopped fighting on their own.

Kunatsa said after some time the two resumed the altercation and fight ensued for the second time. He said accused then pulled out a knife as other patrons were shouting that accused had a knife. Kunatsa said deceased tried to bend to pick a piece of firewood as accused had pulled out a knife but was stabbed by accused twice on the back near the ribs. He said at the time accused stabbed deceased he was not choke held by deceased.

Under cross examination Kunatsa said accused was moderately drunk compared to deceased who was very drunk as deceased had been drinking beer throughout the previous night and continued the next day until 3 pm when the incident happened. Kunatsa said accused stabbed deceased before the two could exchange blows. He later on seemed to say accused stabbed deceased after the two had pushed and pulled each other.

While we accept that Kunatsa witnessed the altercation between accused and the deceased we have no doubt in our minds that Kunatsa's perception of events was greatly compromised by his degree of intoxication. He had spent the whole night drinking beer with deceased and continued to do so until the next day at 3pm when the incident happened. We have no doubt that his recollection of events was blurred by his level of intoxication. This

explains his rather confusing and unclear evidence. For those reasons we are not inclined to accept his evidence.

FUNGAI MUDIMU (MUDIMU)

Mudimu is an ex member of the Neighbourhood Watch Committee and knew deceased facially. He only got to know the accused only in connection with this case.

On 14 January 2012 Mudimu said at about 3pm he arrived at Kubonile bar selling cellphone recharge cards. He said accused and deceased were drinking beer and he was sober. After a while Mudimu said accused and deceased started to fight exchanging blows but he did not know the cause of the fight. After briefly exchanging blows he said the two stopped fighting on their own and they resumed drinking beer.

Mudimu told the court that after a short while he then saw accused and deceased engaged in a scuffle pushing each other towards a maize field. He said accused then pulled out a knife and stabbed the deceased twice on the back near the ribs as Mudimu stood some 20m to 30m away.

Mudimu explained how accused stabbed the deceased. He said the two were facing each other and that accused delivered the first blow as both were standing upright causing the deceased to stagger. He said the second blow was delivered as both accused and deceased had fallen down. Mudimu said the attack with the knife was preceded by a brief exchange of blows and the two then held each other and that no one seemed to overpower the other unlike during the first fight when he said deceased had an upper hand during the fight. Mudimu said deceased seemed more drunk as he staggered more during the fight.

After accused had stabbed deceased Mudimu said patrons tried to rush to help the deceased but accused shouted that he would stab anyone who came to rescue the deceased and people got scared to get close. He said accused then fled from the scene with the knife and Mudimu chased after him with a bicycle as he realised deceased was dead.

Mudimu said when he caught up with accused he devised a way to persuade accused to go to the police by misrepresenting to the accused that accused should go to the police first to report as accused is the one who had been provoked and had acted in self-defence and was therefore the complainant. Mudimu said accused took the bait and they went to ZRP Marlborough where accused was arrested and his okapi knife exh 2 taken.

Under cross examination Mudimu denied that when accused stabbed the deceased he was choke held by the deceased but that they were facing each other pushing one another. He insisted that accused stabbed the now deceased twice before he fled from the scene and that

no one was able to help the deceased immediately as accused was wielding the knife threatening to stab whoever came closer. Mudimu said deceased was taller and older to accused but that accused was bigger in stature.

Our assessment is that Mudimu gave a very clear account of what happened. He was sober and clearly observed what happened. This is different from Kunatsa who was very drunk. Mudimu was clear that accused did not act in self-defence. He was able to explain that accused used a lot of force when he delivered one of the blows with the knife. In relation to accused's sobriety Mudimu said accused fully appreciated what he was doing because after stabbing the deceased accused threatened people so that he could escape and that after he caught up with accused he engaged in a conversation with accused and realised that accused was not very drunk. We therefore assess Mudimu as a credible witness.

#### THE ACCUSED

While the accused seemed clear as to what happened in his confirmed warned and cautioned statement and defence outline the accused in his evidence said he could not properly remember what happened as he was very drunk. The accused also seemed in his evidence to challenge that he had fought the deceased twice insisting that he fought deceased once.

In his evidence accused said after exchanging blows deceased held him by the neck and he cried out for help but no one came to rescue or help him. This was however not put to any of the state witnesses nor is it part of accused's defence outline or confirmed warned and cautioned statement. The accused said in order to free himself he pulled out a knife from his pocket and stabbed deceased after which he fled fearing a backlash from people present. Accused admitted he threatened to stab anyone who tried to come close to him. Accused insisted he acted in self-defence. The accused said when he stabbed the now deceased they were both lying down and deceased was on his back. Accused demonstrated in court how in that position he used his left hand to stab the deceased. Thereafter accused said he stood up and fled unaware that he had seriously injured the deceased. Accused admitted that Mudimu persuaded him to go to the police in the manner Mudimu explained.

Our view is that the accused's version of events of how he stabbed the deceased cannot possibly be true. To start with the accused in his warned and cautioned statement never mentioned that when he stabbed the deceased he was being choke held or that he was acting in self-defence. All what accused said is that he realised he was losing the fight and decided

to use a knife rather than the fists. In our minds the issue that he was choke held is clearly an afterthought.

The manner in which the accused said he stabbed the now deceased cannot possibly be true. To his credit accused admitted that he could not recall the number of times he stabbed the deceased and that he used a lot of force. In our view it is highly improbable that accused would have been able to use such severe force to perforate the deceased's lungs if he was in the position accused demonstrated to the court. This explains why that posture was not put to any of the state witnesses.

The manner in which accused said he stabbed the now deceased is fraught with inconsistencies. For that reason we therefore reject accused's version of events. In terms of s 221 of the Criminal law (Codification and Reform) Act [Chapter 9:23] voluntary intoxication is not a defence to charge of murder. While we accept that the accused had taken alcohol and was intoxicated the evidence before us is that the accused fully appreciated what he was doing. This clearly emerges from the evidence of Mudimu and accused's own acceptance that he appreciated well the events of that day. Our finding therefore is that the effect of intoxication was not such that accused lacked the necessary *mens rea*, intention, knowledge or realization that he was committing an offence.

In terms of s 253 (1) of the Criminal law (Codification and Reform) Act [Chapter 9:23] the defence of self-defence is a complete defence to a charge of murder if the accused meet the requirements in s 253 (1) (a) to (d) of the Code [Chapter 9:23]. In our view we find no need to analyse each of the requirements as it is clear that from the facts of the case, the accused was not acting in self-defence when he stabbed the now deceased. This is clear from the evidence of Mudimu and accused's own confirmed warned and cautioned statement. The fact of the matter is that accused was fighting the deceased with clenched fists and he decided to resort to use of a lethal weapon which is an okapi knife. The accused directed the fatal blow at a delicate part of the body with a lot of force hence the knife perforated deceased's lung who died immediately. The inescapable conclusion is that while accused may not have intended to kill the deceased he none the less realised that in using the knife in the manner he did there was a real risk or possibility that his conduct may cause deceased's death.

Accordingly accused is found guilty of murder as defined in s 47 (1) (b) of the Criminal law (Codification and Reform) Act [Chapter 9:23] which relates to murder with constructive intent.

VERDICT: Guilty of contravening s 47 (1) (b) of the Criminal law (Codification and Reform) Act [*Chapter 9:23*]:- murder with constructive intent.

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*The Prosecutor General*. for the State  
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