

STATE
versus
NINGISAI WAKENI

HIGH COURT OF ZIMBABWE
HUNGWE J
MUTARE, 26 and 31 October 2017 & 1 November 2017

Criminal Trial

Assessors: Mr Raja

Mr Chagonda

Mrs *J Matsikidze*, for the State
Mr *N Mareanadzo*, for the defence

HUNGWE J: The accused faces a charge of murder as defined in s 47 (1) (a) or (b) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. It is alleged that on 6 January 2017, at Utseya Village, chief Mushayavanhu, Chimanimani, he, with actual intent or realizing the real risk or possibility of death, struck Enia Maronga with a pestle multiple times on the head thereby inflicting injuries from which the said Enia Maronga died. He pleaded not guilty.

In his defence, the accused said that two to three years prior to 6 January 2017, the deceased had begun to conduct extra-marital affairs. This has led to quarrels between them as husband and wife. He tried to get her to mend her way without success as she continually openly consorted with various men and, ultimately, with one Paul Tinouta. He said that it became a matter of public embarrassment to him and the children. The children were publicly ridiculed at school and was traumatized and greatly pained by it all. He said that he sought assistance from Church Elders,

close relatives including his in-laws, to resolve his problem with his wife, but nothing appeared to work.

Consequently, she had deserted the matrimonial bedroom thereby depriving him of his conjugal rights. He said that even after her sojourn to her maiden home in Buhera before Christmas of 2016 and specifically on 22 December, he had hoped that she would come back reformed. When she eventually returned on 5 January 2016, she had kept to her separate bedroom. On the following day, he had decided to discuss and settle this issue with her.

However, his efforts were spurned as she ridiculed him leading to a misunderstanding. This misunderstanding degenerated into a fist fight as she tried to strangle him and or grab his private parts. He had rushed out of the kitchen and the deceased had pursued him. He said that she grabbed a pestle next to the kitchen entrance and tried to attack him with this pestle. He then wrestled it away from her and she ran away from him. As he pursued her, he said that the deceased tripped and fell over a rocky surface. After she had fallen, he testified that, he then struck her with the pestle that he still wielded in his hands.

He testified that he did not direct his blows to any particular part of the body. Put differently, it was an indiscriminate assault of the deceased out of anger. He left the scene before he realized that he had delivered fatal blows to his wife. He denied any intention to cause death or that he had realized that his conduct could result in death. He admitted that he was negligent in assaulting the deceased and prayed that he be found guilty of only culpable homicide.

Their 15-year old daughter, Vaida Wakeni provided the evidence upon which the State case was built. She testified that sometime in December 2016 her mother left for Buhera. By that time, to her knowledge, her mother was not sharing the master bedroom with her father the accused. She was not aware of the reasons behind this. She was however, aware of allegations of infidelity directed at her mother by the accused. The name of one Paul Tinouta had featured prominently in these allegations. To her knowledge, her mother had consistently denied the allegations. A day after her mother's return from Buhera, she said that after supper her father sent her to call her mother into the kitchen. When she returned together with her mother, her father sent her away so that they could discuss what the father termed adult affairs. She went into her bedroom.

Shortly after she had left the kitchen, she heard the two quarrel. She was unable to pick up the subject of the quarrel. As the quarrel heated up, she got out of the bedroom. It was apparent to her that the quarrel was boiling over. She testified that, at that stage she saw the accused hold her mother with one hand. He was assaulting her at the same time with the other. She raised alarm by crying out for help. Her mother broke loose of his grip and ran away from the accused, her father. She testified that her father soon thereafter grabbed a pestle and gave chase to her fleeing mother. He used this pestle to trip the deceased to the ground.

When her mother had fallen to the ground, she saw her father strike her mother twice on the head using this pestle before the neighbours arrived at the scene. It was a moonlit night. She was able to see what was taking place a few metres away from her. By the time neighbours arrived, the accused had already fled into the mountains.

Her description of the assault of the deceased by the accused are consistent with findings by Doctor Donzva. They are also consistent with the admissions given by the accused in his defence outline. Doctor Donzva gave the cause of death as subdural hematoma secondary to severe head injury.

We prefer the evidence given by Vaida Wakeni where it contradicts that of the accused. We are of the view that she gave her evidence well, notwithstanding the fact that this was not an easy subject for a 15-year old to discuss in Court. She maintained her version of how the events leading to her mother's death unfolded despite strenuous cross-examination from Mr *Mareanadzo*, counsel for the accused.

It is clear from the accused's defence that he does not deny assaulting the deceased with a pestle that was part of the exhibits tendered to the Court. He however maintains that he had acted out of provocation. Counsel for the accused conceded during submissions that the facts of this case cannot sustain this defence. The accused claimed that his wife provoked him by persistently engaging in acts of infidelity. He however also admitted that he was aware of the infidelity all along. Because of this, he had sought the help of various people including her relatives and other religious institutional personnel to help him resolve this problem. Prior to December 2016, he had invited his in-laws to his residence to resolve this issue. Before the in-laws had intervened, he had also invited his own relatives but to no avail.

What this demonstrates is that he not only knew about his wife's infidelity, but had thus far had tolerated it to that extent. One can infer that he loved his wife hence he had not sought to divorce her. He had spoken to Paul Tinouta, her latest paramour, whom he claimed had invited his wife over to his residence. Had he acted violently against Paul Tinouta on that occasion that would have been understandable since he described the encounter as having been quite provocative. In those circumstances, he would have had reasonable chances of success in raising the defence of provocation.

We do not find that the words attributed to the deceased by the accused on the night of 6 January 2017 constituted sufficient provocation as would have caused a reasonable person in his shoes to have lost all self-control under the circumstances. In the defence submission was reference to gradual provocation. It seems to us that what Counsel was referring to is that accused acted more out of a jealous rage than from provocation. A provocative act is an act which triggers an instant reaction indicating total loss of self-control leading to violence.

In our view, the accused's conduct does not show that prior to 6th of January 2017 his wife had conducted herself in a manner that would have triggered total loss of control on his part. The question that remains is whether the accused intended to kill the deceased on the night of 6 January 2016. If he did not intend to do that, whether in assaulting the deceased, the accused realized that by striking her with a pestle, there was a real risk or possibility of death occurring and notwithstanding that realization, he persisted in his conduct.

The accused is a mature church-going man. There is no suggestion that his faculties were impaired by anything other than anger and jealous on the night in question. He would therefore be aware of the consequences of using a pestle of the size which was displayed in Court on someone's head, especially when that person had fallen to the ground. According to him, he struck the deceased twice on the head. We did not hear the accused to say that he did not realize that there was a real risk of death resulting from such conduct. What he did say however was that he did not intend to kill his wife. Intention can be inferred from someone's actions, not what he denies or admits.

We are satisfied that the accused realized that his conduct was so fraught with the danger or the real risk or possibility of death occurring from the assault of his wife using a pestle as he

did. His flight from the scene immediately thereafter indicates to us the fact that he realized that he may have killed the deceased.

In our view, the State has proved beyond doubt the charge that the accused faces and therefore, the accused is found guilty of murder as defined in s 47 (1) (b) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*].

MRS MATSIKIDZE

The accused is a first offender.

MITIGATION

ADDRESS ON MITIGATION BY MR MAREANADZO

In assessing sentence I would urge this Court to look at the salient mitigatory features which were exposed during the trial, in particular, the undisputed fact that the accused had been living a painful life for a period in excess of six months, where the deceased denied him conjugal rights and for three months immediately preceding her death, he had actually vacated the bedroom altogether. And not only that my lord and gentlemen assessors, accused had the identity of someone who would brag to him and who would come at his residence to openly ask for his wife.

On the fateful day, it would appear from the evidence that the accused's intention predominantly was to try again and salvage his marriage and this is exemplified by the fact that he partook of supper prepared by the deceased. He had to excuse his daughter so that they discuss privately. Although there was no witness except the accused on discussions inside the kitchen. What emerge clearly is that the deceased should have provoked the accused.

COURT: Did the accused not confide in you what the deceased said?

A. He did, although it was disputed, but he did. So that provocation might have then caused the accused to react the way he did. I would urge the Court to put itself in the shoes of the accused person and then give a sentence which will reflect the fact that the accused was in torture himself. Having spent twenty three years with his wife and only to be treated in that fashion, not from the fact that he had committed adultery himself, but for the fact that the wife had suddenly saw someone, although that does not belittle the fact that the accused has been convicted of a serious offence, the Court should also look at the fact that the accused's family is now basically

scattered. Though one may successfully argue that he is responsible for it, the Court cannot lose sight of the fact that this is also the source of his misery.

I will urge the Court to give a sentence which will allow the accused to pick whatever pieces would be available to him and try to unify his family upon release. Those would be my submissions in mitigation.

MRS MATSIKIDZE ADDRESSES THE COURT IN AGGRAVATION OF SENTENCE:

In aggravation the State will submit that life was lost in very unnecessary circumstances. All we have is an accused person, who was insanely jealous and insecure and had never once found the deceased in a compromising position. Even if it were to be accepted that the deceased may have practiced infidelity, my lord and gentlemen assessors the State would submit that many, many people have walked away from unhappy marriages and are alive today or had died of natural causes.

I would also point out that domestic violence is on the increase. In every circuit this year, the Court has had to deal with at least one case of domestic violence. There are ever increasing cases of such violence and mostly, violence perpetrated by husbands against their wives. It is sad that the deceased lost her life at the hands of the one person that she would have expected to protect her.

The accused is said to have headed a group of Evangelists in the United Methodist Church. I would say he did not act in a manner a religious person would be expected to behave. Admitted, the children of the deceased and accused are now orphans, but it is clearly the hand-work of the accused person.

The sentence that the Court will impose therefore should be one that will deter others of like mind. Man that take away the lives of their wives rendering their children practical orphans. My lord and gentlemen assessors, in view of the gravity of the offence, the state is of the view that a sentence in the region of 20 to 25 years would meet the justice of the case and register society's collective abhorrence to domestic violence. Those will be my submissions my lord and learned assessors.

SENTENCE:

In assessing sentence I take into account all what your Counsel has submitted on your behalf in mitigation. Clearly, the evidence shows that you were living in an unhappy marriage and

because your wife is no longer alive, we will never come to know about her story about the source of her unhappiness. It could be true as you said that she was conducting extra-marital affairs. But it could also be true that you were unduly insecure about your relationship and were therefore unnecessarily jealous about what she was doing with regards to the people with whom she associated. So we will never know what the truth is, because she is no longer present to give her side of the story.

I need only say that the solution to an unhappy marriage is not violence or the killing of a spouse, the solution is either conciliation through mediation or when everything else fails, to go for a divorce. There is nothing new about divorces in this country, but it is a necessary social safety valve which will mitigate the ever increasing cases of domestic violence.

In your case, you pursued your wife who was running away from you after your disagreements. You were armed with a pestle which you used to assault her with fatal consequences. Therefore, this case constitutes a worst case of domestic violence, which unfortunately appears to be on the rise in this Province. Where domestic violence leads to death, the court must pass sentences which will try and deter spouses from resorting to violence in resolving their problems.

It is true that your family has been destroyed by your incarceration and her death, but you have no one to blame for this and this court cannot help you to pick up your pieces because it needs to send a strong message out there so that spouses learn to resolve their differences peacefully. We were surprised and shocked that a man could use a log as big as that pestle on a woman who had fallen to the ground running away from her husband. We think that the brutality that you displayed does not represent generally the conduct of men towards their wives. We are of the view that a stiff sentence is called for.

You are therefore sentenced to **22 years imprisonment.**