

THE STATE  
versus  
WANDA NDOWA

HIGH COURT OF ZIMBABWE  
HUNGWE J & ASSESSORS  
MUTARE, 21, 27-28 February 2017

ASSESSORS :           1. Mr Magorokosho  
  
                              2. Mr Chagonda

**Criminal trial**

*J Matsikidze*, for the State  
*B Mungure*, for the defence

HUNGWE J: The accused faced a charge of murder as defined in s 47 (6) (a) or (b) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] (“the Criminal Law Code”). It is alleged that on 24 June 2016 at Sanyabako Village, Chief Saunyama, Nyanga, the accused unlawfully and with actual intent, or realizing that real risk or possibility of death occurring struck Wilbert Mautsa with a knife and an axe all over the body thereby inflicting injuries from which the said Wilbert Mautsa died.

The facts surrounding the commission of this crime are bizarre; the act itself gruesome and the underlying cause of the cruel conflict steeped in witchcraft and allegations of a prior love triangle. The woman at the centre of the alleged love triangle denies that there was any such love triangle. The third person in the trial is the deceased.

To compound the factual confusion surrounding the allegations of murder there was no eye witness to the actual killing of the deceased. The accused is the only person who is able to narrate how the deceased met his death.

We have examined his evidence objectively and were unable to accept it in its totality for the reasons that we shall set out. We had to rely on his version and examine the probabilities of the matter in order to determine whether the State had proved the crime of murder beyond a reasonable doubt.

The evidence admitted on the record in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is the following in summary.

A neighbour of the accused, one David Gwezere, explained that around midday the accused came to his place of business carrying an assortment of weapons which were blood stained, and confessed to killing the deceased. The accused told him that the deceased had attacked him at his residence. He called the Police who came and picked up the accused.

The accused for his part gave a statement to Police, two days later, on 26 June 2016. In that statement, Exhibit 5, he said:

“Wilbert Mamba left a letter at my place on Saturday 23 June 2016 and I found the letter under the stone. I did not understand the contents of the letter because I cannot read Shona. He came to my place with an axe, an axe handle and knife on a Friday of the 24 June 2016. He struck me on my left ribs and I fell to the ground. I managed to stand up and managed to defend myself until overpowered him and struck him with an axe on his head and stabbed him with a knife which has a blade on both ends on his neck. That is all.”

The accused filed a defence outline at the commencement of the trial. It was prepared on his instructions by his legal practitioner Mr *Mungure*. In it he raises the defence of self-defence in the following way.

The deceased had snatched away his wife and had previously accused him of practising witchcraft. On the day in question, the deceased had come to his homestead armed with an axe, an axe handle as well as a short sword strapped to his arm pit. He noticed all that just before the deceased entered his premises. The accused was preparing a fire. He got out. The deceased demanded from him payment for the hut the deceased had built for his son. The accused insisted that the accused should direct his demands to Tatenda, his son and the beneficiary of the construction. Deceased then hurled unprintable insults towards him. The deceased charged towards him and attacked. In the exchange that followed, the deceased struck him with an axe handle. The handle found its mark on the left abdomen. He fell down. The deceased came onto him with the axe but he managed to avoid it and got in between his legs thereby felling the deceased down to the ground. They struggled for the possession of the axe. He finally grabbed it away from him and struck the deceased about the head and face.

Notwithstanding the injuries he inflicted on the deceased, the deceased fought back with the short sword which he had drawn from its wooden sheath. He managed to disarm him of his sword with which he then struck a stabbing blow to the right cheek leaving it stuck on the mandible.

The deceased collapsed and died. He took the axe and axe handle to David Gwezere and confessed the killing to him.

In court however the accused gave a slightly different version to this one.

On this version the deceased did not announce his arrival or why he had come but just struck him with the axe handle asking if he knew him well. He then described, how the fight preceded; how they struggled for possession of the axe which he eventually gained and used to strike the deceased three times about the head thereby causing the deceased to fall. The deceased, undeterred, kept on fighting him. The deceased drew his short sword which the accused again gained possession of and used it to stab him in the right cheek. That stopped the fight as the deceased collapsed and died. He reported his lucky escape to David Gwezere.

The State witness whose evidence was subject to cross-examination was the lady at the centre of the alleged love triangle.

She told the court that she had left the accused in 2005 and went to live with her sister in Mount Darwin. Then their eldest child Tatenda was 12 years old. The youngest was 14 months old. The reason for her leaving accused was abuse. The accused however kept demanding his children back. She decided to come back to their home in 2011 with five of their six children. The eldest child had been married in Mt Darwin. She had to move away from their matrimonial home after only two weeks as the accused demanded that she cooks separately from him. She settled a few hundred metres away with her children.

She disputed that the deceased had built a hut for Tatenda or that she was in a relationship with the deceased. She ascribed the claim of an affair to his unfounded suspicion.

She explained that one day the deceased came by her residence and gave her child a letter. That letter, Exhibit 7, was addressed to her. It was replete with threats to her life and that of her children. The reason for these threats was an allegation of witchcraft practice by her ex-husband, the accused. He demanded that the ex-husband, the accused, pays him a cock, a goat and a bovine to settle the issue. Together with her two sons, she took the letter to the accused. One of them was by then unwell. At the accused's they asked whether he owed the deceased what claimed in the letter and further asked him to resolve the issues between him and the deceased so as to save their lives. The accused admitted that he had taken deceased's millet but assured her that deceased cannot harm anyone. They went back.

Deceased then came home again. They again went to the accused. Again there was an exchange and allegations of witchcraft were mutually exchanged. The children insisted that

he makes peace with the deceased. Accused agreed and they left. The next thing she learnt of between these two men was the deceased's death. Between this version and that given by the accused lies the truth. Besides the oral evidence tendered in court, we were favoured by the evidence of the observation by the doctor who performed the post mortem examination.

The post-mortem report compiled by Doctor Jokwiro showed that the remains of the deceased exhibited the following;

“Multiple (eight) lacerations on the forehead and left temporomandibular region- multiple skull fractures beneath the lacerations revealing brain tissue. Biggest laceration measures over 20cm.

- Bone chip fragments, multiple right must laceration with tissue exposed.
- Knife in situ - right buccal mucosa into mouth with external.
- Severe head injury
- Haemorrhagic shock.”

In assessing the credibility of the accused, we considered the accused's versions as given in the statement to police, then to his legal practitioners, and finally to court. We also considered where the probabilities in the matter lay and whether his version could reasonably possibly be true. We accepted that the deceased must have conducted himself in a provocative manner leading to the violence that erupted at the accused's residence.

The accused stated that the deceased was armed with an axe handle, an axe as well as a short sword. We were unable to reject that there was fight in which these weapon were used by the deceased. We were, however, unable to accept his claim that after he struck the deceased three times on the head and face thereby exposing the deceased's brain matter, the deceased still had the wherewithal to continue to pose a threat to him by drawing his short sword and attacking him again forcing him to fight back by stabbing him on the cheek with the same short sword. By his own version, the deceased would have attacked him whilst carrying the axe and axe handle. His explanation as to how these were used was far from satisfactory. To crown it all we found his suggestion that the deceased was able to continue with fight notwithstanding the skull-shattering blow which exposed the brain matter utterly unbelievable.

It is a factual and physiological an impossibility.

In assessing whether his defence of self-defence ought to succeed, the court must satisfy itself that the factors set out in s 256 of the Criminal Law Code have been met. In the absence of any evidence to the contrary, we did accept that the accused was under an unlawful attack which was underway. Even so, we did not however hold that the accused resorted to proportional force necessary to repel that attack.

He had no injury on his person to justify the brutal attack he unleashed on the deceased. The nature and degree of sheer brutality in our view, excludes any claim of self-defence.

I am aware that the court should guard against an armchair approach which does not take into account the fact that the accused, had no time to weigh the pros and cons of the use of a particular weapon when his life was under threat and when he had to make that decision in the heat of the moment.

In light of all there we were unable to find that the accused had established the defence of self-defence. He did not strike the deceased once with an axe, or twice but three times for good measure he then plunged a short sword into his victim's cheek. He must have realized the real risk or possibility of death occurring from resorting to this vicious attack.

He is found guilty of murder as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*].

### **Sentence**

In assessing sentence the court takes into account the factors submitted on your behalf by Mr *Mungure*.

It is the best submission in the circumstances in that we found that you did not act in self-defence when you killed the deceased.

As you confessed under pressure of cross examination the real motive of attacking the deceased was your suspicion that the deceased had won your ex-wife's affections and therefore he was an obstacle to any possible reconciliation with her. Yet the facts were far removed from your suspicion.

The brutal nature of the attack reveals the blatant disregard for human life in the attack.

Even assuming that he had inadvertently provoked you by the threats that he offered in his letter to you and your family and his subsequent visit to your home, that did not give you licence to mount such a murderous attack on this old man. There are in our view more aggravating features than mitigatory ones. Society abhors such disregard for human life. A sentence that reflects society's abhorrence of such conduct must be passed.

The following sentence is appropriate.

**18 years imprisonment.**

*National Prosecuting Authority, legal practitioners for the State  
Makombe & Associates, accused's legal practitioners*