

THE STATE

vs

NHEMA NYAMAYEVHU

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 21 JANUARY 2019

ASSESSORS:

1. Mr Nish
2. Mrs Chademana

CRIMINAL TRIAL - SENTENCE

M. Tembo for the state

J. Maweni for the accused

MAWADZE J: This matter proceeded on the basis of a statement of agreed facts after the accused who was facing the charge of murder as defined in s 47 (1) of the (Criminal Law Codification and Reform) Act [*Cap 9:23*] pleaded guilty to the charge of contravening section 49 of the same Act relating to the charge of culpable homicide.

This is a bad case of domestic violence which resulted in a fatality wherein the thirty-three-year old wife died at the vicious hands of her thirty-six-year-old husband.

The brief and agreed facts are as follows;

Both the now deceased and the accused were residing in Nyamayevhu village, chief Nyajena, Masvingo and were wife and husband respectively. In fact, the accused was in a polygamous marriage with the now deceased Molline Ellias as the senior wife and one Alice

Ellias as the junior wife. Each of the wives has three minor children born out of the marriage. They all resided at the same homestead.

On 15 July 2018, the accused arrived home from a beer drink. He was confronted by the now deceased over the proceeds of a bovine accused had sold and squandered the money. The accused would have none of that inquiry and resorted to brutal violence. The accused proceeded to drag the now deceased from home. At some place away from the prying eyes of other family members the accused brutally assaulted the now deceased with switches. As a result, the now deceased sustained bruises on lower limbs and face, haematoma on left temporal area and bled from the left ear. Her neck was hypermobile as a result of assault.

The now deceased collapsed and accused called the junior wife Alice Ellias to ferry the now deceased back home. At home the accused tried to resuscitate the now deceased with the help of Alice Ellias to no avail. The now deceased passed on that same night and the accused fled from home only to be arrested some days after. As per the post mortem report, the now deceased died from the injuries inflicted upon her resulting in the head injury and fracture of the cervical spine.

Indeed, this is a borderline case between the offence of murder with constructive intent and that of culpable homicide.

In assessing the appropriate sentence, we have considered submissions made by both counsel.

In mitigation we have taken into account the accused's personal circumstances. As already pointed out the accused had two wives and six minor children. As he is unemployed the family survives on his manual labour and has no meaningful savings. As at now he only owns one donkey and a scotch cart. His family would be greatly prejudiced as a result of his incarceration. We were advised that the accused suffers from chronic pain arising from a hip problem where he was injured while employed by Triangle Limited. The severity of this injury could not be ascertained as no further medical details were availed.

It is in accused's favour that he has no previous criminal record. We are therefore inclined to exercise some leniency with the hope that he would reform and desist from further crime.

This matter has been finalised in a very short time simply because the accused decided to accept his wrongful conduct. A plea of guilty should therefore be seriously considered as a mitigatory factor. This matter had been set for two days but was finalised within few minutes. The witnesses who were present were excused and saved the trauma of facing the accused while testifying as most of them are accused's relatives, like his brother, son and second wife. The scarce state resources have also not been wasted. For all these reasons we are obliged to reduce whatever sentence we are inclined to impose and or to suspend part of the overall sentence to give effect to the plea of guilty.

The accused has suffered from a pre-trial incarceration of six months and has not been granted bail pending trial. While in custody, the now deceased's relatives caused the accused's relatives to surrender some of the accused's assets as compensation. These included nine cattle, twelve goats, four bales of cotton, 2 tonnes of maize and R5000.00 While this can never be compared to the loss of life we cannot close our eyes to the fact that accused has somehow atoned for his criminal conduct. Indeed, the accused through counsel profusely apologised for his conduct. It is worth noting that accused shall forever live with the stigma that he is responsible for the demise of his wife. Worse still he will have to explain this also to the children he had with the now deceased.

It is however unfortunate and very saddening that many couples are losing their lives at the hands of their spouses who are expected not only to love them but to protect them. The sanctity of human life can never be over emphasised and human blood is sacred. Another worrying issue is that such cases are very prevalent hence the need for deterrent sentences if we are to tame this tide.

Domestic violence should not be condoned at all. This explains why the state has specifically enacted the Domestic Violence Act Cap 5:16 to specifically address this scourge.

The dispute in this matter was minor and could have been amicably resolved. In fact, the accused is the one who was at fault as he had squandered the money realised from disposal of a family asset. The now deceased being a responsible wife and mother was entitled to question the accused and rebuke him for his selfish conduct. The now deceased should not therefore have been battered and lose her life for this.

It is aggravating that the assault itself was the indiscriminate and brutal. The now deceased was injured on the head, limbs and her cervical spine broken. Severe force was therefore exerted against this defenceless housewife. The accused's degree of negligence is clearly very high. This elevates the accused's moral blameworthiness. Despite the mitigatory factors alluded to, the accused deserves a fairly lengthy custodial sentence.

In the result, the accused is sentenced as follows;

“Ten years’ imprisonment of which two years’ imprisonment is suspended for five years on condition the accused does not within that period commit any offence involving the use of violence upon the person of another and for which the accused is sentenced to a term of imprisonment without the option of a fine.

The effective sentence is eight years’ imprisonment”

National Prosecuting Authority Counsel for the State.

Mutendi, Mudisi and Shumba, *pro deo* Counsel for the accused.