

THE STATE
versus
WINNIE MUSEKANEHUKU
and
TICHAONA CHIPOMHO
and
IYKE CHIPOMHO

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 11 February 2020

Criminal Trial

ASSESSORS: 1. Dr Sana
2. Mr Raja

M Musarurwa, for the State
J Zviuya, for the 1st accused
C. N Mukwena, for the 2nd accused
Mrs Y Chapata, for the 3rd accused

MWAYERA J: In this case an 18 year old lost his life at the hands of the three accused persons, his family. Domestic violence in the form of physical assault was perpetrated over suspicions of theft of ZW \$30.

The three accused mother and 2 sons pleaded guilty to charge of culpable homicide. It is alleged by the state that on 30 June 2018 and at Chipombo Village, Divonia Farm, Chief Chipunza, Rusape the 3 accused or one or more of them unlawfully caused the death of Francis Mawasa by assaulting him several times interchangeably all over the body with sticks and head butting him negligently failing to realise that death may result from their conduct and negligently failing to guard against that possibility resulting in injuries from which the said Francis Mawasa died.

Pursuant to the pleas of guilty to culpable homicide the parties came up with a statement of agreed facts outlining common cause aspects. It is common cause the deceased was a brother to the first accused and had been taken in for care by accused 1 since the deceased's parents were late. The first accused's sons, accused 2 and 3 were therefore cousins of the deceased. On the fateful day the first accused demanded her ZW\$30.00 from the deceased whom she suspected of having stolen the money. In a bid to recover the money, the 3 accused teamed up and severely and severely interchangeably assaulted the deceased all over the body. The third

accused further head butted the deceased on the forehead. As a result of the assault the deceased sustained multiple injuries from which he died. The remains of the deceased were examined by Doctor Simbarashe Elton Matienga who concluded that cause of death was polytrauma per the post-mortem report tendered as exh 1 by consent. Also adduced in evidence was the certificate of weight of the sticks recovered at the scene. The certificate and the sticks were marked as exh 2 and 3 respectively by consent.

It was agreed that the accused persons were negligent in their conduct when they severely assaulted the deceased failing to realise that death may result from their conduct and thus all three accused were held liable of negligently killing the deceased.

Accordingly the 3 accused are found guilty of culpable homicide as defined in s 49 (a) of The Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Having been addressed in mitigation and aggravation we proceeded to sentence the accused as follows.

Sentence

In arriving at an appropriate sentence we have considered all mitigatory factors advanced by Mr *Zviuya* for the first accused, Mr *Mukwena*, for the second accused and Mrs *Chapata* for the third accused respectively. We have also considered aggravatory factors advanced by the state counsel Mr *Musarurwa*. All the accused are first offenders who pleaded guilty to culpable homicide. The first accused is the biological mother of accused 2 and 3 and she was also in *loco parentis* for the deceased before his demise. All the accused have been in custody for about 1 year 8 months while awaiting the finalisation of this matter. The court is alive to the trauma that goes with the anxiety and suspense of awaiting the hearing let alone finalisation of murder allegations. The pre-trial incarceration period is not a walk in the park and thus the court will take note of that period in considering an appropriate sentence for each of the accused persons.

The first accused as a mother must indeed be agonising over losing a brother and also having her children incarcerated over loss of life which could have been avoided had she acted responsibly. All the accused despite being convicted of culpable homicide will suffer and live all their lives with the stigma of having killed a close relative over ZW\$30-00. The society is blind to the legal necessities of the distinction between murder with actual or legal intention and culpable homicide. That the accused pleaded guilty to having negligently caused the death of the deceased, that they cooperated with the police and did not waste time should surely be reflected in the sentence. Whereas the accused cannot be applauded for negligently engaging in violence which caused the death of the deceased their pleas of guilty are a sign of regret and

demonstration of remorse and penitence. It is settled a plea of guilty should be credited for what it is worth and that can only be shown and reflected in the sentence imposed. Further in mitigation for accused 2 and 3 who are 24 and 19 respectively is the fact that the two are youthful offenders. They also fall in the bracket of immature adults prone and susceptible to influence from external forces. In this case the two youthful offenders appeared unamused by extended family bringing in deceased an uncle under the same roof with them. They excitedly found comfort and joy in joining their mother accuse the deceased of theft of \$30-00. Emotions in a clear excited mode took the better of them as they interchangeably and severely assaulted the deceased. The irresponsible conduct which culminated in the death of the deceased though not premeditated can however not go unpunished. As correctly emphasised by the state counsel the deceased an 18 year old died a painful death at the hands of those he looked up to for protection and love. There was no evidence to substantiate that he had stolen the \$30-00 which caused him to be visited with the fatal assault. The deceased was severely assaulted with switches head butted and left unattended outside till the following morning when he succumbed to the injuries and died. He sustained multiple bodily injuries as evidenced by the post mortem report. He died as a result of poly trauma. The nature and extent of the injuries shows the intensity and severity of the assault. In considering sentence it is important to consider among other factors the degree of participation, the circumstances surrounding the commission of the offence, the gravity of the offence and the attitude of the offender, his mode of life and personal circumstances. See *Moyo v S HB 114/06*.

In the present case going by the number of blows and the severity of the assault culminating in loss of life, we find no reason why the 3 accused should be given different sentences. Granted accused 2 and 3 are youthful offenders but that does not minimise their participation. The moral blameworthiness of accused 1 is high as she as a mother could have stopped the savage attacks and could have done better when the deceased was injured. However, the manner and mode of assaulting does not justify differential treatment of the accused as they clearly acted together with common purpose and in concert. Having pointed out that the assault was protracted and severe aimed all over the body even breaking the neck one cannot possibly attribute the degree of negligence as ordinary but gross in the circumstances. The three subjected the deceased to assault negligently causing his death. Precious human life which is a God given and constitutionally guaranteed right was unnecessarily lost.

Upon considering all mitigatory and aggravatory factors and of course the time immemorial sentencing principle of matching the offence to the offender, a custodial sentence is considered appropriate in the circumstances. We are alive to the *State v Muzilawempi Hlupai HB 125/17* and *State v Landelani Tshuma HB 126/17* cases cited and wish to emphasise that the cases are a distinguishable from the present case. The accused in the cases had to wait for 6 and 7 years respectively for matters to be finalised. It is worth noting that despite that long wait the suspended prison term of 5 years denote the seriousness of the offences which involve loss of life. For loss of life occasioned by 3 people violently subjecting the deceased to assault, the suggestion of the option of a fine will not only put into disrepute the justice delivery system but is a mockery to the sanctity of human life. In passing sentence the court in exercising its sentencing discretion is duty bound to consider all circumstances and seek to match the offence to the offender tempering justice with mercy while ensuring that justice is done. It should be made clear to the society that disputes of whatever kind and manner cannot and should not be resolved by violence as this culminates, in most cases loss of life as occurred here.

What further aggravates this offence is the fact that it is a culpable homicide related to domestic violence. The family and home should be a safe and peaceful abode not a volatile and scary abode.

Given the totality of the circumstances it is our considered view that each accused be sentenced as follows:

Each 3 years imprisonment of which 1 ½ years imprisonment is suspended for 5 years on condition accused does not within that period commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Bere Brothers, 1st accused's legal practitioners
Chibaya & Partners, 2nd accused's legal practitioners
Henning Lock, 3rd accused's legal practitioners