

THE STATE  
versus  
KUZIVA MUKUNGUMA

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 18, 19, 20 and 27 February 2020, 5 and 23 March 2020 and 20 May 2020

### **Criminal Trial**

ASSESORS: 1. Mr Chipere  
2. Mr Mudzinge

*M Musarurwa*, for the State  
*S Chikamhi*, for the Accused

MWAYERA J: The accused pleaded not guilty to a charge of Murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 19 April 2019 at around 2100 hours and at Village 26, Mount Zonwe, Odzi, the accused person stabbed the deceased thrice on the left arm, abdomen and left side of the chest with a bayonet knife intending to kill him or realising that there was a real risk or possibility that his conduct might cause the death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which the said Agent Mukunguma died. The remains of the deceased were taken for post mortem and Dr Chibowa compiled a Post Mortem Report tendered as exh 1 by consent. The doctor observed wounds and concluded that cause of death was massive hemothorax chest trauma.

The accused in his defence outline denied having an intention to kill the accused at all. The accused pointed out that they had spent the greater part of the day together with the deceased drinking beer. Upon their return home that is when an argument ensued when accused threatened to assault his wife after she served sadza. The two engaged in a fight and when deceased took stones accused then took a knife to scare off the deceased. The fight continued until one Simbanai Mawoyo restrained and deceased escaped. The accused was however undeterred so he followed and the fight continued. It was then that the accused started to stab the deceased in self-defence.

Worth noting at this stage is the accused's confirmed warned and cautioned statement, exh 2 in which the accused admitted stabbing the deceased with a bayonet knife while the two who were drunk were fighting. In the warned and cautioned statement there is no mention of use of stones by the deceased. Also tendered in evidence by consent was the sketch plan exh 3, the certificate of weight of the bayonet knife exh 4 and the bayonet knife itself exh 5. The State relied on evidence of 14 witnesses, 2 of whom gave oral evidence while the other 12's evidence was formerly admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Beulah Mutoma the wife of the accused gave oral evidence to the effect that the accused and deceased, his nephew, engaged in a fight. The fight was occasioned by the efforts to intervene made by the deceased in an attempt to stop the accused from assaulting his wife the witness. The witness's account was that the accused was violent on the day in question as he would physically lift her and then throw her on the ground over an issue of the quantity of sadza. The witness who was visibly bitter and keen on seeing the accused punished exaggerated her testimony. She sought to convince the court that she observed the first fist fight and then remained in attendance and watching while the accused was armed and striking the deceased with a bayonet knife. Despite pointing out that she fled with her children, she sought to paint a picture that she witnessed the accused strike the deceased who had fled to his home. Further she stated that she also witnessed the tobacco field slashing of deceased and the striking at the homestead. The witness sought to have the court accept that she was everywhere and that despite the darkness of the night she had a vivid picture of how the accused struck the deceased. She did not hide her desire to have the accused punished and nailed for his violent conduct. She could have done better as a witness if she had maintained an honest stance as opposed to being vindictive and thus exaggerate the testimony.

We did not take the witness as entirely credible. What we deduced from the bitter witness's testimony is that accused and deceased engaged in a fraca because the deceased sought to stop accused from assaulting his wife the witness. Her overzealous manner of testifying is understandable when one considers the manner of assault perpetrated on her, that is being raised and thrown to the ground. To correspond with what the witness stated, the accused was generally of violent disposition and that he was in the habit of violently abusing her. She obviously was not candid with the court when she stated that she observed each and every stage and blow of the fight, but we cannot ignore the common cause aspects particularly

that the accused and deceased engaged in a fight and that the accused stabbed the deceased with fatal consequences.

Shylet Manyanga's evidence which was formerly admitted was essentially as follows. She was married to the deceased and the accused is a brother to her father in law. The deceased proceeded to the accused's homestead reacting to the accused's wife's scream for help since accused was assaulting her. The witness also followed and found the accused and deceased fist fighting. The fight was stopped by one Simbanai Mawoyo and Pirato Machingura. Later the deceased went back to look for his shoe and a fight erupted in the tobacco field. She then heard her husband scream, he had been stabbed. She observed him bleeding from the arm and abdomen. The deceased then followed accused at his homestead requesting him to finish him off. It was then that accused stabbed deceased in the chest and he instantly fell to the ground whereupon he died.

The third witness Simbanai Mawoyo's evidence was formerly admitted. It was essentially that the accused and deceased were earlier drinking beer together. They went home together with the witness. After accused's wife served the two with sadza he together with deceased left accused's homestead and parted ways. He later heard screams from a female voice from accused's homestead. This prompted the witness to rush to the scene whereupon he observed accused fighting with the deceased while one Pirato Machingura was restraining. After restraining the two dispersed and everyone went home. After a while the witness heard accused and deceased at it again shouting. This time the two were now in a tobacco field. He heard deceased shouting words to the effect that he had been stabbed with a knife by the accused. The deceased had injuries in the abdomen and on the arm. The two protagonist were unstoppable as they returned to accused's homestead. Straight thereafter accused shouted he had stabbed the deceased and was going to report himself to the village head. The witness observed the deceased lying dead on the ground with blood oozing from the chest.

The fourth witness Pirato Machingura gave oral evidence. His evidence tallied with Simbanai Mawoyo's evidence on all material respects. The witness stopped the fist fight between accused and deceased. He together with Simbanai Mawoyo tried to stop the second fight in the tobacco field but failed. The accused who was armed with a knife was violent occasioning the first stab wound in the arm and abdomen and finally back at the homestead a stab wound in the chest. The witness gave evidence well and his manner of testifying was beyond reproach.

The fifth State witness Calvin Muperekedzwa a neighbour to the accused had his evidence formerly admitted. He was drawn to the accused's residence just like the other witnesses by screams from accused's wife. Accused could not accept his efforts to stop him from assaulting his wife so he went back to his homestead. Later accused's wife and children approached his homestead seeking refuge. He later learnt about the death of deceased whose body he observed in a pool of blood at accused's homestead. The police details who attended the scene namely Ngonidzashe Mukunguma of the Special Constabulary Unit, Sergeant Admire Mhaka, Detective Assistant Inspector Henry Thuso, Sergeant Innocent Manyika, Constable Farai Mayengehana, Constable Alex Chimugoro, Assistant Inspector Brighton Mudzingwa's evidence was formerly admitted. It was basically evidence on common cause aspect involving attendance of the scene of crime, investigations, recording statements and indications. The investigating officer recovered the bayonet knife and his team caused the body to be taken for Post Mortem examination.

Caleb Mhlanga's evidence was basically confirmation of the measurement of the knife presented to him by the police. The witness compiled the certificate of weight exh 4.

The accused was the only witness in the defence case. His evidence on common cause aspects was essentially similar to the State witness. Although he was none committal on the root cause of the fight, it was apparent he was involved in a fight with the deceased. The accused in giving evidence could not successfully dodge the obvious that he was generally violent on the night in question. He was violent against his wife who raised alarm and three State witnesses came to assist to no avail as the violence continued. The deceased also came in to assist and the violence turned nasty resulting in the deceased being fatally stabbed.

Given the obvious sequence of events of the night in question that the accused stabbed the deceased is not in dispute. It is common cause the uncle and nephew who had spent the day drinking together engaged in three fights. The fight was as a result of the deceased trying to intervene to stop accused from assaulting his wife, initially it was fist fight. The second fight was in the tobacco field this time accused was armed with a bayonet knife and he stabbed deceased on the arm and the abdomen. The third and last fight was when accused stabbed deceased in the chest.

The question that falls for determination is whether or not when the accused stabbed the deceased he unlawfully stabbed with an intention to kill. The offence which the accused is facing has to be proved beyond reasonable doubt by the State. The State has the onus to prove that both the *actus reas* and *mens rea* were present for a charge of murder to be sustained. See

*S v Lovemore Kurangana* HH 267/17 and *S v Mugwanda* 2002 (1) ZLR 57. The accused sought to rely on self-defence, a defence provided for in the s 253 of The Criminal Law (Codification and Reform) Act. A close look at the sequence of events on the day in question shows that the requirements of the defence cannot be met. For one to successfully rely on this defence it must be shown that there was an unlawful attack or imminent attack which the accused sought to defend himself from. Further that there was imminent danger to life which could not be averted in any other manner. The means used to avert the attack has to be proportionate for one to successfully plead the self-defence. In the circumstances the defence crumbles for the obvious reason that all the requirements cannot be met. See *S v Best Sibanda* HB 139/19 and also *S v Mabvumbe* HH 39/16. Given the common cause aspects the *actus reas* component needs no further discussion.

From the evidence adduced the first fight was a fist fight. None of the State witnesses observed the deceased being armed in any manner. In fact it is the accused who was unrelenting on his attack on the deceased. The accused took issue with being restrained from assaulting his wife. He armed himself with a bayonet knife which he collected from his bedroom. The accused proceeded to stab an unarmed man, the deceased in the tobacco field. Even if it were to be accepted that deceased threw stones as alleged by the accused an assertion never confirmed by all the State witnesses the use of a bayonet knife was clearly disproportionate. When the final blow was delivered in the chest the accused was aware the deceased had been injured in the arm and abdomen as he exclaimed he had been injured and in agony uttered words to the effect that accused should finish him off. The deceased was badly wounded and not a threat at all to the accused. The accused without hesitation and oblivious to Mawoyo and Pirato Machingura's efforts to restrain directed his blow to the deceased's chest. In fact at that stage the accused was faced by a helplessly injured man. There is no basis therefore to argue he was defending himself as he was not under threat, as such the defence cannot be sustained.

The other thinly veiled defence of intoxication was properly not pursued but just mentioned in the defence outline. It was evident during cross examination of the accused by the State counsel that although the accused had partaken alcohol he was in full appreciation of what was going on. In any event voluntary intoxication is not a defence. As a witness the accused did not fare well as both suggested defences could not be supported even from the accused's own narration. The evidence adduced spoke volumes to the unlawful conduct of the accused causing the death of the deceased.

From the totality of the evidence the accused did not set out with an aim to kill and proceeded to kill the deceased. From evidence adduced it is crystal clear that the accused inflicted three blows with a knife on the deceased. The last blow was aimed on the chest and it had instant fatal consequences. The manner and nature of assault coupled with the weapon a bayonet knife speaks volumes to *mens rea*. The accused subjectively foresaw the possibility of his conduct of stabbing deceased causing death but was nonetheless reckless as to the outcome. That recklessness denotes intention. In the case of *S v Lloyd Mukukuzi and Another* HH 577/17 the court made pertinent remarks commenting on intention that:

“It is the reckless disregard of the risk associated with their conduct which provides necessary *mens rea* in the case of specific intent crime like murder.”

Given the realisation and recklessness of stabbing with a bayonet knife in the chest both the *actus reas* and *mens reas* have been proved beyond reasonable doubt. Legal intention in the circumstances of this case can easily be inferred from the manner of attacking, the body part attacked and the weapon used. See *S v Mema* HB 143/13. In this case the intense attack with a bayonet knife occasioning three stab wounds speaks volumes to the vicious nature of attack. Such an attack denoted the attacker had an intention to kill for it was foreseeable death will occur.

Accordingly the accused is found guilty of murder with constructive legal intention as defined in s 47 (1) (b) of the Criminal Law (Codification and Reform) Act.

### **Sentence**

In passing sentence we have considered all mitigatory and aggravatory factors submitted by Mr *Chikamhi* and Mr *Musarurwa* respectively. The accused is a first offender. Accused is a family man with responsibilities. The accused has been in custody for slightly over a year awaiting the finalisation of this matter. The anxiety and pain that goes with Pre-Trial incarceration will not be ignored in passing sentence. The fact that the offence was not premeditated is also mitigatory. Accused stands convicted with a charge of murder with constructive intention. Accused although he pleaded not guilty to the charge admitted having been involved in physical contact with the deceased right from the onset even in his warned and cautioned statement. The accused and deceased had spent the greater part of the day drinking. Although the accused knew what he was doing he had partaken alcohol. That is all that can be said in mitigation.

However the accused stands convicted of a heinous and prevalent offence. Murder with constructive intention is murder in this case worsened by use of a lethal weapon a bayonet knife. Accused indeed caused loss of precious human life in violation of the right to life, a God given and constitutionally guaranteed right. The manner in which the offence was committed aggravates the offence. The accused took exception to being restrained from subjecting his wife to inhuman and degrading treatment of physical domestic violence. Four people including deceased tried to stop him but he was unrelenting. The accused used a lethal weapon, a bayonet knife on a vulnerable part of the body, the chest and abdomen. The offence is deserving of a custodial term. The deceased lost life at a tender age to the detriment of his wife and child because of violence. Courts and society abhor use of violence to resolve whatever form of dispute.

In seeking to match the crime to the offender it is our considered view that a fairly long prison term is appropriate.

You are sentenced as follows:

20 years imprisonment.

*National Prosecuting Authority, State's legal practitioners  
Mvere, Chikamhi & Mareanadzo, accused's legal practitioners*