

THE STATE

Versus

MAXWELL NYATHI

And

ALBERT NDLOVU

IN THE HIGH COURT OF ZIMBABWE
MOYO J with Assessors Mr T E Ndlovu and Mr G Maphosa
HWANGE 5 OCTOBER 2022

Criminal Trial

B Tshabalala, for the state
U Nare, for the accused

MOYO J: The 2 accused persons are charged with murder in that it is alleged that on the 4th of September 2020 and at Stand No. 4 Mucklenuck village in Inyathi, the 2 accused persons unlawfully caused the death of Pilate Moyo by assaulting him with fists on the face, butt of a shotgun once on the forehead and a whip 3 times all over the body and thereby causing his death.

Accused 1 pleaded Not Guilty to murder but offered a limited plea to the lesser charge of culpable homicide. Accused 2 pleaded Not Guilty to murder but tendered a limited plea to assault.

The state counsel accepted the pleas and the parties drew a statement of agreed facts. It was tendered and it reads as follows:-

1. Accused 1 was aged 48 years at the time this offence was committed and he resides at Stand number 4 Mucklenuck Village Inyathi.
2. Accused 2 was 24 years of age at the time the offence was committed and he resides at stand number 3 Mucklenuck Village Inyathi.
3. The deceased was aged 47 years at the time he met his death and he used to reside at Rio De Ore Mine, Inyathi.

4. On the 4th of September 2020 and at around 1600 hours, the deceased was on duty and he was armed with a shot gun. He was in the company of colleagues Naison Siyamloba and Vincent Ndlovu.
5. Deceased left the mine premises and went in search of gold ore which was alleged to have been stolen at the mine.
6. Deceased's first port of call was accused one's homestead. The accused was not present at the homestead, but there was one Sincengani Ndlovu who is accused one's wife. A child was sent to go and call accused one from the dip tank where he was.
7. Accused one arrived at the homestead running and they exchanged harsh words with the deceased. Deceased slapped accused one on the face and then once on the face with a clenched fist. The two started to engage in a scuffle.
8. Accused one disarmed the deceased of his shot gun and assaulted him with the butt twice on the body and once on the head causing the deceased to fall to the ground.
9. Accused two who had arrived at the scene in a scotch cart with one Mandlenkosi Muzanango disembarked from the scotch cart and went onto assault the deceased three times on the body with a whip and thereafter returned to the scotch cart.
10. Vincent Ndlovu and Naison Siyamloba who had received communication from deceased arrived at the scene whereupon they found the deceased squatting on the ground in front of accused one's gate. Deceased was bleeding from the forehead. Accused one was still holding the shot gun.
11. The gun was retrieved from accused one. A search was conducted in accused one's house leading to the recovery of the stolen sack of gold ore.
12. Accused one pleads not guilty to murder but plead guilty to culpable homicide in that he negligently caused the death of the deceased.

13. Accused 2 pleads not guilty to murder but guilty to assault in that he assaulted the deceased intending to cause bodily harm or realizing that there is a real risk or possibility that bodily harm may result.

The post-mortem report was also tendered and it gives the cause of death as:-

- 1) encephalic contusion
- 2) head trauma

From the evidence before this court the 2 accused persons are dealt with as follows:-

Accused 1

The evidence tendered before this court only supports a verdict on the competent charge of culpable homicide as pleaded.

Accused 2

The evidence tendered only supports a verdict of assault as pleaded.

Accordingly both accused persons are found Not Guilty and are acquitted on the murder charge.

Accused 1 is however convicted on the lesser charge of culpable homicide.

Accused 2 is convicted on the lesser charge of assault.

Sentence

Accused 1

The accused is convicted of culpable homicide. He is a 1st offender and a family man. He pleaded guilty and therefore saved the court's time. He showed remorse. However, loss of life through violence is frowned upon by these courts. Despite the deceased having been the aggressor, these courts do not encourage retaliation and therefore that a deceased committed violence first does not reduce deceased's life to one that could be taken through violence. All life is sacred and where it is lost violently, it remains mitigatory that deceased was the aggressor but it does not go to the extent of trivialising the sanctity of life lest society misunderstands these courts. Appropriate sentences should be given, showing the value of

life and also balancing the weighty mitigation in an accused's favour. In such instances a minimal custodial sentence is appropriate except where there are other additional mitigatory features that would warrant a custodial sentence excessive.

This court would thus settle for a custodial sentence.

It is for these reasons that accused 1 shall be sentenced as follows:-

The accused is sentenced to 3 years imprisonment with 1 year imprisonment suspended for 5 years on condition accused is not within that period convicted of an offence involving violence, whereupon conviction, he shall be sentenced to imprisonment without the option of a fine.

Accused 2

Accused 2 is convicted of assault. He just whipped the deceased 3 times on the body. He certainly did not inflict any serious or life threatening injuries. He pleaded guilty. He is a 1st offender, is youthful and has shown remorse. He has also served 1 year 6 months in pre-trial incarceration which is in itself excessive for the offence with which he has been convicted. He thus cannot be given any other effective sentence. The best sentence for him will be a few months wholly suspended.

It is for these reasons that accused 2 shall be sentenced as follows:-

Accused shall be sentenced to 3 months imprisonment wholly suspended for 5 years on condition the accused shall not within that period, commit an offence involving violence whereupon conviction, he shall be sentenced to imprisonment without the option of a fine .

National Prosecuting Authority, state's legal practitioners
Maseko Law Chambers, accused's legal practitioners