

THE STATE

Versus

QONDANI NGWENYA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa
HWANGE 29 JUNE 2023

Criminal Trial

M Dube, for the state
Mrs J Change, for the accused

KABASA J: The accused is charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded not guilty to the charge but tendered a limited plea of guilty to the lesser charge of culpable homicide. The state accepted the limited plea.

The agreed facts are that the accused and the deceased were cousins. On 25 December 2021 the deceased was caught having sexual intercourse with the accused's wife and was made to pay damages when the matter was reported to the village head.

On 15 May 2022 the two met along a footpath and the deceased accused the accused of having made his life difficult in the community after reporting the adulterous affair. The deceased proceeded to assault the accused with a bamboo stick and choked him after he fell to the ground. The accused picked up a stone and hit the deceased on the head. The deceased then dragged the accused across a river and proceeded to strangle him. The accused picked up the bamboo stick the deceased had earlier on used to assault him and used it to assault the deceased on the head and all over the body. Fellow villagers heard screams and rushed to the scene. They tried to restrain the accused but failed. The assault on the deceased continued. The accused then left but before he did, picked up a stone and struck the deceased on the head.

The deceased succumbed to the injuries and the cause of death was traumatic shock as a result of an assault.

The accused was also examined by a doctor about a week later and found to have sustained bruises at the back and bite marks on the left little finger.

The broken pieces of the bamboo stick, the stones and the accused's medical report were produced and marked exhibit 2 – 4 respectively. The post-mortem was marked exhibit 1.

From these facts it was not in issue that the deceased met his death at the accused's hands. The assault perpetrated on him with the use of a bamboo stick and stones caused the injuries which took his life.

The facts however show that the deceased was the aggressor. He provoked the accused reminding him of the December incident and complaining that the accused had now made his life difficult in the community because he reported the matter.

One could say the deceased was the author of his own demise as it was his conduct which precipitated the assault.

Section 239 (1) (a) of the Criminal Law Code provides that provocation, when proved, reduces murder to culpable homicide. The circumstances of this case fall squarely into what is envisaged by section 239 (1) (a).

The sustained assault on the deceased and the circumstances under which such sustained assault occurred do not speak to self-defence.

Be that as it may however the provocation is a defence available to the accused.

The state's acceptance of the limited plea was therefore informed by a correct appreciation of the facts and the law.

In the result the accused is found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing an appropriate sentence we considered the fact that the accused is a 37 year old first offender who pleaded guilty. A plea of guilty shows remorse and contrition. It saves time by avoiding a protracted trial.

The accused is married with 2 minor children. He is the sole breadwinner for his family.

The deceased was his cousin and the death is likely to haunt the accused for a long time to come. He will also endure the stigma that comes with the label of murderer and members of the public's judgmental attitude will weigh heavily on the accused.

As already stated the deceased was the aggressor. The accused also sustained injuries but such are not comparable to the ones inflicted on the deceased.

In aggravation is the fact that a life was needlessly lost. Life is precious and a gift given to each one of us once. Once taken it cannot be regained. No one deserves to have their life cut short by another human being.

The use of the stones weighing 0, 48 and 0, 30 kg on the deceased's head speaks of a callousness which cannot be condoned.

The sentence must therefore fit the offence, the offender and be fair to society. (*S v Zinn* 1969 (2) SA 537).

The following sentence would therefore meet the justice of the case:-

4 years imprisonment of which 1 year is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

Effective:- 3 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mviringi and Associates, accused's legal practitioners