

THE STATE

Versus

JABULANI MTENGWA

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mrs C Baye and Mr E. Shumba
GWERU 24 AND 25 JANUARY 2024

Criminal Trial

M. Ndlovu, for the state
T. Kamwemba, for the accused

KABASA J: The accused appeared before us on a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23. He pleaded not guilty to the charge.

The state allegations are that the now deceased, Shanangurai Chomwisa and the accused were at Mwembe business centre on 3 June 2020. The two had an argument as they left the shops and the accused picked up a log with which he assaulted the now deceased on the chest and arms. The now deceased was then assisted home by her son who had been called to the scene by a by-stander. The following day she was taken to hospital where she was admitted and later succumbed to her injuries on 28 June 2020.

In his defence the accused denied having been at these shops on the day in question. He therefore denied assaulting the now deceased and explained that the witnesses who placed him at the scene were not telling the truth.

To prove its case the state produced the accused's confirmed warned and cautioned statement in which he said:-

"I do not admit to the charges levelled against me. I did not assault the now deceased."

The post-mortem report compiled by Doctor Juana Rodriguez Gregori was also produced. The cause of death was given as:-

- (a) hypovolemic shock
- (b) right haemothorax
- (c) thoracic contusion

The log allegedly used in the assault was also produced and it had the following measurements:-

Length	-	2, 25 m
Weight	-	2,006 kg
Circumference	-	16 cm at the widest part

The evidence of eight witnesses was admitted as it appeared in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07. These witnesses are:-

Atnos Madya

Gray Maravanyika

Nyasha A Makura

Khabo Meluleki

Angeline Watambwa

Neriate Mujoni

Welcome Dube and

Doctor Juana Rodriguez Gregori

Evidence was led from two witnesses, Remekedzo Hove and Tinomotenda Chomwise. Remekedzo's evidence was to the effect that she was in her house with her husband when she heard commotion outside. She heard the now deceased saying the accused had killed her, he had injured her and she was crying. She went out to investigate but did not get too close due to fear. She observed the now deceased lying down facing up and she was still crying repeating that accused had injured and killed her. The accused offered to carry her home but she refused preferring to wait for her son. The son later arrived and carried the now deceased on his back.

The witness's evidence was clear and straightforward. It was suggested to her that she was mistaken as to who the perpetrator was but she explained that she was not mistaken. Although visibility was not good she identified the accused's voice as he is a person she knew well.

The witness's testimony was materially corroborated by Tinomutenda who was the second witness and is the now deceased's son. Tinomutenda confirmed that Michael Shumba who the first witness said is her husband is the one who called him reporting the assault on his mother. When he got to the scene he found his mother lying on her back and the accused was holding a log. He identified exhibit 3 as the log the accused was holding. The first witness was also at the scene. His mother reported the assault and identified the perpetrator. She was crying complaining of pain in her ribs and hand. The accused charged towards him but stopped when one Chenjerai threatened to assault him. The accused subsequently left but returned announcing that there were people along the road he had taken. He however later left and the witness carried the now deceased on his back. Efforts to find transport to ferry her to hospital were in vain until the following day when she was ferried to Mnene hospital. She was never discharged and died on 28 June 2020.

Like the first witness this witness also gave his evidence well and without rancour. He was not shaken at all under cross-examination. The accused is his uncle and he has known him for a long time. They also attended the same school.

When it was suggested to him that he is lying against the accused as a way of settling old scores he laughed, the manner in which he responded was indicative of incredulity at the suggestion that he had once fought with accused over some money he had misappropriated.

We were impressed by the manner in which this witness gave his evidence and also the manner in which he fared under cross-examination. We got the distinct impression that he was merely relating what he knew to have happened and nothing more.

If the two witnesses were bent on fabricating against the accused, it would not have been difficult for them to tailor their evidence and place themselves at the scene at the time of the assault. Both of them candidly admitted that they did not witness the assault.

We were satisfied the court could safely rely on their evidence.

The accused on the other hand did not impress as a credible witness. This is why: - He sought to suggest that he did not know the first witness and had never seen her until her appearance in court and yet he confidently explained how Tinomutenda was related to the first witness. If he did not know this witness and had never met her, how did he know of her relationship to Tinomutenda? He even went on to say he only saw her name on the state papers, creating an impression that she is a total stranger to him.

The evidence showed that Tinomutenda, accused and Remekedzo stay in the same area. Tinomutenda and accused attended the same school. Remekedzo resides at the shops where this incident occurred and Tinomutenda arrived at these shops and found the accused there. How then could Remekedzo be a stranger to accused when evidence showed that the accused was not a stranger at these shops? Is he suggesting that his eyes were selective such that they would see everyone else at this business centre except Remekedzo? He even knew that Remekedzo's husband is related to Tinomutenda and yet wanted the court to accept that he only saw Remekedzo for the first time on the day she came to testify.

He might not have been arrested soon after the assault but the point is after his arrest he had an opportunity to give his side of the story. All he said was he did not assault the now deceased but never mentioned that he could not have because he was not even at that place on the day of the alleged assault.

He cannot be heard to say he did not mention that because he was not given that opportunity. He gave a warned and cautioned statement and had he raised that alibi at that time this Chenjerai who he would have the court believe he was with was still alive and the Police could have verified that alibi. Chenjerai died when accused was in custody following his arrest over the now deceased's murder. He said he did not mention the alibi in his statement because he knew the matter was going to be tried and so he would explain in court.

Why would a person choose not to give their side of the story when given the opportunity and choose to withhold important information for the reason that he would say it in court? It does not require a person to be schooled in law to appreciate that if they choose to answer to the allegations, such answer should state what their response is to the allegations. Where such allegations place you at a place where you know you were not and such evidence is crucial, why would anyone not just blurt that out and choose to keep it until trial? It makes no sense and points to the accused's lack of credibility.

Just observing him as he spoke and responded to questions gave one the impression that he was a person with little respect for the truth, who was also thinking of what to say with each question that was posed.

That said we are alive to the fact that none of the witnesses witnessed the assault. The evidence was therefore circumstantial.

WATERMEYER JA in *R v Blom* 1939 AD 188 at 202 – 203 enunciated the two cardinal rules of logic to be applied when dealing with circumstantial evidence.

- “1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

What are the proved facts *in casu*:-

The accused and Tinomotenda knew each other from childhood and attended the same school. On the day in question Tinomotenda was called to where his mother was and on arrival confirmed the message that had been relayed to him by Remekedzo’s husband. His mother was crying of pain on her ribs and hand and identified the accused who was at the scene as the perpetrator. Remekedzo had heard the now deceased crying out mentioning the same accused’s name and on investigating saw the accused or identified him by his voice at the scene. Tinomotenda interacted with the accused at the scene. The now deceased’s complaint of where she had been assaulted was confirmed by medical evidence.

Barely 3 days after the assault Nyasha Makura, a medical practitioner whose evidence was admitted in terms of section 314 of Criminal Procedure and Evidence Act attended to the now deceased at Mnene Mission Hospital and observed that she was breathing with difficulties and could not stand on her own. An X-ray revealed that she had fractured 4 ribs on the right side from the 5th to the 8th rib, had pneumothorax on the right side (collapsed lung) and a fractured right proximal third of ulnar.

These injuries were consistent with her complaints as she cried out which cries were heard by Remekedzo.

It could not have been a coincidence that she would cry out complaining of an assault and Remekedzo also heard sounds of such assault and medical evidence proved that the injuries she was complaining of were real not feigned.

The proved facts in our view can only call for the drawing of only one reasonable inference. Jabulani whose name the now deceased was calling out as the perpetrator and who was seen at the scene by Remekedzo and Tinomutenda was the one who inflicted these injuries which turned out to be fatal.

In saying so we did not lose sight of the issue of identification. *S v Nkomo* 1989 (3) ZLR 117, *R v Turnbull* 1976 3 ALL ER 549 make it clear that the recognition of someone you know already is usually more reliable than identification of a stranger. Accused was no stranger to Tinomutenda and Remekedzo.

S v Mutters & Anor S 66-89 and *S v Makoni & Ors* S 67-89 are authority for the proposition that even where the court is satisfied the witnesses were honest and truthful, it must still ask itself whether there is no danger of an honest but mistaken identification.

The circumstances of this case show that the identification was honest and not mistaken. Remekedzo's identification was through the voice but Tinomutenda's was visual, placing the accused at the scene in circumstances where the court must warn itself against allowing the exercise of caution to displace the exercise of common sense. The accused exhibited aggression towards Tinomutenda whose presence there was only to attend to his mother who had already been injured. That aggression was also evident when Remekedzo heard the sounds of an assault accompanied by the now deceased's distress call. It was the accused who was holding the log which proved to be the murder weapon.

It was suggested to us by defence counsel that the now deceased could have fallen. The question is what kind of fall could that be that would cause the kind of injuries observed by the medical practitioner?

Counsel also urged the court to be cognisant of the fact that all an accused need do is state their story, no matter how improbable it is the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false (*R v Difford* 1937 AD 370, *S v Kurauone* HH 961-15).

The accused's story is not taken in isolation. The evidence before the court must be considered in its totality. When that is done the accused's story was shown to be not only improbable but beyond doubt false.

He would have the court accept that some two or so years ago he assaulted the now deceased's son over some money and when the now deceased was assaulted 2 years later the son decided that now was the opportune time to get back at him and falsely implicate him. In other words the perpetrator was known but a plan was hatched to lie against the accused in order to settle an old score.

If one were to believe such they can believe anything.

The accused used a log of the dimensions already stated and flogged a 60 year old woman using severe force which resulted in fractured ribs and arm and resultantly a collapsed lung. He has not taken us into his confidence for us to appreciate why he perpetrated such a vicious assault on a 60 year old woman.

He may not have desired death and set out to cause it (*S v Mugwanda* 2002 (1) ZLR 547 (S), *S v Tomasi* HH 217-16 but he must have realised that there was a real risk or possibility that his conduct may cause death but continued to engage in such conduct inflicting mortal injuries on the deceased.

It matters not whether he had actual or constructive intent, whatever intent it is the killing in such circumstances is murder. (*S v Mapfoche* S 84-21).

The state has therefore proved its case beyond a reasonable doubt and the accused is accordingly found guilty as charged.

Sentence

In assessing sentence we considered the following:-

You are a 39 year old first offender. You have two minor children aged 10 and 5 who look up to you for support.

You have been in pre-trial incarceration for 2 years 7 months. That is a relatively long period for one to await trial. The anxiety over such a period cannot be underestimated.

This is all in your favour. In aggravation we considered that:-

The deceased was a 60 year old woman. She was an elderly woman deserving of respect and not abuse. At 37 you were almost half her age. You ought to have respected her as a mother figure. She can be described as a vulnerable person in the circumstances.

You showed no remorse throughout the trial. It was as if the deceased's death was of no consequence. The deceased's son had to go through the pain of reliving the incident and your insensitive attitude did not make it any better for him.

You used a log whose measurements attest to the severity of the injuries suffered by the deceased. It was a brutal assault which saw the deceased fracturing 4 ribs and an arm. Her lung also collapsed explaining why she was breathing with difficulty. She must have been in excruciating pain as she hung on to life until she finally succumbed to her injuries.

The courts have time without number implored society to respect the sanctity of life. The supreme law of the land states that every person has a right to life. No one should end another's life especially with such brutality on a defenceless 60 year old woman. You did not offer or pay compensation which would have been indicative of remorse and regret.

The aggravating factors outweigh the mitigatory ones. A sentence of 20 years would have been appropriate but for the fact that you have spent 2 years 7 months in pre-trial incarceration.

You are accordingly sentenced to:-

18 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Tavenhave – Machingauta, accused's legal practitioners