

THE STATE

Versus

MUSAWENKOSI MOYO

And

MAYIBONGWEINKOSI MOYO

And

NKOSILATHI NCUBE

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr. P Damba and Mr. M Ndlovu
BULAWAYO 16 MAY 2023

Criminal Trial

T. Muduma, for the state
T. Dube, for all 3 accused

KABASA J: The 3 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. They all tendered pleas of not guilty to murder but guilty to culpable homicide. The state accepted the limited pleas in respect of all 3 accused.

With that acceptance, a statement of Agreed Facts was produced and marked Annexure A. The facts are to the effect that on 5th June 2020 at around 0300 hours the deceased forced entry into the 1st accused's room where she was sleeping with her daughter-in-law. He went on to jump onto the bed whereupon 1st accused screamed alerting accused 2 and 3. The deceased fled but accused 2 and 3 gave chase and apprehended him. The 2 then got hold of him whilst accused 1 assaulted him several times on the knees and hands using a knobkerrie. This rendered the deceased immobile. The 1st accused then instructed accused 2 and 3 to take the deceased outside her bedroom which they did and left him outside the bedroom hut under a tree.

The deceased's father was then called to come and fetch the deceased. The father took him home using a wheelbarrow. The deceased passed on on 6th June 2020.

Doctor Thabo Sithole subsequently examined the deceased's remains and observed that he had a 3 cm x 2 cm right forefoot wound, superficial swollen left knee, swollen right and left forearms, bruises on the left hand and abrasions. The doctor concluded that the cause of death was hypothermia as there was no evidence showing that the trauma as a result of the assault was the cause of death.

The post-mortem was produced and marked exhibit 1.

From the foregoing there is no doubt that the deceased was alive in the early hours of 6th June 2020 and that as a result of the assault perpetrated on him by accused 1 with the aid of accused 2 and 3 he was immobilised and carried out of accused 1's bedroom. He died due to exposure to the ravages of cold weather.

There is also no doubt that but for the assault he would have been able to walk home in much the same way that he had earlier on fled before accused 2 and 3 gave chase and brought him back.

The facts clearly show that the deceased was no longer a threat to accused 1 at the time he was assaulted. He would have made good his escape had accused 2 and 3 not pursued him.

It was therefore due to the assault which rendered him immobile exposing him to cold weather which led to his death.

The nexus was therefore established between the accused's conduct and the resultant death.

The assault and the exposure of the deceased to the cold weather was meant to be punishment for what he had done and not dictated by a need to defend the person of accused 1.

The circumstances however show that the 3 accused did not set out to kill the deceased nor did they realise the real risk or possibility that their conduct may cause death but continued despite that risk or possibility. They were however negligent in causing the deceased's death.

We were therefore satisfied that the state's acceptance of the limited plea was indicative of an appreciation of the facts and the law.

The 3 accused are accordingly found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing an appropriate sentence we considered all that was said in mitigation. Accused 1 is a female first offender who was aged 47 at the time and is now 50 years old. Accused 2 was 26 at the time and is now 29. He is married with 2 minor children aged 10 and 8. Accused 3 was 23 and is now 26 years old. He too is married with a 2 ½ year old baby. Accused 1 has 3 children who are now all majors. One of the children lives with a disability and relies on the accused as he requires constant attention.

All 3 are now unable to return to the village due to the tension and hostility from the deceased's relatives.

Accused 1 assisted with funeral expenses she paid US\$500 towards funeral expenses and provided mealie-meal.

Whilst their conduct resulted in the loss of life, the circumstances show that whatever deceased's intentions were they cannot be regarded as having been noble but sinister. He forced his way into a bedroom hut where 2 females were sleeping and proceeded to jump onto their bed at the ungodly hour of 0300 hours.

The 3 accused's conduct must therefore be looked at in light of these circumstances.

All 3 have waited for 3 years for the matter to be finalised. Their anxiety over this period cannot be over-emphasized. Taking the life of another can never be easy and will undoubtedly weigh heavily on all 3's conscience. It will not be an exaggeration to say the imprisonment of the mind they are likely to endure outweighs the imprisonment which comes with the 4 corners of a prison cell.

Their pleas of guilty, albeit to a lesser charge shows contrition.

All 3 are family people whose incarceration is likely to impact heavily on their respective families, especially accused 2 and 3 whose families are still very young.

Aggravating is the fact that a life was lost. Courts have time without number exhorted society to respect the sanctity of life. Life is a gift which is given once and when taken away cannot be recovered. No one has a right to take another's life except in those exceptional circumstances recognised at law.

The deceased's family has lost a loved one in tragic circumstances and their pain at such a loss cannot be over emphasized.

People must learn not to take the law into their own hands. The 3 accused had identified the deceased and could have caused his arrest but chose to punish him as they deemed fit.

That said however there is need to mete out a sentence that fits the offenders, the offence, is fair to society and also cognisant of the loss occasioned by the deceased's death.

We were referred to the case of *S v Bhunu* HMT 5-2021 where a woman piqued by insults hurled at her by the deceased assaulted him leading to his death. A sentence of 3 months which was wholly suspended for 5 years was considered appropriate.

Whilst sentences for culpable homicide range from 6 years or more with part suspended, the important consideration is the particular circumstances of each case.

The cases of *S v Ncube* HMA 12-18 where 6 years with 2 years suspended for 5 years on condition of good behaviour and *S v Ndlovu* HB 243-20 where 4 years with 2 years suspended for 5 years are indicative of the general line of sentencing in culpable homicide cases. In these 2 cases however there was some provocation, in the former the accused assaulted an intruder he found in his daughter's bedroom who turned out to be her boyfriend and in the latter the accused assaulted the deceased who persistently followed him even to the gate of the accused's house when the 2's earlier fight had been thwarted by those they were gambling with.

Whilst in both cases the deceased were not blameless and could be said to have been the authors of their demise, the effective terms of imprisonment were justified due to the nature of the assault and the weapons used.

In casu the circumstances do not warrant an effective term of imprisonment, more so as the cause of death was not directly linked to the assault but the exposure to cold as a result of an assault which hindered movement leaving the deceased at the mercy of the cold weather.

This and the deceased's conduct which was in itself reprehensible informed our decision not to send the 3 accused to prison. This is not to be taken as condoning their actions but merely ensuring the sentence fits the offence, offenders and is fair to society.

We are therefore persuaded to follow the sentencing as imposed by MWAYERA J (as she then was) in *S v Bhunu* (supra). However 3 months would not in our view be appropriate given that the deceased was pursued when he had tried to flee.

For these reasons the appropriate sentence would be:-

Each accused:- 1 year imprisonment the whole of which is suspended for 5 years on condition the accused does not within that period commit any offence of which an assault or violence on the person of another is an element and for which upon conviction she/he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Ncube and Partners, accused's legal practitioners