

THE STATE

Versus

CALISTO MAZAMBA

And

CHENJERAI MUDENDA

And

TITUA DONKOLA

And

TARISAI MUDENDA

IN THE HIGH COURT OF ZIMBABWE

MOYO J with Assessors Mr T. E. Ndlovu & Mr G. Maphosa

HWANGE 10 & 11 OCTOBER 2022

Criminal Trial

B. Tshabalala for the state

Ms C. Manyeza for the accuse

MOYO J: The 4 accused persons face a charge of murder, it being alleged that on the 3rd of October 2021 and at Siiachilaba Business Centre, one or more of them unlawfully caused the death of Miccah Mudenda by assaulting him on the head with a stone and thereby causing his death. The accused persons pleaded not guilty.

The following were tendered into the court record;

- (a) State summary
- (b) Defence outlines
- (c) Post mortem report
- (d) Accused's confirmed warned and cautioned statements

3 witnesses gave evidence for the state that is Twabona Sunfay, Bright Mwinde and Millot Mudimba. The accused persons gave evidence for the defence.

The evidence of Sergeant Kache and Dr S. Pesanai was admitted into the court record as it appears in the state summary. The facts of this matter are fairly straight forward. The 4 accused persons visited the business centre on the fateful day to drink beer. They had with them a younger man called Vusa. Vusa separated from them as they drank beer since he did not drink beer. Later Vusa was assaulted causing the accused persons to intervene. A fight broke out and stones ended up being thrown in the confusion that followed.

The 3 state witnesses have told the court that it is the accused persons who threw stones at people. The accused persons say it is not them but the state witnesses particularly Bright Mwinde. This court has to resolve this factual dispute before coming to a conclusion on what could have transpired on the day in question.

The 1st state witness, Twabona Sunday, told the court that he heard some noise in the front of the shops, went and found accused 3 assaulting Twalumba. He used his hands but his co-accused used stones. He was also hit by a stone on the abdomen. He ran away to where Bright Mwinde was. The accused persons followed him and accused 3 stopped him. They all beat him until Bright Mwinde intervened. Bright told them to get out of his shop. They then threw stones at Bright Mwinde and this witness, he then ran away. He saw them chasing Bright Mwinde and throwing stones at him. He does not know what happened behind the shops where Bright Mwinde went to and where deceased was hit. This witness we found credible in that he told his account very well and he did not strike the court as someone who wanted to incriminate the 4 accused persons at all costs.

A question was put to him during cross-examination;

“Q - It was Bright Mudenda who struck deceased intending to strike accused 3.

A - I do not know about that because behind when deceased lost his life I was not there.

If the witness was bent on telling lies and protecting Bright Mwinde as suggested in his cross-examination, he could have disputed this fact, but he was fair enough to say he was not there. He must have told the court the truth in his testimony. Bright Mwinde says Twabona the 1st state witness came to his stand and the accused persons followed and asked him why he beat the young man and he said he beat him because he did not answer properly. Accused 3

then hit him with an open hand. Twabona stated that he did not know why they hit him. It is not clear what Twabona's role was in the assault of the young man but the accused persons themselves also do not state that it was Twabona who beat the young man but Twalumba so this court will take it that Bright Mwinde was mistaken in this regard as already it was Twalumba who assaulted accused young man. This fact is however not material though to the dispute at hand. Lack of clarity on it would not cause the court to fail to resolve the rest of the material issues. However, at Bright's flea market he then intervened trying to stop the accused persons from hitting Twabona. They started assaulting him and Twabona then ran away. They started throwing stones at him and he ran behind the grinding mill. The deceased followed and tried to restrain them. Accused then turned and started throwing stones at him. He then ran away. He turned back after he heard people saying they have killed him. When he turned back he could see the 4 accused persons running away. Bright Mwinde also gave his evidence well.

Millot Mudimba told the court that a noise started at the shops where he was watching soccer on television. He then walked towards the grinding mill, he says deceased was in front of him. That there were 4 people throwing stones at him. When behind the toilet he tried to dodge a stone thrown at him but it hit him and he fell to the ground. He told the court that the 4 accused persons threw stones but that he did not know who exactly threw the stone that hit the deceased. He said the 4 accused persons ran away after hitting the deceased. He saw Bright Mwinde and he told the court that Bright Mwinde, never threw stones, in fact he saw him running away fleeing from the accused persons. He said under cross-examination that he was about 20 metres from him. He said he was never hit by a stone as he ducked them. The evidence of Milliot Mudimba was straight forward and he struck the court as a reliable witness. He in fact corroborated Bright's testimony.

Accused 1, 2 and 4's versions is that they went to the shops then their young man Vusa was assaulted by Twalumba. They then decided to approach Twalumba and ask him. Twalumba the grabbed accused 3 (the one who had asked him about assaulting the young man). All Twalumba's friends at the shops ganged up against the accused persons. They then started beating the accused persons throwing stones at them. He said the accused persons were outnumbered and they ran away. He said accused 3 was surrounded by a mob and that he never fought Twabona. Accused 3's version is that when he was surrounded, his co-accused fled and he then ducked a stone thrown by Bright Mwinde and that, it is that stone that then hit the

deceased. On further clarification he said he was held by a number of people with his hands to his back, these people stood behind and around him. Bright Mwinde was at a distance, he then threw a brick trying to hit accused 3, accused 3 ducked and fell to the ground, resulting in the same hitting the deceased. He said it was Bright Mwinde who threw a stone and hit the deceased. However, under cross-examination he said he did not see the deceased being struck with a stone but it was the only stone that was thrown at the scene.

This court upholds the cardinal principle in criminal cases that an accused's version should not be dismissed simply because he is an accused, however, an accused's version must still be subjected to a logical analysis and be found to be either reasonably possible true or not. The court finds problems with accused 3's version as follows:

He says he was held by people, many of them. Bright Mwinde who was at a short distance, in front of him then threw a brick intending to strike him whilst he was held by other people. This defies logic in that accused 3 was surrounded, being held by people a lot of them per his own testimony how then would Bright Mwinde throw a brick at accused who was being held and surrounded by Bright Mwinde's friends. Obviously the stone might have hit those who held him. This court finds a problem with this version in this respect. Again, accused 3 first said Bright Mwinde's stone was the only one that was thrown at the scene that is why he says it is the one that struck the deceased.

He later under cross-examination told the court that Twalumba had also thrown 2 stones before that. His version is that only 3 stones were thrown on the day in question. This is not the picture painted by accused 1 who said people threw stones at them. He was asked who threw stones and kicked accused 3 and he said many people did that. So it is not correct that only 2 people, Twabona and Bright Mwinde threw 3 stones, even if one were to go by the versions as given by the defence. The other problem is that accused 3, gave an adamant story that Bright Mwinde threw the stone that struck the deceased and yet he did not even see the deceased himself being struck. From his own evidence deceased was not in his view, so clearly he does not know which stone struck deceased but he however by all means attributes it to Bright Mwinde. Accused 3's version is thus not credible, this court rejects it for the above reasons and finds that it is not in the circumstances reasonably possibly true. In fact this court finds that accused 3 did not tell the truth.

It is for these reasons that this court finds that accused 3 threw stones on the day in question as seen by the state witnesses and that in the company of his co-accused they threw stones acting in common purpose and that it is one of the stones that hit the deceased on the day in question. The accused persons, after their young man was assaulted, then behaved in a rowdy manner attacking everyone who tried to intervene and stop them that is clearly what transpired on the day in question

Verdict

This court cannot find that the accused persons had the intention to kill the deceased in the circumstances. The accused persons behaved carelessly, wantonly throwing stones all over a business centre where there were people. A single stone struck the deceased resulting in him sustaining fatal injuries. The only logical conclusion in the circumstances is that what the accused persons may not have harboured an intention to kill someone on the day in question, they were negligent.

It is for these reasons that the accused persons will be acquitted on the charge of murder, but will be convicted on the lesser charge of culpable homicide.

Sentence

The 4 accused persons are convicted of culpable homicide. They are all first offenders. They are all youthful. They spent about 4 months in remand prison. They got carried away when their young brother was assaulted. They however, became rowdy and took it too far. These courts frown at the loss of life through violence. Beer drinks and places of leisure must not be turned into places of slaughter wherein even the slightest misunderstanding results in a loss of life. The circumstances of this case are such that an effective sentence of at least 4 years imprisonment should meet the justice of the case, particularly due to the fact that these accused are convicted of culpable homicide and they are also youthful 1st offenders. It is for these reasons that they shall be sentenced as follows:

Each accused is sentenced to 6 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition each accused person, is not within that period convicted of an offence involving violence whereupon conviction each shall be sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mhaka Attorneys, accused persons' legal practitioners