

**THE STATE**

**Versus**

**CLIFFORD SIBANGUMUZI PHIRI**

IN THE HIGH COURT OF ZIMBABWE  
KABASA J with Assessors Mr P.M. Damba and Mr O. Dewa  
BULAWAYO 12 AND 13 JANUARY 2023

**Criminal Trial**

*Ms C. Mabhena*, for the state  
*Ms M.N Sibanda*, for the accused

**KABASA J:** The accused appeared before us facing a murder charge to which he pleaded not guilty.

The state alleges that on 29 August 2021 the accused was at Redbank shops in the company of one Gibson Ngwenya. The two left the shops after the accused failed to locate his wife, the now deceased. They boarded a truck which was being driven by one Collen Nkomazana and the now deceased was aboard that truck. This did not augur well with the accused who proceeded to assault the now deceased. The truck driver ordered them to disembark which they did and walked home. The two passed by Gibson Ngwenya's home, who had gone ahead of them as he did not disembark from the truck when the two were ordered to alight. The accused shouted at the deceased and assaulted her at Gibson's home before Gibson ordered them to leave his home. This was the last time the deceased was seen alive. Her body was later retrieved from a disused well on 9<sup>th</sup> September 2021.

A post-mortem conducted by Dr Juana Rodriguez Gregori on 13<sup>th</sup> September 2021 gave the cause of death as:-

1. encephalic contusion
2. cranial trauma
3. assault

In his defence the accused admitted assaulting the deceased on the day in question, that is 29<sup>th</sup> August 2021 but explained that the nature of the assault could not have resulted in her death. The now deceased's grandmother was the last person to see the deceased alive and someone could have killed the deceased and decided to frame him for the murder.

To prove its case the state led evidence from 2 witnesses and the evidence of 8 witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

The evidence so admitted established the following:-

1. The now deceased was alive and well on 29<sup>th</sup> August 2021 when she left home.
2. The now deceased was later offered a lift in Nkomazana's truck at around 1400 hours that same day.
3. The accused and Gibson Ngwenya boarded the same truck at Redbank shops and the accused proceeded to assault the now deceased wanting to know where she had been.
4. Nkomazana decided to leave the two behind and as he stopped his motor vehicle he saw the accused assaulting the deceased using a plastic bag which had eggs and as he drove off he saw the accused assaulting one of the boys who had been in deceased's company.
5. Gibson Ngwenya arrived at his home first as he was not asked to disembark from the truck. The accused and the now deceased later passed by Gibson's home and the accused was shouting obscenities at the now deceased who he again assaulted before the two were ordered to leave Gibson's home.
6. At around 2000 hours of the same day the accused went to the now deceased's aunt's home inquiring about a man he accused of relaying messages between the now deceased and truck drivers.
7. The following day, 30 August 2021 around 0530 hours the accused went back to the now deceased's aunt's home, bought airtime and inquired from her whether she had seen the now deceased. Later that day the accused called this

aunt asking her to check for the deceased at her boyfriend's home in Cowdray Park before breaking down lamenting that he used to love his wife.

8. Efforts to locate the now deceased came to naught until early September 2021 when a foul smell was detected emanating from a disused well. The body of the deceased was later retrieved and a post-mortem conducted thereafter gave the cause of death as head trauma emanating from an assault.

The question is who caused the deceased's death? Who inflicted the injuries from which the deceased died?

Besides the evidence admitted in terms of section 314 of the Criminal Procedure Evidence Act, the now deceased's grandmother and uncle testified. The gist of the grandmother's evidence was that the now deceased left home around 11 a.m. going to Redbank shops. She did not see her again until her body was retrieved from a disused well which is about 20 m from their homestead.

On the night of the 29<sup>th</sup> August 2012, a date she could not recall but which was not in dispute, the accused had knocked at her bedroom and when he entered she asked him where the now deceased was. He responded that she was in the kitchen preparing their bedding as that is where they used to sleep. The accused then stood there for a long time before he then left going to the witness's niece's house. The following morning the search for the deceased began in earnest until she was advised to report to the Police.

This witness's evidence was straightforward and to the point. We got the distinct impression that she was only relating that which she could honestly recall about the events leading to the discovery of the now deceased's body.

Had she been bent on embellishing her evidence she could easily have added that she heard the accused assaulting the deceased on the night in question. It was therefore clear that she only limited herself to what she knew and nothing else.

Her evidence did not show who killed the deceased as no one witnessed the murder.

The second witness is the one who went with the accused to the shops where the accused wanted to buy beer and also look for his wife. This witness's evidence established that the accused was angry when he saw his wife aboard the truck which they boarded at the shops. He assaulted her prompting the truck driver to drop them off.

Later on the accused's anger had not subsided as he was hurling insults at the now deceased and again assaulted her at this witness's home before he ordered them to leave. He later explained that he too was scared as the accused was threatening to destroy the witness's kitchen.

The evidence therefore showed how aggressive the accused was, so aggressive that the witness was unable to calm him down.

This witness also gave his evidence well and appeared to show genuine surprise when under cross-examination it was suggested that he had told the accused that the now deceased was being unfaithful with a truck driver who drove a blue truck which that driver used to ferry sand.

The witness did not seek to exaggerate the extent of the assault he witnessed and candidly stated that the now deceased had no visible injuries when she left his home and was walking on her own.

What this evidence showed therefore is that the now deceased was well and she was last seen alive in the company of the accused who was abusing her physically and verbally.

It is important to note that the now deceased's grandmother did not see the now deceased when she came back from where she had been. The evidence showed that when she came back she was now in the company of the accused who was angry with her for having gone to the shops ostensibly to buy sugar and cooking oil when the accused had told her he would bring these items on his way from work.

Equally important to note is the fact that the accused told the now deceased's grandmother that the now deceased was in the kitchen preparing their bedding. If that was so why would he have thereafter gone to the deceased's aunt and inquire about the deceased's whereabouts? Is this not indicative of a cunning mind and the start of an orchestrated plan to cover his tracks?

If the deceased was not with him at the time the grandmother asked for her whereabouts one would have expected the accused to have gone to this grandmother's bedroom looking for the deceased. Why did he say she was in the kitchen and without even going back to that kitchen proceed to the aunt's home to ask about the deceased's whereabouts?

We got the distinct impression that the accused already knew what had happened to the deceased and that is why he took time just standing in the deceased's grandmother's bedroom after telling her the deceased was in the kitchen. Why was he knocking at this elderly woman's bedroom instead of staying in the kitchen until the deceased was done with preparing their bedding? Isn't it that people prepare bedding in preparation to retire for the night, more so as this was a kitchen and so preparation of bedding in there signified the end of that day and non-use of the kitchen until the following day.

It is also interesting to note that the accused bought airtime from this aunt and repeatedly called her asking whether the deceased had returned. There was no evidence to show that the now deceased stayed with this aunt. Why was he calling this aunt instead of working with the now deceased's grandmother to whom he had earlier said the deceased was in the kitchen?

It was only under cross-examination that he lamely said he assisted in looking for the deceased without elaborating on how he so assisted. If he was so concerned about the now deceased's whereabouts because he genuinely did not know where she was, would he have gone to work on the following day and not bother report to the Police, leaving the grandmother to do so? He said on 29 August 2021 he came back home earlier than anticipated because he had run out of cement and on the following day there still was no cement. So why go to work instead of concentrating on solving the mystery surrounding his wife's disappearance?

We found it very telling that on 30<sup>th</sup> August 2021 in the morning, hardly 24 hours after the disappearance of his wife he called the deceased's aunt sobbing and said "but I used to love my wife Margret Ndlovu." Why use the past tense? Why not just say he loves his wife. Was the use of the past tense not indicative of the fact that he knew she was no more?

We pose these rhetoric questions just to show how improbable the accused's story is. Granted there was no direct evidence to prove who murdered or caused the deceased's death but is the circumstantial evidence wanting in showing who was responsible? We think not.

We considered the circumstantial evidence in light of all the circumstances as already highlighted.

In looking at circumstantial evidence we were alive to the 2 cardinal rules of logic enunciated by WATERMEYER JA in *R v Blom* 1932 AD 202:-

- “1. The inference sought to be drawn must be consistent will 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.” (See also *S v Kazangarare* HB 9-16)

The accused would have us subscribe to the suggestion or possibility that the deceased who he had left with her grandmother went away to meet a boyfriend and that boyfriend killed her and brought her back to their home, dumping her body in a disused well.

True the accused need not convince the court as to the truthfulness of his story, whatever explanation he gives, no matter how improbable it may be, 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) but the court must look at that story in light of the evidence as a whole.

We must say the accused’s story does not make much sense. He says that person must have taken advantage of the fact that he (accused) had assaulted the deceased earlier and so killed the deceased and decided to frame the accused. Who is this boyfriend who was aware of the assault and why would that boyfriend kill the deceased? Is it being suggested that the blue truck driver who had earlier on ordered them to disembark from his truck made a U-turn and went to the now deceased’s home? Given the time lines given by the grandmother and the aunt, when is the deceased supposed to have sneaked out to go to this boyfriend. The fact that her body was found in an advanced state of decomposition speaks to her having been in that disused well for some time. So is it being suggested that she was killed by this mysterious boyfriend on the night of the 29<sup>th</sup> August 2021 and thrown in the well that same night. Not only is this story far-fetched but there is absolutely nothing upon which to make such suggestions.

The encephalic contusion speaks to trauma to the head and so is cranial trauma which is also indicative of a blow to the head. Whether such injuries were sustained at the time the deceased was thrown into the well i.e. when the deceased was still alive or whether the injuries were inflicted before the body was then thrown into the well is something that this court will not have an answer to. That however does not change the fact that the injuries were inflicted by the person who caused the deceased’s death and the proven facts point to no one else but the accused.

We find no other reasonable inference which can be drawn from the facts as articulated in this judgment except the only one reasonable inference linking the deceased's death to the accused.

The accused appeared to be thinking on his feet as he testified, giving this elaborate story about his wife's cheating which the second witness had also told him about. There was no mention of such in his defence outline and it was almost a marvel to listen to him waxing lyrical about the deceased's grandmother encouraging the deceased to be unfaithful and the second witness giving him details of how unfaithful the deceased was. We were not left in any doubt that he was just making up a story in order to cast aspersions on the deceased and possibly justifying his conduct.

Even if it were to be accepted that he was provoked by his wife's decision to go the shops and his finding her in the truck in question, such provocation is not a defence neither does it avail him as a partial defence to the charge of murder. (S 238 and s 239 of the Criminal Law Code)

By deciding to be very economical with the truth the accused has not shown any possible defence to the crime of murder. The blows to the head with such force as to cause the death of the deceased shows an intention to kill or a realisation that such conduct may cause death but he continued despite the risk and possibility. His conduct stemmed from an obsessive jealousy and his story was merely the ranting of an obsessively jealous husband.

As per MAKARAU JA (as she then was) in *Tafadzwa Watson Mapfoche v State* SC 84-21 the distinction between a conviction of murder with constructive intent, which under the common law greatly influences the court in assessing sentence is no longer as significant or material as it was.

It is therefore not necessary to specify that the accused has been convicted of murder under section 47 (1) (a) or (b). Whether 47 (1) (a) or (b) the fact is the conviction is of murder.

That said, we are satisfied the state has proved its case beyond a reasonable doubt and accordingly find the accused guilty of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act, Chapter 9:23.

### **Sentence**

In assessing sentence the court considered the following:-

You are a 42 year old first offender. You are a father to 5 minor children and the sole breadwinner. You also look after your 83 year old father.

You have been in custody since September 2021. You must have had some measure of anxiety which in itself is some form of punishment.

Aggravating is the fact that a young woman of 20 lost her life. The courts have time without number emphasized the need for society to respect the sanctity of life. Life is a gift which is given once to each and every one of us and once taken away cannot be replaced.

You were almost twice the age of the deceased and you ought to have played a protective role as her husband.

Gender based violence is a cancer that refuses to go away. A home must be a place of peace, security and safety and not a place of violence. Sadly the majority of homes are turned into battle fields where spouses abuse each other and even causing death as happened here.

The courts must therefore send out a clear message that violence will not be tolerated and the killing of a spouse will be visited with exemplary sentences.

That said however the court must never adopt a vengeful attitude but must be rational in its approach to sentence (*S v Ndlovu* HB 46-96)

The sentence must fit the crime, you the offender and be fair to society.

You are accordingly sentenced to:-

18 years imprisonment.