

THE STATE

Versus

FORTUNE MTHANDENI MOYO

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa
HWANGE 29 AND 30 JUNE 2023

Criminal Trial

Ms M Munsaka, for the state
Ms C Manyeza, 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, to which he pleaded not guilty.

The state alleges that on 11 February 2022 the deceased was at Somhlanga shops in Lupane when the accused arrived. The accused proceeded to shout at the deceased accusing him of having impregnated his mother and thereafter neglecting her. The accused thereafter took a brick, an iron bar and a knife and used these weapons to assault the deceased. He threatened to cut off his testicles as he considered them as the offending parts that had caused problems for his aunt.

The deceased, who was 67 sustained injuries from which he died.

In his defence the accused did not deny assaulting the deceased but explained that the deceased slapped him with an open hand first and he retaliated using a cement brick, iron rod and a knife. He however had no intention to kill the deceased as he acted in the heat of the moment.

To prove its case the state produced the following exhibits, all were produced by consent:-

- a) A confirmed warned and cautioned statement
- b) A post-mortem report

- c) An iron bar
- d) An okapi knife
- e) A brick

The iron bar had the following dimensions:-

98 cm in length

4 cm in circumference

0,505 kg in weight

The okapi knife's dimensions were:-

13 cm the length of the handle

2 cm the width of the handle

10 cm the length of the blade

2 cm the blade width at the wide end

3 mm the blade width at the tip

50 grams the weight of the knife

The cement brick had the following dimensions:-

23 cm in length

12 cm in width

10 cm in height

5,050 kg in weight

The statements of 2 witnesses was admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

These two witnesses were the police officer who attended the scene and the pathologist who compiled the post-mortem report. Their evidence established the fact that the weapons used in the assault were recovered as a result of indications made by witnesses.

The pathologist who examined the deceased's body observed the following marks of violence:-

Wound of 1 cm in length in both superior part of eyebrow

Excoriations in left arm and frontal region

The cause of death was subdural hematoma, cranial trauma as a result of an assault.

The only issue was whether the accused intended to bring about the deceased's death or realised that there was a real risk or possibility that his conduct may cause the deceased's death but continued to engage in that conduct despite the risk or possibility.

Two witnesses testified for the state. Patience Dube's evidence was briefly that she was at the shops when she heard noise, this noise was from the now deceased who was crying out asking the accused why he was killing him. When the witness got to where the two were she found the accused on top of the deceased armed with a brick, took a knife and ordered the witness to leave as he wanted to kill the deceased. He then pulled the deceased to a storeroom and proceeded to repeatedly assault him with open hands and clenched fists. He then stabbed him with the knife just above the eye. When the deceased asked him why he was killing him the accused kicked him with booted feet at which point the deceased fell to the ground motionless. The accused proceeded to tear off his trousers and underwear, got hold of his private parts and made as if he was going to cut them off, all the while saying he now would kill him as the deceased was now powerless.

This witness's evidence was straightforward and to the point. She happened to be at the shops because she had her own shop at that place. She is not related to either of the two. We got the distinct impression that she was merely relating what she observed and heard and nothing else.

She gave her evidence well and without rancour.

It was clear from her evidence that the accused's assault on the deceased was prolonged and indiscriminate. As he uttered the words that he wanted to kill the deceased he acted that threat out through the use of a knife, a brick and booted feet. The accused did not dispute using an iron rod as well.

The state case hinged on the evidence of this witness. She was a competent and credible witness whose evidence was satisfactory in every material respect. The second witness's evidence was colourless as he did not witness the assault. All that his evidence established was how aggressive the accused was as he also assaulted this witness accusing him of being one with the deceased.

From the totality of the evidence there was no doubt that the deceased succumbed to the injuries that were inflicted by the accused.

The accused's story is that he did not intend to kill the deceased or realised the real risk or possibility that his conduct may cause death.

In his confirmed warned and cautioned statement he had this to say:-

"I admit the charge of killing Pilisi Mpala which is preferred against me. I assaulted him with a cement brick once in the chest, hit him twice with an iron rod on the back and lastly stabbed him once on the chest with an okapi type of knife."

When he testified in court he sought to portray a different picture. He would have us accept that it was a fight between him and the deceased and the knife he used was the deceased's. The brick was not intentionally used but the deceased fell onto it during the scuffle and the iron rod he only picked it so as to defend himself from the knife the deceased had taken out of his pocket.

He also sought to challenge the warned and cautioned statement, lamely explaining that he was harassed by the police but he did not state so to the confirming Magistrate because he was in shock at the death of the deceased.

He sought to downplay the extent of the assault and at one time said the witness who witnessed the assault was not there. He however later accepted that she was there but said he however is not aware of when she got there and what she observed.

We must say the accused was a hopeless witness. He sought to deny just for the sake of denying the extent of the assault he perpetrated on the deceased.

He was determined to inflict harm on the deceased and his threat to kill him was no idle threat.

The deceased was a 67 year old man compared to the accused who was 34 years old. The description of the assault as given by Patience was ample proof of the fact that the deceased was no match for the accused.

The prolonged assault with the use of weapons, clenched fists, knife, iron rod, booted feet and a brick was meant to inflict maximum physical harm on the 67 year old. The accused knew the effect of such assault and his words that he wanted to kill the deceased were matched by his actions.

The accused's actions showed that he desired death and set out to achieve that result (*S v Mugwanda* 2002 (1) ZLR 547 (S)), *S v Jealous Tomasi* HH 217-16).

The distinction on whether the murder was in terms of section 47 (1) (a) or (1) (b) is however unnecessary. In *S v Mapfoche* SC 84-21 MAKARAU JA (as she then was) had this to say:-

“Thus under the section, it is not necessary, as was the position under the common law, to find the accused guilty of murder with either actual intent or with constructive intent. Put differently, it is not necessary under the Code to specify that the accused has been convicted under section 47 (1) (a) or (b). Killing or causing the death of another person with either of the two intentions is murder as defined by the section.

It further appears to me that the distinction between a conviction of murder with actual intent and 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.”

The evidence against the accused when pitted against his puny attempt at defending the indefensible explains why even defence counsel had really nothing to say in his defence and literally agreed with state counsel on the appropriate verdict.

We are accordingly satisfied that the state proved its case beyond a reasonable doubt and the accused is found guilty of murder as defined in section 47 of the Criminal Law Code.

Sentence

In assessing an appropriate sentence we considered the following:-

The accused is a 34 year old first offender, married with 3 minor children. His level of education is Grade 7.

He has been in pre-trial incarceration for 17 months. The death of the deceased is likely to weigh on his conscience. The members of the public's attitude where they will call him a murderer will also weigh on him and his life may never be the same again.

Aggravating is the fact that the deceased was a 67 year old man, almost double the accused's age. Our culture expects the younger generation to be respectful of their elders. The accused showed total lack of respect.

He humiliated the deceased, cutting open his trousers and underwear and getting hold of his private parts. No one should be humiliated to that extent especially at the shops where there could have been more people than the ones who happened to be there on the day.

The prolonged attack on the defenceless elderly man using all manner of weapons displayed a viciousness that has to be suitably punished.

Life is precious and people must respect the sanctity of life. Courts will be failing in their duty if they fail to drive this message home.

That said the court should still approach sentence rationally and not with a vengeful attitude. The sentence must still make sense to the accused and not result in him being resentful.

For these reasons the following sentence should meet the justice of the case:-

20 years imprisonment.

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