

THE STATE

Versus

KELVIN MOYO

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa

HWANGE 27 JUNE 2023

Criminal Trial

Mrs M Cheda, for the state

Mr D Ncube, for the accused

KABASA J: You appear before us on a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. You pleaded not guilty but tendered a limited plea of guilty to culpable homicide. The state accepted the limited plea.

A statement of agreed facts was then produced and marked Annexure 'A'. These facts revealed that as at 28 December 2022, the day when the offence was allegedly committed, you were 26 and the deceased was 33 years old. You were both at Lutsha football ground in Nkayi where there was a soccer match. The deceased was in the company of his brothers whilst you were with a friend. You were supporting different teams. The team the deceased and his brothers were supporting scored a goal and they celebrated. This did not sit well with you as you were disputing the goal. Your friend proceeded to assault one of the deceased's brothers and you joined in. The deceased tried to stop the ensuing melee whereupon you picked up a log and hit him once on the head. The deceased fell to the ground and lost consciousness. He was ferried to hospital where he succumbed to his injuries on the following day.

On 3 January 2013 the deceased's body was examined by a pathologist and the cause of death was said to be:-

Subarachnoid haemorrhage

Cranial trauma

Assault

The post-mortem report was produced by consent and marked exhibit 1.

From these facts it was not in dispute that you assaulted the deceased with a log and that assault led to the deceased's death.

The issue is whether you set out to kill the deceased and achieved that purpose or you realised the real risk or possibility that your conduct may cause death but continued nonetheless.

Whilst it is evident from the facts that the deceased did not provoke you nor did he try to attack you to warrant your reaction, the circumstances are not such that it can be said you set out to kill the deceased and achieved that goal.

You were however negligent in failing to guard against the conduct which led to the deceased's death. But for your negligence the deceased would not have lost his life.

On the facts of this case and the circumstances which led to the death of the deceased a charge of murder was not sustainable. The state's acceptance of the limited plea was therefore well informed.

In the result you are accordingly found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing an appropriate sentence we are alive to the need to ensure the sentence fits the offence, you the offender and is fair to society. (*State v Zinn* 1969 (2) SA 537).

In looking at you the offender, we take into account that you are a first offender. Your plea of guilty, albeit to the lesser offence, is a sign of contrition. You have taken responsibility for your actions. You are married with 3 minor children, aged 6, 4 and 1 year 3 months.

You have been in pre-trial incarceration for 5 months. The death of the deceased is likely to weigh on your conscience for the rest of your life. The taking of another's life brings with it a stigma that you will live with and this in itself amounts to a psychological imprisonment probably far worse than the imprisonment that comes with the four corners of a prison cell.

Aggravating is the fact that a life was needlessly lost. You behaved in a manner that was totally uncalled for. The deceased posed no threat to you and all he was trying to do was to achieve harmony.

Death must have been the last thing his loved ones anticipated for a person who had gone to watch a football match.

Life is precious and society must learn to respect the sanctity of life. The courts have time without number warned people against resorting to violence.

Using a log to hit the head is reprehensible, especially in circumstances where such was not warranted.

Whilst the court should never adopt a vengeful attitude when assessing sentence, the court ought also not to have maudlin sympathy for an offender. (*S v Ndlovu* HB 14-96, *S v Rabie* 1975 (4) SA 855 (A)).

The offence calls for a custodial sentence and given the circumstances under which the deceased lost his life a sentence of 7 years with 1 year suspended for 5 years on condition you do not within that period commit an offence of which an assault on the person of another is an element and for which upon conviction you are sentenced to a term of imprisonment without the option of a fine, will meet the justice of the case.

You are so sentenced.

National Prosecuting Authority, state's legal practitioners
Legal Aid Directorate, accused's legal practitioners