

THE STATE

Versus

QHELANI TSHABALALA

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa

HWANGE 28 JUNE 2023

Criminal Trial

Mr M Dube, for the state

Ms W Makorokoto, for the accused

KABASA J: You stand before us charged with murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. You are said to have caused the death of Kujani Mudenda by assaulting her all over the body with a switch intending to kill her or realising the real risk or possibility that your conduct may cause death but continued nonetheless. You pleaded not guilty to this charge but tendered a plea of guilty to the lesser charge of culpable homicide.

The state accepted the limited plea. A statement of agreed facts was produced and marked Annexure 'A'. These facts are to the effect that on 8 May 2022 you were drinking beer at Mlagisa Business Centre Tsholotsho when word came to you that your wife was having sexual intercourse with one Tinaye Mkandla at a grinding mill storeroom. You proceeded there and found your wife seated outside the storeroom and she was very drunk. Tinaye was nowhere to be found. You then wrestled with your wife as you wanted her to go back home. On the way she struck you with an open hand and you retaliated causing her to fall. You then took a mopani switch and assaulted her. She was unable to stand and you dragged her for about 20 m before you left her whilst you proceeded home. At home you lied to your mother that you did not know where the now deceased was. When you eventually told your mother she went to where you had left the deceased but the deceased was only able to eat a little of the porridge your mother had brought for her before she died.

On 12 May 2022 the deceased's body was examined by a pathologist who gave the cause of death as:-

Epidural hematoma

Cranial trauma

Assault

The post-mortem report and the switches used in the assault were produced by consent and marked exhibit 1- 6 respectively.

From these facts it is not in issue that the deceased died as a result of an assault perpetrated on her by you. The issue is whether the facts and circumstances prove a charge of murder. By accepting a limited plea the state appreciated that the facts could not sustain a murder charge.

Section 239 (1) (a) of the Criminal Law Code provides that:-

- “(1) If, after being provoked, a person does or omits to do anything resulting in the death of a person which would be an essential element of the crime of murder if done or omitted as the case may be, with the intention or realisation referred to in section forty-seven, the person shall be guilty of culpable homicide if, as a result of the provocation –
- (a) he or she does not have the intention or realisation referred to in section forty-seven.”

You might not have witnessed the alleged infidelity but you did see your wife at that place where she was said to have been intimate with another man. She refused to go home and assaulted you as you tried to get her to go home.

Such circumstances are such that it cannot be said when you assaulted her you intended to kill her. You lacked the requisite intention to kill.

You were however negligent in not taking care that your conduct would not result in death.

You are accordingly found not guilty of murder but guilty of culpable homicide.

Sentence

You are a 38 year old first offender. You pleaded guilty to culpable homicide, showing contrition. You have been in pre-trial incarceration for a little over a year.

The deceased was your wife of two years. Her death is likely to haunt you for the rest of your life.

The stigma that will attach to you will also weigh heavily on you. Society will refer to you as the murderer who killed his wife.

As MAWADZE J said in *State v Mbiti* HMA 01-20:-

“The general public make no distinction between murder and culpable homicide. That is the luxury of those who know the law.”

In aggravation is the fact that a life was needlessly lost. You acted on rumour and reacted in a manner that showed lack of self-restraint. You assaulted the deceased and left her alone helpless.

You knew you had done wrong and that is why you did not tell your mother what you had done. Had you told her chances are the deceased could have been assisted early and probably would have lived.

Assaulting an adult in a manner you did cannot be condoned. She was your wife, deserving of respect. You could have talked the matter over and allowed her to say her side of the story.

Women who get killed by their spouses are now commonplace and that cannot be tolerated. Gender based violence is to be frowned upon by any right thinking person.

That said the punishment must fit you the offender, the offence and be fair to society (*S v Zinn* 1969 (2) SA 537).

But for the year you spent in pre-trial incarceration a sentence of 6 – 7 years would have been appropriate.

In the circumstances you are sentenced to 5 years imprisonment of which 1 year is 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 which upon conviction you are sentenced to a term of imprisonment without the option of a fine.

Effective: - 4 years imprisonment.

National Prosecuting Authority, state legal practitioners
Mashindi and Associates, accused's legal practitioners