

THE STATE

Versus

JOEL NKOMO

IN THE HIGH COURT OF ZIMBABWE
KABASA J with Assessors Mr G Maphosa and Mr J Ndubiwa
HWANGE 30 JUNE AND 3 JULY 2023

Criminal Trial

Mrs C Gorerino, for the state
Ms C Manyeza, for the accused

KABASA J: The accused pleaded not guilty to a charge of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. His plea to a lesser charge of culpable homicide was rejected by the state.

The state alleges that on 20 March 2022 the accused visited a prophet and on arrival back home he found his two year old son unwell. He suspected that this was due to his mother who was bewitching his family. He proceeded to her home where a misunderstanding ensued. The accused struck her with a knobkerrie on the forehead and twice on the back resulting in her death.

The accused thereafter misled his relatives into believing that the deceased succumbed to a headache which she had been previously complaining about. The accused's arrest followed a tip-off to the police as the deceased's death was suspicious.

In his defence the accused did not deny assaulting the deceased with a knobkerrie. He however explained that he arrived home to find his two year old son sick, barely 2 weeks before this day they had buried a niece whose death was mysterious. He decided to confront his mother, took a knobkerrie and went to her home. He accused her of being the cause of the mysterious occurrences within the family. The two had a misunderstanding and he hit her on the head and back and later assisted her into bed before securing the door and left. The following morning he went to exchange morning greetings with her and discovered that she was dead. He however did not intend to kill her.

To prove its case the state produced a letter authored by the accused in which he was chronicling all the mysterious occurrences that were happening within the family. The letter was marked exhibit 1. The post-mortem report indicating the cause of death was also produced and marked exhibit 2. Doctor S. Pesanai who conducted the post-mortem indicated that the cause of death was:-

Severe subarachnoid haemorrhage

Depressed skull fracture

Assault

The doctor also noted that there was extensive scalp hematoma on the left temporal, parietal and occipital region, depressed skull fracture on the left occipital region in the left posterior cranial forsa and extensive subarachnoid haemorrhage.

The knobkerrie which inflicted the foregoing injuries was produced and marked exhibit 3. It has the following dimensions:-

Length of handle – 82 cm

Circumference of handle – 9 cm

Circumference of the head – 21 cm

Weight – 600 g

The evidence of four witnesses was admitted as it appeared on the State Summary in terms of section 314 of the Criminal Procedure and Evidence Act, Chapter 9:07.

The evidence so admitted established the fact that a concerned villager reported the community's suspicions regarding the cause of the deceased's death. A villager who visited the deceased's homestead and observed her body saw that she had injuries on the left ear which area was also swollen. She also had blood stains on her dress and left shoulder. The knobkerrie which was used in the assault was recovered hidden in the field.

Evidence was led from the deceased's 23 year old grandson and son to the accused. His evidence was largely not disputed. He visited his grandmother on the morning of 21 March 2022 and found the door secured from outside. He called out to his grandmother and received no response and upon peeping through the window he saw her lying in her bed covered with a

blanket. She still did not respond to his persistent calls prompting him to seek out his father, the accused, who was on his way from fetching water. They had to use pliers to cut the wire which had been used to secure the deceased's door and on entering her bedroom hut discovered that she was deceased. Before his father's arrest he had told him that the assault he perpetrated on the deceased might have killed her.

With this witness's testimony the state closed its case. The accused testified in his defence and what he had to say largely confirmed his son's testimony. The son did not witness the assault and so it was the accused's testimony which established how such assault was perpetrated, 4 blows to the head and 2 blows on the back.

There were no serious factual disputes regarding the assault, who perpetrated it and the weapon used. The accused's belief in witchcraft was also not in dispute.

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

Does the accused's belief in witchcraft avail him as a defence?

Section 101 of the Criminal Law Code provides that:--

"It shall not be a defence to murder, assault or any other crime that the accused was actuated by a genuine belief that the victim was a witch or wizard, but a court convicting such person may take such belief into account when imposing sentence upon him or her for the crime."

In *S v Tsaura & Anor* HMT2-20 the court had this to say:

"The belief in witchcraft ... although not reducing criminal liability in that the belief is not a defence it certainly qualifies as mitigatory and as a factor reducing the moral blameworthiness of the appellants."

The accused lost 5 children and a niece had also died in circumstances which were suspicious. He believed that when his mother cursed such curse would come to pass. She had previously cursed and uttered words to the effect that baby preparations which were being done for a pregnant relative were all in vain as she would not hold the baby and that came to pass. The baby died soon after birth.

The belief in witchcraft in rural communities is a reality. (*S v Techu and Ors* HH 271-15, *S v Misimo & Ors* HH 358-17).

In *State v Musindo* HMA 27-20 MAWADZE J, whilst accepting that the circumstances of that case justifiably reduced murder to culpable homicide, acknowledged that the belief in witchcraft is not a defence to murder and that people should not take the law into their own hands as "... if such conduct remains unpunished it would not only lead to break down of law and order but would lead to chaos in the villages as those suspected of being witches or wizards would be lynched."

MAWADZE J went on to refer to *State v Hamunakwadi* HH 323-15 where HUNGWE J (as he then was) said:-

"The attempts of the common law courts to address witchcraft inspired violence differed markedly from the suppression tactics of various legislative initiatives. Whereas legislation recognises the wide spread violence and seeks to curtail it, the criminal law has often recognised the belief that gave rise to the violence and carved witchcraft provocation defence that could be offered as a mitigating factor in cases of witchcraft related violence. Under this theory accused persons could reduce their crimes or punishments upon proof that they, or persons under their immediate care, were being bewitched and that this belief caused them to temporarily lose self-control. In some ways, this theory provokes tacit recognition that in certain communities killing of a "witch" is not merely explainable, or excusable but praise worthy."

Turning to the facts *in casu* the accused went to his mother's home at 10 pm to confront her about the issue of witchcraft. He took a knobkerrie with him. Whilst the defence outline suggested that he had been to consult a prophet earlier on that day, in his evidence he said he had been to collect his debts. Again whilst the defence outline sought to suggest that he got home to find his 2 year old child unwell, in his evidence he said this child had been unwell for 7 days. It therefore cannot be said whatever he was told by the prophet was confirmed when he got home to find his child sick and so infuriated him.

He also said his mother had confessed to witchcraft and a prophet who had come to cleanse the homestead confirmed that she was a witch but this had happened 5 months prior to the fateful night.

Under these circumstances can it be said he was provoked and at the time he assaulted his mother such provocation negated the intention to kill as envisaged in section 47 of the Criminal Law Code?

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, or
- (b) he or she has the intention or realisation referred to in section forty-seven but has completely lost his or her self-control, the provocation being sufficient to make a reasonable person in his or her position and circumstances lose his or her self-control.”

The accused did not articulate the nature of the misunderstanding he had with his mother on the night in question. All the evidence established therefore was that he took a knobkerrie and went to confront his mother at the odd hour of 10 pm. Did the mother say anything to him that caused him to snap and completely lose control? This is a question that found no answer despite the attempts by defence counsel to get the accused to articulate why he assaulted his mother and the purpose of his visit to her that late at night.

We were therefore left with the irresistible conclusion that the accused harboured resentment toward his mother as a result of the previous confession to witchcraft and his child’s illness which was not abating brought things to a head. The fact that after delivering these blows to the head of an 86 year old woman he left her only to return later and put her to bed when he could see she was not well, and secure the door from outside, did not bother to check on her until his son alerted him to the deceased’s condition, speaks to a person who realised the real risk or possibility that his conduct may cause death but continued in such conduct nonetheless.

Unlike *Musindo (State v Musindo (supra))* who used a switch from a mulberry tree, he used a knobkerrie and struck the head which is a very vulnerable part of the body. He struck the head of an 86 year old woman who already was complaining of a head ache, not once but four times with such severe force that caused a fracture of the skull and severe bleeding into the brain. He rendered no assistance to her after such a vicious assault and pretended as if she had died of a headache. A distinction ought to be made between a person who acts as a result of resentment harboured over some time and one who reacts on the spur of the moment due to events which occur immediately preceding their conduct. The accused’s failure to articulate what happened which precipitated the assault was a clear indication that he did not lose self-control as a result of whatever conversation he had with his mother but acted out of pent-up anger and resentment. Such is not what amounts to provocation which reduces murder to culpable homicide.

In the result the accused has no defence to the charge of murder. In light of MAKARAU JA's (as she then was) remarks in *S v Mapfoche* SC 84-21 it is not necessary under the Criminal Law 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.

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

Sentence

The accused is a 48 year old first offender, married with 6 children. He has been in pre-trial incarceration for a year and two months.

He killed his mother and this will haunt him for the rest of his life. His remorse was evident throughout the trial, he appeared to be in a prison of his own, a mental prison. This kind of imprisonment far outweighs the imprisonment of a prison cell in its severity.

He is now shunned by his siblings and being ostracized by one's own family is a punishment in itself.

He had 11 children but lost 5 in mysterious circumstances. Their deaths, that of a niece and the unusual occurrences within the homestead made him believe that witchcraft was at play. His mother confessed and a prophet confirmed it making his belief entrenched. Throughout the trial the accused's strong belief in witchcraft was evident. Whilst such belief is not a defence, it is however mitigatory and reduces his moral blameworthiness (*S v Tsaura & Anor* HMT 2-20).

The belief in witchcraft in the rural areas is a reality (*S v Techu & Ors* HH 271-15, *S v Misimo & Ors* HH 358-17).

The accused only went up to Grade 7, the lack of education paired with the rural background and the resultant lack of sophistication cannot be downplayed.

He will forever live with the stigma of being labelled a murderer worse still a murderer who killed his mother.

The deceased was 86 years old and in terms of section 47 (3) of the Criminal Law Code:-

- “(3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that –
- (a) or
 - (b) the murder victim was ... of or over the age of seventy years ...”

In casu we found that there were circumstances of a mitigating nature and so the court was not mandated to impose the sentence of death, life imprisonment or imprisonment of not less than 20 years, which sentence it is mandated to mete out upon a finding that the murder was committed in aggravating circumstances.

In assessing an appropriate sentence the fact that the victim was accused’s 86 year old mother is an aggravating factor. He hit her on the head, a most vulnerable part of the body and left her to her own devices when she was obviously injured.

Life is not to be lost at the hands of another. The deceased had been blessed with long life and the accused snuffed this life out instead of allowing her to live out the rest of her years in relative peace and comfort. A parent should never lose their life at the hands of their own child.

In our culture an assault on a mother is said to bring great misfortune. This is how much a mother is respected. The accused’s conduct was a total negation of this cultural norm.

We are however not oblivious to his pain and regret. The sentence ought not to be from a vengeful attitude (*S v Ndlovu* HB 14-96).

The sentence must still be rationally assessed and fit both the offence, the offender and be fair to society. (*S v Zinn* 1969 (2) SA 537).

The accused is already broken and the sentence ought not to completely destroy him.

That said however the sentence must send a clear message that no matter how strong one’s belief in witchcraft is, with seeming “evidence” upon which such belief is anchored, such belief is not a defence to murder and the courts will not tolerate people taking the law into their own hands.

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

14 years imprisonment.

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