

THE STATE

Versus

TENDAI TIGERE GONDO

IN THE HIGH COURT OF ZIMBABWE

KABASA J with Assessors Mr P. Damba and Mr O. Dewa

BULAWAYO 19, 20 AND 27 OCTOBER 2023

Criminal Trial

K. Shava, for the state

T. Vhiki with *M. Nyika* for the accused

KABASA J: The accused appeared before us facing a charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He pleaded not guilty to the charge.

The state alleges that on 16 September 2022 around 0655 hours, the accused had a misunderstanding with his wife over US\$310 the accused owed. The accused proceeded to where his Toyota Hino truck was parked and reversed out of the yard. The now deceased ran out of the house and grabbed the door handle demanding her money. The accused did not stop but increased speed resulting in the deceased falling. She was subsequently run over by the rear wheels. The accused stopped his vehicle and attended to the now deceased who he ferried to hospital but she was pronounced dead on arrival.

In his defence the accused did not dispute running over the deceased. He therefore did not dispute causing the injuries which led to the deceased's death. He however explained that when he observed the deceased running towards the vehicle he decided to drive off so as to avoid an altercation. The deceased ran parallel to the vehicle until the accused got to the intersection of Baxendale and Chaplain Road where he slowed down. The now deceased then attempted to open the passenger door but missed a step and fell due to the road surface as there was a depression at that spot. She was run over by the rear left wheels. He did not intend to kill her nor did he realise the risk or possibility that his conduct may result in death.

To prove its case the state produced the post-mortem report which gave the cause of death as polytrauma as a result of a road traffic accident. An accident evaluation report was also produced in which the police officer opined that the matter was not a road traffic accident.

Evidence was led from four state witnesses. The first witness was the police officer who responded to the incident report. His evidence was to the effect that when he arrived at the hospital the accused reported to him that his wife had been a victim of a hit and run accident. The motor vehicle the accused was driving had left the scene of the accident to deliver pit sand. He however saw where the deceased was run over which was in the middle of the intersection of Baxendale and Chaplin roads. He later learnt of how the incident occurred on the following day and it was the accused's uncle who gave him that information. As a result he referred the matter to CID Homicide.

The witness's evidence was completely different from the evidence given by two witnesses who were present when the incident occurred. None of them were aware of the hit and run story. Their recollection of what happened was almost on all fours with the accused's account of the incident.

We got the distinct impression that this witness's evidence was meant to push a certain narrative. A narrative that sought to portray the matter as a murder which was perpetrated with the use of a motor vehicle. Under cross-examination it became apparent that the deceased's relatives were suspicious and communicated their suspicions to the police, resulting in the police visiting the accused's home and asking to search his house. One wonders why there was need to search the house when the incident had occurred along the road, out of the accused's yard. What was it that the police and the deceased's relatives hoped to find in the house? The accused said the narrative was that the deceased had been murdered in the house and an accident stage-managed to cover up the murder. The police's decision to visit the accused's home in the company of the deceased's relatives and that search appear to lend credence to this story. It would appear the police were now acting more on unsubstantiated suspicion rather than as police officers investigating a matter in order to arrive at the truth.

We were not impressed by this witness. He had a story of his own which we were left wondering as to its source. Since the accused was reporting an accident to him, he could have taken down what was being said but chose not to. He therefore had absolutely nothing on paper and yet he went to attend to a road traffic accident. He was not a credible witness and

unsatisfactorily tried to justify why he did not write down what was said to him at the time he attended the scene.

The second witness was one of the two eye witnesses. His evidence was to the effect that he opened the gate so accused could drive out. As he was driving out the now deceased came running towards the truck. The accused did not stop and the now deceased kept following running until she caught up with the vehicle, grabbed the door handle and subsequently fell. She rolled and was run over by the left rear wheel.

This witness's evidence was corroborated by the third witness, who was accused's gardener and was with the second witness when they went to open the gate for the accused to drive out. He too saw the deceased running after the truck until she caught up with it and grabbed the door. She fell as accused did not stop after she had grabbed the door. She was then run over by the rear wheels.

We got the impression that these witnesses were merely relating what they observed.

Granted human observation is fallible and two people observing the same incident may differ in their account of what it is they observed. Two people giving an account of an accident may differ materially as to what each one observed. These two witnesses' account however did not differ materially. The evidence on how the deceased ran after the truck to the point she fell and was run over was simple and straightforward.

The evidence also tallied with the accused's account of what happened. The only difference was on the text messages the accused said he exchanged with his wife, whom he referred to as his girlfriend, before she ran out of the house. The two witnesses would not have known of these text messages and understandably so, it was a private conversation between the accused and the now deceased.

We considered the two witnesses' evidence as reliable. They were credible witnesses. The third witness appeared nervous but that did not strike us as indicative of lack of reliability but more of the effect of the court environment which is intimidating to most people.

The last witness was the traffic accident evaluator. Apart from narrating what he was told by the witnesses we did not see how his expertise assisted the court. His conclusions were seemingly based on the suspicion narrative that the first witness was influenced by. We struggled to appreciate what his expertise served in this case. As an expert one would have

expected him to dwell on the observations he made, the point of impact, skid marks, what was to be concluded from the fact that the deceased was run over by the rear left wheel and some such evidence but this was not the case.

We therefore considered the evidence of the two eye witnesses as all that we had to go by in looking at the circumstances which led to the deceased's death.

The accused's testimony did not differ much from the eye witnesses'. He did not stop when he could no longer see his girlfriend. He saw her as she ran after the motor vehicle, he saw her as she attempted to open the passenger door and missed the step. He said he drove to the other lane so as to avoid her but decided not to stop as he did not want an altercation with her.

The issue is whether it can be said the accused intended to kill the deceased. Did he desire to bring about the death of the deceased and succeeded in doing so? (*S v Tomasi* HH 217-16, *S v Mugwanda* 2002 (1) ZLR 547 (S)). The evidence does not show that. To say he set out to kill and achieved that result is tantamount to saying he decided to use the motor vehicle as the weapon to bring about the deceased's death. The evidence does not support such a finding.

Can it be said he did not mean to bring about death but continued to engage in an activity after he foresaw that there was a real risk that that activity would result in the death of the deceased? We think not.

Granted he saw the deceased running after the vehicle. He said he thought she would tire and give up. She however did not and managed to catch up with the vehicle. He had been seeing her through the rear view mirror but there was a point when he could not see her and this was because his rear view mirror could only pick the truck's loading box and not the blind spot. He therefore could not tell where she was at that particular point. He however did not stop to ascertain where she was.

Can one conclude that the only reasonable inference that can be drawn is that he had legal intention to kill? In other words he must have and did foresee the possibility of death? We are unable to draw such an inference from the facts of this matter. There is no dispute the deceased was run over by the left rear wheel and on the opposite lane from the direction of travel, in other words the right lane. The accused had moved to that lane when he could not

see the deceased who had been running parallel to the vehicle. The evidence did not show that he deliberately swerved in order to dislodge the deceased. It also did not show that he had seen her fall and roll as was observed by the second witness. The accused's decision to drive to the right lane, the on-coming traffic lane, cannot therefore be said to be the behaviour of one who must have foreseen and did foresee the real risk or possibility that his conduct may lead to death but proceeded nonetheless.

Section 49 of the Criminal Law Code provides that:-

“Any person who causes the death of another person –

- (a) negligently failing to realise that death may result from his or her conduct; or
- (b) realising that death may result from his or her conduct and negligently failing to guard against that possibility;

shall be guilty of culpable homicide.....”

A reasonable man in the circumstances of this case would have stopped the motor vehicle. The point is the accused could no longer see where the deceased was, she could have been anywhere and she had already demonstrated a determination to run after and catch up with the vehicle the accused was driving. It matters not that the motor vehicle had slowed down due to the fact that it had approached an intersection which intersection had a depression. A reasonable man would have guarded against the possibility of the now deceased throwing caution to the wind in her quest to stop the accused and thereby putting herself in harm's way. The accused fell below the reasonable man standard and cannot escape liability for the deceased's death. He had no intention to kill but he negligently failed to realise that death may result from his conduct.

We are therefore satisfied that the accused negligently caused the deceased's death. He is accordingly found not guilty of murder but guilty of culpable homicide.

Sentence

In arriving at an appropriate sentence we have considered the following:-

You are a 30 year old first offender. You are not married and have no children but you look after your 75 year old mother who is of ill health and your sister's minor children. There was contributory negligence on the part of the deceased who ran after the truck and wanted to

open the door of a moving vehicle. She did so because she wanted US\$310 but you were going to go back home and that issue could have been discussed on your return.

You had been in a relationship with her for 2 years, there was an emotional attachment. The death will obviously haunt you for a long time to come. Society is also unforgiving and will label you a murderer or refer to you as “that one who killed his girlfriend”. This will affect you psychologically. (*S v Mbiti* HMA 01-20)

You paid US\$6 700 in “civil damages” to the deceased’s family. That shows contrition. Granted, no amount of money will bring the deceased back but such show of contrition ought to be acknowledged. You also tried to assist her after the accident although it was too late.

Aggravating is the fact that a life was lost. Life is a gift given to us all once and once it is taken away, it cannot be given back. The courts have time without number urged society to respect the sanctity of life.

You must have known the deceased’s temperament and so as you were about 7 years older than her you ought to have stopped the motor vehicle. What could possibly have happened besides probably a public scene with the deceased insisting on you giving her her money?

The deceased was young, at 21 she was in the prime of her life. You robbed her family of a loved one and robbed her of whatever dreams she had at that young age.

Whilst the state considered it as aggravatory that you encroached into the opposite lane, that must be considered in its proper context. You were trying to avoid the deceased not that you were deliberately flouting road rules.

We were referred to a number of cases, *S v Dzvatu* 1984 (1) ZLR 46, *S v Mtizwa* 1984 (1) ZLR 23 where fines imposed in an RTA culpable homicide were criticised.

In arriving at an appropriate sentence we are guided by *R v Richards* 2001 (1) ZLR 129 (S) where it was said:-

“The accused is not being punished for his evil intent, for he had no intent at all, but for being careless. The function of punishment in this situation is not so much to punish wrong doing as to inculcate caution in the citizenry and encourage attentiveness to the

safety of others. The function of the crime of culpable homicide is as much educative as it is corrective.”

Is imprisonment the only appropriate penalty in the circumstances? Tampering justice with mercy is a humane approach to sentence which ensures the penalty fits the offence, the offender and is fair to society (*S v Rabie* 1975 (4) SA 855 (A)). The court should never approach sentence with a vengeful attitude (*S v Ndlovu* HB 14-96).

An educative and corrective penalty is in our view a fine. Your negligence in the circumstances was not gross or reckless and the penalty must reflect that.

You were however driving a heavy vehicle and we do not see any special circumstances that militate against prohibition.

In the result you are sentenced to pay a fine of US\$2 000 or in default of payment 5 months imprisonment. The fine is payable at the RTGS equivalent on the date of payment.

You are prohibited from driving all classes of motor vehicles for a period of 2 years and your driver’s licence is cancelled.

National Prosecuting Authority, state’s legal practitioners
Macharaga Law Chambers, accused’s legal practitioners