

THE STATE**Versus****WEBSTER MUGANDANI**

IN THE HIGH COURT OF ZIMBABWE

MOYO J with Assessors Mrs Baye & Mr Matemba

GWERU 25 SEPTEMBER 2023

Criminal Trial*Ms L. C. Mamombe* for the state*K. Parere* for the accused

MOYO J: The accused person faces a charge of murder it being alleged that on the 2nd of October 2021 at Village Marawa, 1B, Nembudziya, Gokwe, he unlawfully caused the death of Shepherd Nzomba by hitting him once on the head with the back of an axe and further striking him once with an axe on the right cheek, once on the left cheek and once on the right side of the chest and thereby killing him. He pleaded not guilty and stated that he was acting in self defence. The following were tendered into the court record and were dully marked;

- The state summary
- Accused's confirmed warned and cautioned statement
- Post mortem report
- And the axe that was allegedly used. They were all duly marked.

The evidence of the following witnesses was admitted into the court record as it appears in the state summary in terms of section 314 of the Criminal Procedure and Evidence Act Chapter 9:07.

2 witnesses gave *viva voce* evidence for the state and the accused gave evidence for the defence. The facts of the matter are largely common cause. Accused had a work party comprising 6 state witnesses. They were clearing land on a field accused allegedly owned. Deceased came twice to warn them to stop working on that land as it did not belong to accused. It is in the 2nd time he came that fateful events then occurred. A misunderstanding ensued when accused ordered him to leave and he did not oblige, causing accused to strike him with an axe several times on the head and the face. Accused avers that he acted in self defence as deceased was also armed with an axe and was charging towards him and threatening to kill him. The 2

state witnesses that gave *viva voce* evidence denied that deceased was armed with an axe and one of them said he just carried a cellphone. They said accused first pushed the deceased before striking him with an axe when deceased did not honor accused's order to leave. The question is did deceased have an axe and charge towards accused threatening to kill him? We will resolve this question by looking at the following:

Accused's confirmed warned and cautioned statement

In his confirmed warned and cautioned statement accused admits the charge and states that he killed the deceased with an axe because of a misunderstanding between them over land ownership.

The warned and cautioned statement was recorded on 3 October 2021 a day after the murder so this is the best version from accused when his memory was still fresh. This statement was also confirmed by a magistrate on 17 October 2021 about 2 weeks post the event so accused's mind was still fresh and he confirmed his statement as being fine, free voluntary and without any inducement or duress. Accused tried to disown his warned and cautioned statement by stating that the police did not allow him to state more, but he told the magistrate later in court that there was nothing wrong with the way the statement had been obtained from him. In terms of section 256 (2) a confirmed statement made by the accused shall be produced as evidence before any court without any further ado

Again, the evidence of Thomas Hove, who recorded accused's cautioned statement was admitted as it appears in the state summary and it confirms that the accused gave his statement freely and voluntarily.

Not only that, accused never raised the lack of voluntarily giving the statement with his counsel as if he had done so, the defence outline should have disowned the statement and stated that at the trial the accused would disown his statement as it does not reflect a true version of the events as he narrated them to the police.

Again, even if one were to for argument's sake accept accused's version that deceased was armed with an axe and was charging towards the accused and that accused thought he was defending himself. It is accused's version that he never fled, he in fact also walked towards the deceased with his axe. That would not qualify as conduct in self defence as explained in section 253 because in terms of section 253 (b) his conduct must have been necessary to avert

the unlawful attack. Butchering the deceased in the manner that he did, would not have been necessary in the circumstances he should also show that he could otherwise not flee, by virtue of the same section in this case accused went straight to the deceased and did not attempt to flee at all. In terms of section 253 (1) (c) the that he used should have been reasonable in the circumstances. Brutally assaulting the deceased in the manner that accused did cannot be said to be reasonable in the circumstances, it thus follows that accused cannot invoke the defence of self, as the requirements for the defence of self-required in terms of section 253 one clearly not from the facts. The post mortem report gives the cause of death as;

- Severe brain damage
- Multiple skull fracture
- chop wounds

The deceased's per the marks of violence from the post mortem report suffered 4 chop wounds and one stab wound on the left chest midline with 4 fractured ribs. The brain was oozing out from the wound on the head. The wounds are callous and brutal. Whilst accused attacked deceased in the midst of a misunderstanding, the manner of the attack is such that he definitely realized that death was a real possibility or risk from those attacks. It is the finding of this court that whilst accused may not have set upon a mission to kill the deceased the manner of the attack is sufficient for this court to make a finding that he did have the requisite legal intentions to commit murder.

The accused is accordingly found guilty of murder in terms of section 47 (1) (b) in that realizing that there is a real risk or possibility that his conduct may cause death, he continued to engage in such conduct despite the obvious risk and possibility.

Sentence

The accused is convicted of murder. He is a 1st offender. He is youthful aged 27 years old. He regrets what happened. There was an element of provocation by the deceased. He has spent about 2 years in remand prison. However, the accused youthful as he has started at the deep end. A life was unnecessarily lost through violence. These courts must continue to send a message, very loud and clear that loss of life through violence is not accepted. However, in so doing the court should still balance accused's personal circumstance, circumstances of the

commission of the offence and the public interest. The accused is a youthful 1st offender and has already spent 2 years in pre-trial incarceration. The accused is entitled as a matter of right to a discount on the sentence that befits him as he has already spent 2 years in pre-trial incarceration. A sentence in the region of 15 years would meet the justice of this case. With the 2 year discount accused is entitled to, he remains with 13 years. It is for these reasons that accused will be sentenced to 13 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Mapfumo Mavere Law Firm, accused's legal practitioners