

THE STATE

Versus

AISON CHIBAYA

IN THE HIGH COURT OF ZIMBABWE
MOYO J with Assessors Mrs Baye & Mr Matemba
GWERU 19 SEPTEMBER 2023

Criminal Trial

M. Ndlovu for the state

E. Zingano for the accused

MOYO J: Accused faces a charge of murder in that on the 27th of November 2021 at Pasimupindu Co-operative in Shurugwi, he unlawfully caused the death of Dingilizwe Dzingai by striking him with a wooden axe handle once on the head. Accused denied the charge tendered a limited plea of guilty to a charge of culpable homicide. The parties drew a statement of general facts, it was tendered and marked exhibit 1. It reads as follows:

1. Aison Chibaya (hereinafter called the accused person) was aged 20 years at the time of the commission of the alleged offence. He resides at Pasimupinda Co-operative, Shurugwi.
2. Dingilizwe Dzingai (hereinafter referred to as deceased) was aged 41 years at the time of commission of the alleged offence. He resided at Pasimupinda Co-operative, Shurugwi, during his lifetime.
3. The deceased and the accused are not related but they reside in the same area.
4. On the 27th of November 2021 at about 1700 hours the accused person was at home with his pregnant wife when the deceased arrived. The deceased then accused the accused person of taking cellphone that the deceased had won at a gambling school. The deceased was visibly angry and was shouting at the top of his voice.
5. Thereafter the deceased started picking up stones and throwing them in the room where the accused and his wife were sitting. The stones thrown by the deceased damaged and broke the hut's metal plated wooden door.

6. The accused person's wife sensed danger and ran out of the room. The deceased gave chase and caught up with her and took her cellphone. The accused person took an axe handle and followed the deceased who had taken possession of his wife's cellphone.
7. When accused person reached the deceased he hit him once on the head, causing the deceased to become unconscious. Accused person poured water on the deceased in order to resuscitate him. The deceased managed to wake up and left for his homestead but lost consciousness on the way.
8. The deceased was taken to Shurugwi District Hospital where he passed on the following day.
9. The matter was reported to the police leading to the arrest of the accused person.
10. The deceased's remains were ferried to United Bulawayo Hospitals. On the 29th November 2021 Dr S. Pesanai examined the remains of the deceased and concluded that the case was:
 1. Intracranial haemorrhage
 2. Skull fracture
 3. Blunt force trauma

Thereafter post mortem report number 123-964-21 was compiled.

11. The accused accepts the evidence of the state witnesses and contents of the post mortem report. The accused denies having requisite intention to kill in the form of *dolus directus* or *dolus eventualise*. Rather, the accused acknowledged that, through his conduct aforesaid, he was negligent in causing the death of the deceased.
12. The state concedes to the fact that the accused was negligent in the manner he assaulted the deceased and therefore the accused's plea of culpable homicide.

State counsel tendered the accused's confirmed warned and cautioned statement. It was marked exhibit 2. The post mortem report was also tendered and marked exhibit 3. It gives the cause of death as:

1. Intracranial haemorrhage
2. Skull fracture
3. Blunt force trauma

The wooden axe handle allegedly used in the commission of the offence was also tendered and duly marked. From the facts before us we are satisfied that the accused person acted negligently in the circumstances as opposed to harbouring the requisite intention to commit murder. It is for these reasons that the accused person shall be found not guilty of murder but instead will be convicted on the lesser charge of culpable homicide:

The accused person is thus acquitted of murder and found guilty of the lesser charge of culpable homicide.

Sentence

The accused is convicted of culpable homicide. He is a 1st offender. He pleaded guilty to the appropriate charge. He is a family man and a bread winner. Was aged 20 years at the material time. Has spent 22 months in remand prison. The deceased was the aggressor, firstly entering accused's home to make noise and to snatch accused's wife's phone. Accused struck deceased once with a log on the head. In aggravation a life was lost and these courts frown at the loss of life through violence. However, there is no one jacket fits all kind of sentence, in sentencing each case must be assessed on its own merits and demerits and this is done through the careful analysis of the facts before the court. In this particular case there is weighty mitigation as follows:

1. Accused is a youthful 1st offender who pleaded guilty.
2. Deceased was the aggressor, choosing to disturb the peace of a man his business this court cannot turn a blind eye to the fact that a man's home is his castle and those who visit often to disturb their peace are ordinarily frowned at by these courts.

Not only deceased attacked accused and his pregnant wife with stones, he also damaged the door. He did not stop there, he charged accused's pregnant wife and snatched her cellphone. Deceased behaved in a very provocative manner and persisted with such provocation. Accused reacted after deceased had arrived, shouted at them, threw stones, broke the door and snatched

his wife's cellphone, all scenes of provocative actions before accused acted. He only struck deceased once. Realising deceased had fallen unconscious he tried to assist him by pouring water on him. Whilst accused used excessive force in the circumstances it cannot be taken away from him that deceased was persistent in his annoying conduct causing accused to act in defence out of anger given the level of the provocation. At 41, deceased could have behaved better.

3. Accused also spent 22 months in remand prison and this must surely be discarded from the final sentence. Accused also has the youthfulness in his bag of mitigation that at 20 he was immature and failed to handle the deceased's provocative behavior in a better and more peaceful manner. Indeed a life was lost and life being secured, these courts need to balance the interests of society by meting out sentences that show the essence of sanctity of life. This however, does not entail turning a blind eye to weighty mitigation for to do so will result in a miscarriage of justice. This is one case where a sentence in the region of 5 years with a suspended portion would meet the justice of the case. A further discount on the 22 months (almost 2 years) already spent in prison is available to the accused as a matter of right. This leaves him with the 3 years from the 5 years (after discounting 2 years) he is still entitled to a portion suspended and from the remaining 3 years it is for these reasons that the accused shall be sentenced as follows:

The accused is sentenced to 3 years imprisonment with one year imprisonment suspended for 5 years on condition the accused is not within that period convicted of an offence involving violence for which upon conviction he shall be sentenced to imprisonment without the option of a fine - 2 years effective.