

THE STATE

Versus

TAWANDA NDLOVU

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr. Ndubiwa and Mr. Ndlovu

HWANGE 8 March 2024

Criminal trial

M. Dube for the State

Ms. J. Change for the accused

DUBE-BANDA J:

[1] The accused is appearing before this court charged with the crime of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It being alleged that on 9 August 2023 he unlawfully caused the death of Cabangani Tshuma referred to as the deceased by striking him with a wooden log once on the head intending to kill him or realising that there was a real risk or possibility that his conduct may cause the death of the deceased and continued to engage in that conduct despite the risk or possibility.

[2] The accused pleaded not guilty to the crime of murder and offered a plea of guilty to the lesser crime of culpable homicide. The State accepted the plea of guilty to the lesser crime of culpable homicide. The State tendered into the record of proceedings a statement of agreed facts, which is before court and marked Annexure "A". The statement reads as follows:

- i. The accused was aged 38 years of age at the time of the commission of the offence and he resides at his own homestead, Khokoloza Village, Chief Sinamagonde, Lusulu, Binga.
- ii. The deceased was aged 39 years at the time he met his death. He used to reside at his own homestead, Khokoloza Village, Chief Sinamagonde, Lusulu, Binga.
- iii. Accused and deceased were cousins.
- iv. On the 9th of August 2023 and at Raising Business Centre, the accused and deceased and other locals were at a gambling school. Deceased indicated his desire to join the gambling team and he was asked to pay a joining fee of USD1.00.

- v. Deceased decided to sell his phone in order to raise the fee. Accused offered to buy the phone and paid deceased USD 10.00.
- vi. Accused realised that the phone was faulty and he returned it to deceased and he was given back his money. Deceased complained about accused's decision to return the cell phone. A misunderstanding arose between the two and resultantly the gambling school dispersed.
- vii. As accused and deceased were quarrelling, deceased was holding an okapi knife and threatening to stab the accused.
- viii. Accused ran away from the scene and deceased chased after accused. Deceased caught up with accused. Accused then picked up a log and struck the deceased once on the head and deceased fell unconscious.
- ix. Hardlow Ndlovu poured water on deceased and rendered first aid until deceased regained consciousness. Deceased could not walk and he appeared confused. Deceased was crawling and was struggling to breathe. He had no visible injuries but was bleeding from the left ear.
- x. Deceased was ferried to the hospital where he died the following day.
- xi. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

[4] The State produced the following exhibits: the first a post mortem report No. 188/140/2023 exhibit 1 compiled by Dr. I. Jekonya who concluded that the cause of death was intracranial haemorrhages; skull fractures; post assault severe head injury. The second is a log exhibit 2 with the following measurements: length 99 cm; circumference 14.5cm; and weight 1.576kg. This is the log that was used to strike at the deceased.

[5] The totality of the facts and the evidence adduced in this trial show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

[6] The facts show that the deceased was the aggressor. As the two were quarrelling, the deceased was holding an okapi knife and threatening to stab the accused. The accused escaped from the scene and deceased gave chase until he caught up with him. The accused then picked up a log and struck the deceased once on the head and causing his death. The facts show that

accused struck the deceased in self-defence. In terms of the law in this jurisdiction the defence of “self-defence” has been codified in s 253 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In respect of the attack, it is required that the attack must be unlawful, must have commenced or was imminent, while the defensive act must be directed against the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances. In casu the attack was unlawful and had commenced or was imminent. The accused was entitled to take defensive action. However, he used excessive force to repel the attack. In striking the deceased with severe force on the head fracturing the skull, a reasonable man placed in the same circumstances as the accused would have foreseen the possibility of death and would have guarded against it. The conduct of the accused shows that he fell below the reasonable person standard. The accused ought, as a reasonable man, to have foreseen the death of the deceased and guarded against it. The accused was negligent and it was his negligence that led to the death of the deceased. On the basis of the facts and the evidence of this case, the court is satisfied that the State’s concession was properly taken.

In the result: the accused is found not guilty of murder and found guilty of the lesser crime of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

[7] Mr. Ndlovu, this court found you guilty of the crime of culpable homicide. It is now the task of this court to sentence you. In determining an appropriate sentence this court must consider the applicable sentencing principles, taking into account the specific circumstances of this case and factoring in to the equation the well-known triad of sentence consisting of the crime, the offender and the interests of society. Again, the court will factor into the equation the provisions of the Criminal Procedure (Sentencing Guidelines) Regulations, 2023.

[8] Your personal circumstances are these: you are 38 years old; and married with four children. You are a subsistence farmer and the sole provider of your family. The court will further take into account that you are a first offender, pleaded guilty to the crime of culpable homicide; and that you have been in pre-trial incarceration for period of three months. Again, the deceased was the aggressor who pursued you armed with an okapi knife. The attack was unlawful, which had commenced or was imminent and it was lawful to defend yourself. The only problem is

that you used excessive force which was disproportionately to the harm in defending yourself, you struck the head a delicate part of the human body. The attack fractured the deceased's head. The circumstances of this case locate it on the lower end of culpable homicide cases.

[10] A sentence of direct imprisonment is not warranted in this case. In the circumstances, the following sentence will meet the justice of this case.

The accused is sentenced to 36 months imprisonment of which 24 months suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine. The remaining 12 months imprisonment is suspended on condition accused completes 420 hours of community service at Gwangaliba Primary School.

National Prosecuting Authority, state's legal practitioners
Dube & Associates, accused's legal practitioners