

**THE STATE**

**Versus**

**KEFASI NDEBELE**

IN THE HIGH COURT OF ZIMBABWE  
MOYO J with Assessors Mr J H Sobantu and Mr E Mashingaidze  
BULAWAYO 16 MARCH 2023

**Criminal Trial**

*B. Gundani*, for the state  
*P. Butshe*, for the accused

**MOYO J:** The accused person faces a charge of murder, it being alleged that on the 23<sup>rd</sup> of March 2020 and at Makokoba Compound, Makhudu village in Mphoengs, the accused stabbed Linnet Siziba once on the upper part of the left thigh and once on the left arm using a kitchen knife and thereby causing her death.

The accused pleaded Not Guilty to the charge but tendered a limited plea to a charge of culpable homicide. The limited plea not having been accepted by the state, the matter went into a full trial.

The state tendered into the court record the following:-

1. state summary
2. affidavit by Constable Dube who identified deceased's body to the pathologist.
3. post mortem report
4. the Zimpost official's affidavit on the particulars of the knife being the object that was allegedly used in the commission of the offence.
5. the knife itself.

The defence tendered the defence outline into the court record. All the exhibits were duly marked.

The state led *viva voce* evidence from 4 witnesses namely, Petronella Ncube, Edith Siziba, Butholezwe Bhebhe and Frank Chimhapa. The accused person gave evidence for the defence.

The evidence of:-

- (a) Mqondisi Masuku,
- (b) Mehluli Nkomo,
- (c) Bothwell Moyo,
- (d) Serbias Ndlovu,
- (e) Hardlife Zhou,
- (f) Dereck Edmore,
- (g) Dr Joan Rodriguez Gregori,
- (h) and Boniface Gava was admitted into the court record as it appears in the state summary.

The facts of this case are largely common cause, in that accused and deceased were husband and wife. They operated tuckshops wherein Petronella Ncube worked in one of them and Edith Siziba assisted in the other. On the fateful day accused and deceased had an altercation, according to Petronella Ncube, the cause of the dispute was that deceased said she would put up at the tuckshop that night which did not go down well with accused, who then told deceased that she wanted to commit adultery with other people that is why she chose to sleep at the shop. The deceased then said accused was always suspecting her of infidelity and that she was tired and was thus no longer interested in the relationship they had. Deceased took a knife feigned an attack at the accused and then put the knife down, accused then took the knife, accused tried and missed stabbing the door in the process. The second time that is when he stabbed her. She did not notice where accused stabbed the deceased. Deceased went outside and fell to the ground. She saw accused go out and check on the deceased and then left. She confirmed that there was only one knife in the tuck-shop. She further told the court that the second state witness Edith Siziba arrived while the accused and deceased were fighting and that by fighting she meant the harsh exchange of words. She disputed that there were 2 knives. Although Edith Siziba's testimony is somewhat different in certain respects from the

one given by Petronella Ncube, as to what stage Edith came in and what then followed after the stabbing, the testimonies are primarily similar in the material respects. The material respects are what transpired between accused and deceased just before and during the stabbing. Edith Siziba corroborates Petronella's testimony in the material respects of what happened just before and during the stabbing. She confirms that accused and deceased had a verbal altercation and that accused took a knife and stabbed the deceased in her presence during the altercation. She also confirmed that there was no other knife in the tuckshop,

Butholezwe Bhebhe was the Investigating Officer in the matter and he told the court that he attended the scene after the fact, searched for the knife that was allegedly used and did not find any, he also questioned witnesses on its whereabouts but it has was not found. The knife was finally found with accused who gave it to the witness in Bulawayo. Those were the material aspects of the state case.

Accused's version is that he was acting in self defence as deceased was also armed with a knife on the day in question and that he was trapped as accused stood on the doorway wielding a knife thus forcing him to stab deceased in order to flee. In his defence outline paragraphs 3-4 the accused states the following:-

- “3. The deceased became violent and she took a knife and she advanced towards accused, the accused went backwards until he hit against a zinc wall as the deceased was advancing undeterred.
4. When the accused realised that he had nowhere to go he then picked up a kitchen knife which he used to stab the deceased on the thigh in order to incapacitate her.”

Accused told the court of an earlier altercation between deceased and Edith Siziba and according to him it is that altercation that led to the deceased saying she will then sleep at the tuckshop as she was angry. She then told accused that she was no longer interested in him and that he should go and have a relationship with Edith. She then stood by the door holding a knife, he asked her what the knife was for and she appeared very angry and wanted to stab accused, he then moved backwards, picked a knife and feigned an attack so that he could escape and unfortunately she was stabbed. He said that he did not know if he had stabbed the door he only heard about that. He said he took the knife and deceased got stabbed on the thigh but he does not know how, he also attributed the wound on the arm to deceased falling and being

stabbed by the knife she was carrying. Asked to clarify in clear terms how deceased got injured on the thigh, he said he picked the knife and deceased got stabbed but he did not know how she got stabbed. He said that he did not see the knife stabbing the deceased he only heard that he had stabbed her.

There is one problem with accused's version which renders his whole testimony unreliable, that is, in his defence outline at paragraph 4, it is stated in precise terms that he realised that he had nowhere to go, he then picked up a kitchen knife which he used to stab the deceased on the thigh in order to incapacitate her. Clearly from the defence outline the deduction is that accused took the knife and stabbed deceased on the thigh with an intention to incapacitate her so that she does not harm him. However, in his oral evidence, he is evasive on the aspect of how he stabbed the deceased. He gives the impression that he does not know how deceased got stabbed after he picked the knife, he just heard that he had stabbed the deceased. So clearly accused is not telling the truth here for he cannot on one hand have stabbed deceased on the thigh in order to incapacitate her, and on the other, to have stabbed deceased without realising or noticing how she got stabbed or where she was stabbed. Accused's version for this reason will be rejected and the evidence of Petronella Ncube who witnessed everything from start to the end, will be accepted as the true version of what transpired on the fateful night.

The evidence of Edith Siziba is also corroborative of Petronella's evidence on the material respects of how and where accused stabbed the deceased and on the aspect that there was no other knife. In fact the 2 witnesses' testimony on the absence of any other knife is also corroborated by the Police Officer Butholezwe Bhebhe.

It is this court's finding therefore that on the facts, accused and deceased had an altercation, deceased feigned an attack with a knife at the accused, accused took the knife, first struck and missed deceased, hitting the door instead and then struck deceased on the thigh and on the arm. The defence of self falls away the moment the court accepts the version of the 2 state witnesses, to the effect that at the time she was struck deceased was no longer armed meaning accused could have made his way out of the tuckshop easily. The accused person therefore, did act wrongfully and unlawfully on the day in question.

What then should be the verdict against accused? The state counsel submitted that accused should be found guilty of murder as he must have foreseen the risk or real possibility

of death but nonetheless persisted. In other words, the state submission is that accused had the requisite legal intention.

Defence counsel on the other hand submitted that an intention either actual or legal cannot be attributed to accused's actions and that he should be found guilty on the competent verdict of culpable homicide instead as he was negligent in the circumstances. That then takes us to assess and evaluate the difference between murder and culpable homicide.

“Where it is alleged that accused had the legal intention to kill, accused will usually deny that he foresaw that his actions will result in death. The question then is, whether, as a matter of inference, he did have such foresight despite his denial. He can only be convicted of murder if the only reasonable inference that can be drawn from the facts is that he had legal intention to kill. If the court draws this inference, the court decides that he must have and did foresee the possibility of death. (In effect a finding that he was lying when he said he did not foresee that possibility if there is a reasonable doubt as to whether he had the legal intention, he must be given the benefit of the doubt and can only be convicted of the lesser crime of culpable homicide if it is proved that he negligently caused the death in question.” Per Professor Feltoe in “*A Guide to the Criminal Law of Zimbabwe*” 2005 Edition page 96.

In drawing an inference on accused's intention, it is this court's view that the court must take into account all the relevant factors and the circumstances of the commission of the offence. It is only when all the proven facts point towards an intention that the court can draw an inference that the accused did have it. Such factor as, what was happening between the accused and deceased, that, is the circumstances of the commission of the offence, for instance, whether there was a dispute or not, the weapon used, the area of the human anatomy that the blow was aimed at, whether it's a vulnerable part of the body or not, the resultant injuries, the degree of force applied etc.

In this case the following are common cause:-

1. Accused and deceased had a misunderstanding.
2. Accused picked a kitchen knife and struck deceased on the thigh and upper arm.
3. The injuries described by the post mortem report are:
  - (a) an incised wound, penetration, located on the left arm, 6 cm in length with exit on the interior face 2 cm.
  - (b) an incised wound, penetrating, located on the left thigh upper third midline (4 x 3 cm).

The post mortem report does not describe the nature of the wounds as in being severe, deep or the extent of the force applied.

The definition of “incised” is given in the online dictionary as “a cut into a surface”

The post mortem report gives the cause of death as hypovolemic shock, laceration of the femoral artery, stab wound. And the online dictionary defines it as severe blood loss,

The femoral artery is also defined in the online dictionary as the main blood vessel supplying blood to your lower body.

The stab wound in the thigh was given as the main cause of death.

The court then asks the pertinent question can it be found that the only reasonable inference that can be drawn from these proven facts is that having caused the stab wound in the thigh, accused did foresee death as a real possibility?

The answer is no for the following reasons:-

1. The thigh is not a vulnerable part of the body whose strike will almost reasonably result in the death of a person. In fact it should be conversely found that a single strike on the thigh or leg would naturally not mostly result in death for accused to have seen death as a real possibility. There is in fact a remote possibility of death when a person is struck once on the thigh. Of course it also depends on the nature of the weapon used and the degree of force. In fact even the post mortem report describes a cut and a lacerated wound whose severity cannot be concluded *ex facie* the post mortem report.

It thus becomes too onerous on an accused who stabbed a deceased on the thigh, to expect that he must have foreseen death as a real risk and possibility in the circumstances. There are vulnerable organs of the human body from where an assault on them can be without doubt a life-threatening occurrence, but the thigh is definitely not one of them. The accused person in this instance must be given the benefit of the doubt to the extent that he cannot be found to have had the requisite legal intention to commit murder.

It is for these reasons that the accused person will be found Not Guilty of murder but will instead be convicted on the lesser charge of culpable homicide.

## **Sentence**

The accused is convicted of culpable homicide. He is a first offender. He is a family man with 4 children. He pleaded guilty to the appropriate charge. However a life was unnecessarily lost through accused's actions. It could have been avoided if he had just left the tuckshop. These courts frown at the loss of life through violence and the only conviction that can be made and given to the society out there, are appropriate sentences that will clearly be seen to register the court's displeasure on lives being lost through violence when there are numerous societal avenues that can lead to a peaceful resolution of disputes. It is this court's finding that this particular case ranks high amongst culpable homicide cases in that a knife was used. A knife is in itself a dangerous weapon and inflicting injuries through its usage is not taken lightly by these courts. It is for these reasons that this court finds that an upper bracket sentence in this matter is appropriate. Culpable homicide sentences generally range from 2 years to about 10 years imprisonment effective, and this court finds that a sentence in the upper bracket of that range will be appropriate.

It is for these reasons that accused is sentenced to 8 years imprisonment.

*National Prosecuting Authority, state's legal practitioners*  
*Mathonsi Ncube Law Chambers, accused's legal practitioners*