

**THE STATE****Versus****QHUBEKANI NYATHI**

IN THE HGH COURT OF ZIMBABWE

MOYO J with Assessors Mr T. E. Ndlovu & Mr G. Maphosa  
HWANGE 4 OCTOBER 2022**Criminal Trial***Mrs C. Gorerino* for the state  
*Ms B. Khuphe* for the accused

**MOYO J:** The accused faces a charge of murder it being alleged that on the 26<sup>th</sup> of April 2022 and at a bushy area in Mbangiso Village, he unlawfully caused the death of Mirriam Ncube by striking her with a stick once on the head and thereby causing her death. The accused pleaded not guilty to the charge of murder but instead offered a limited plea to a charge of culpable homicide.

The state accepted the limited plea and the parties drew a statement of agreed facts which was tendered and duly marked. It reads as follows:

- “1. The accused was aged 43 years at the time of the commission of the offence and he reside at his own homestead, Mbangiso Village, Singwangombe area, Chief Sikhobokhobo, Nkayi.
2. The deceased was aged 69 years at the time she met her death she used to reside at her own homestead, Mbangiso Village, Singwangombe area, Chief Sikhobokhobo, Nkayi.
3. Accused and deceased were brother and sister.
4. On the 20<sup>th</sup> of April 2022 at 1700 hours deceased was attending a funeral in the village. After the burial, she went back home in the company of Similo Moyo and Nonsikelelo Sibanda.
5. Along the way the deceased met the accused. Accused asked deceased as to why she left young people only at the funeral. The deceased said she was going to pen her cattle and would be back.
6. The deceased became angry and struck accused with two fits on the chest.
7. Accused got angry and slapped deceased on the face. Accused further assaulted deceased with fists on the head and further assaulted her with her walking stick and booted feet several times all over her body.
8. Similo Moyo ran back to the funeral and reported the incident. Khulekani Moyo who had remained at the funeral arrived at the scene and tried to refrain the accused but accused told him not to meddle in their family affairs.
9. Deceased lost consciousness and did on the spot.

10. The accused person pleaded not guilty to murder but pleaded guilty to culpable homicide in that he negligently caused the death of the deceased.”

The post mortem report and the stick that was allegedly used was also tendered and marked. The post mortem report gives the cause of death as;

- (a) Subarachmoid haemorrhage
- (b) Cranial trauma
- (c) Assault

From the facts presented before us, the accused person is found not guilty and is acquitted on the murder charge and is accordingly convicted on the lessor charge of culpable homicide.

### **Sentence**

The accused is convicted of culpable homicide, he is a 1<sup>st</sup> offender, pleaded guilty to the correct charge, family man and sole breadwinner. Deceased was also the aggressor. There is indeed weighty mitigation in this case vis-à-vis the circumstances of the commission of the offence and the accused's personal circumstances.

Defence counsel advocated for a non-custodial sentence in the form of a fine or community service. State counsel advocated for a minimal period of imprisonment in the region of 3 years. This court has this to say on these submissions, it is accepted that an accused person who has been provoked by a deceased does have in his favour, weighty mitigation in sentence, but these courts must not be clouded by the aggression by the deceased to the extent of failing to appreciate that life is sacred and its loss through violence is not an acceptable occurrence in our society. These court must not over emphasis the deceased's conduct in provoking an accused, to the extent that such a deceased's life is considered as being trivial before the eyes of the law. Life is sacred, yes including the life of an unruly deceased. Deceased's conduct in the transaction that led to her unfortunate demise, is not a ticket on its own to a non-custodial sentence or a fine, no, lest society misunderstands the courts, and end up believing that there is justification in the murder of those who are aggressive, there is not. What exists in such a case is weighty mitigation that leads the court to tamper justice with mercy by giving such an accused a custodial sentence that correlates with the degree of his moral blameworthiness in the commission of the crime.

It is for these reasons that this court finds that a custodial sentencing though not too long, meets the justice of this case.

The accused person is accordingly sentenced to 5 years imprisonment with 2 years imprisonment suspended for 5 years on condition the accused, does not within that period commit an offence involving violence, whereupon conviction he shall be sentenced to imprisonment without the option of a fine.

*National Prosecuting Authority, state's legal practitioners*  
*T. Hara Attorneys, accused's legal practitioners*