

STATE
versus
ALIVINE MUSIWARWO
and
CLEVER MUSIWARWO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 October 2022, 18 & 21 November 2022, 18 January 2023 & 8 March 2023

Criminal Trial

Assessors: Mr *Chakvinga*
Mr *Mpofu*

D H Chesa, for the State
T Kabasa, for the accused

MUREMBA J: The two accused persons who are brothers pleaded not guilty to the charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).

The allegations are that on 16 May 2021 and at Hokonya business centre in Chivhu, the accused persons unlawfully stabbed Blessing Hokonya (the deceased) with an okapi knife once on the left side of the chest intending to kill him or realising that there was a real risk or possibility that such conduct may cause death continued to engage in that conduct despite the real risk or possibility.

In the summary of the State case it is alleged that on the fateful day at around 1930 hours, Tichaona Hokonya who was drinking beer in Sky Blue Sports Bar accidentally spilled beer on the second accused who threatened to assault him. Tichaona Hokonya informed his colleagues who included the deceased of what had happened and together they confronted the second accused. The accused persons became violent and a commotion ensued. Accused one asked for a knife from the second accused who took an okapi knife from the back pocket of his trousers and handed it over to him. The first accused stabbed the deceased once on the left side of the chest and fled

from the scene. The deceased was ferried to Chivhu General hospital where he was pronounced dead on arrival.

In their defence outline the two accused persons did not deny that the first accused person stabbed the deceased in the manner described in the State's summary of evidence. However, their narration of what led to the stabbing of the deceased is different from the allegations by the State. According to the accused persons what happened is that while they were drinking beer in Sky Blue Sports Bar the first accused urinated on the verandah and the bar lady was not happy about it. She confronted him. The second accused offered to clean up the verandah and told the bar lady that the first accused had a history of mental illness. A group of men who appeared to be close to the bar lady arrived and started to assault the first accused. All patrons then went out of the bar. The group of men who included the deceased continued to pursue the first accused who then rushed to where the second accused was standing and took a knife from his back pocket. He then used it to stab the deceased in self-defence. After stabbing the deceased, he ran away. The second accused and Benjamin Musiwarwo an elder brother to both accused persons with whom they were drinking beer, remained where they were standing and they were both apprehended by members of the public. The second accused denied that he gave the first accused the knife that he used in stabbing the deceased.

Issues that are common cause

At the conclusion of the trial it emerged that the following issues were common cause. The two accused persons were drinking beer in the company of their elder brother Benjamin Musiwarwo in Sky Blue Sports Bar. The accused persons were strangers at the business centre. The first accused person urinated on the verandah of the bar. The bar lady, Susan Ganye, was not happy about it. She confronted him over the issue. Thereafter, there was commotion inside the bar by 10 – 15 men and Susan Ganye ordered everyone out of the bar and closed the bar. Thereafter, the first accused person stabbed the deceased once on the left side of the chest with a knife which previously had been in the possession of the second accused. According to the post mortem report what caused the death of the deceased was haemorrhagic shock and a stab wound.

Issues that are in dispute: -

What remained in dispute between the parties which the court needs to resolve are the following issues. What caused the commotion which later resulted in the first accused stabbing the deceased; whether or not the first accused was acting in self-defence when he stabbed the deceased; whether or not the first accused intentionally killed the deceased; and whether or not the second accused handed over the okapi knife to the first accused after the first accused had asked for it.

Evidence led on the disputed issues

The State led evidence from Tichaona Hokonya; Tapiwa Chidamahiya; Justice Mpofo; Stallon Kawodza and Susan Ganye.

Tichaona Hokonya's testimony was as follows. The deceased was his nephew. The witness did not know the accused persons prior to the fateful evening at Hokonya business centre. On the evening in question, the witness was drinking beer in Sky Blue Sports Bar. He accidentally spilled beer on the second accused who was drinking beer with the first accused and a third man. The witness apologized for what he had done. After some time, he went to the toilet. On his way back, he met the two accused persons and accused one told him that what he had done was not going to end well. Since the witness had apologised for what he had done, he asked what had gone wrong, but the two accused persons insisted that it was not going to end well. The witness became afraid and decided to go to Hunters Bar to tell his colleagues about it. His colleagues were Shepherd Darimani, George Chokera; Stallon Kawadza and the deceased. After he had told them what had happened, he asked them to accompany him to Sky Blue Sports Bar to help him apologize to these men that he did not know. When they got to Sky Blue Sports Bar, the deceased asked whether the accused persons had threatened to assault the witness. However, no response was given by the accused persons, but a commotion started. People started to push each other until the bar lady asked everyone to leave the bar. People left the bar and she closed it. People continued to make noise at the verandah. The deceased and the accused persons were standing on the right side of the verandah. Accused one then asked for a knife from accused two who produced it from the back pocket of his trousers and handed it over to accused one. The witness said when accused one asked for the knife from accused two, he said, "*Ndipe banga ndava kutobaya vanhu*" meaning "*Give me the knife I am now going to stab people.*" The witness was standing at the edge of the

verandah opposite the door. There were lights on the verandah and it was very bright. When accused one was handed the knife, he stabbed the deceased on the left side of the chest and fled from the scene. The deceased shouted twice that he had been stabbed as he was holding his chest. He staggered backwards before he fell on his chest. The second accused and the third man who was in the company of the accused persons were apprehended by people at the scene. It appeared that the accused persons were very drunk because they failed to understand a small issue. They were drinking two keys beer. Under cross examination the witness said that he was not aware of the first accused having urinated on the verandah on the evening in question. The witness said that he did not witness the dispute between the first accused and the bar lady over the issue. The witness denied that when the first accused stabbed the deceased, he (accused one) was being pursued by a group of men. He denied that the first accused stabbed the deceased in self-defence as no one was pursuing him. He said that accused persons were strangers in the area.

Tapiwa Chidamahiya a police officer who attended the scene testified as follows. He received a report of someone having been stabbed at Hokonya business centre and attended the scene on the same evening. He recovered the okapi knife at a point which was 10-15 metres away from the point where the deceased was stabbed. The deceased had already been ferried to hospital, but there was a pool of blood where he had been lying. From the interviews that he carried out, he gathered that the deceased was stabbed on the verandah and he staggered backwards and fell 2-3 metres away from the verandah. He also established that there had been no fight but a quarrel before the deceased was stabbed.

Justice Mpofu, the investigating officer testified as follows. He attended the scene on the same evening the crime was committed. He found police officer Tapiwa Chidamahiya already at the scene and having recovered the knife. From the interviews that he carried out, he gathered that the deceased was stabbed whilst on the verandah and that he then staggered backwards and fell at the edge of the verandah about 12-13 metres. The witness also established that there had been no fight but a commotion before the deceased was stabbed. The witness said that when he initially interviewed the bar lady, Susan Ganye she said that accused one had urinated on the verandah but she did not take issue with that. She mopped the urine. This is what was written in the form 242 as the cause of the misunderstanding that resulted in the commotion that resulted in the deceased being stabbed. However, follow up investigations revealed that what triggered the commotion was

Tichaona Hokonya who had spilled beer on one of the accused persons. Although the urination issue happened, it is not what triggered the commotion that led to the deceased being stabbed by the first accused.

Stallon Kawodza testified as follows. He was braaing at Hunter's Pride bar on the fateful evening when Tichaona Hokonya arrived at around 7.30pm and asked the witness and others to go with him to Sky Blue Sports Bar to ask for forgiveness or apologize to the people that he had wronged. When they proceeded to Sky Blue Sports Bar, the bar was about to be closed. The bar lady was saying the issue was over and was asking everyone to leave. She was telling people not to make noise. When the witness was leaving the verandah he then heard the deceased crying out that he had been stabbed as he was holding the left side of his chest. The deceased was on the verandah. He walked some few metres and then fell to the ground. When the witness went back to see what had happened, he saw the first accused running away holding nothing. The witness was about 3 metres away from where the deceased fell. The deceased was stabbed whilst at the verandah, about 2m away from the door. The witness did not know what caused the deceased to be stabbed because the witness was walking ahead of the deceased when they were leaving Sky Blue Sports Bar. The witness said that when he got to Sky Blue Sports Bar, people had already been ordered out by the bar lady, so he did not witness the pushing that had happened inside. He said this was so because when Tichaona Hokonya came to ask for help he had lagged behind when the others left for Sky Blue Sports Bar. He was wondering whether he should go or not. The witness also confirmed that he had heard that accused one had urinated on the verandah. The witness noticed that accused two was standing near where the deceased was standing. He (accused 2) was 1 metre away from the deceased and 1 metre away from accused one. Some other people were away from the scene as they were walking away. The witness did not see anyone attacking any one of the accused persons. The witness did not witness any commotion at the verandah.

Susan Ganye the bar lady at Sky Blue Sports Bar testified as follows. The accused persons were drinking beer in her bar. They were strangers at the business centre. At one stage the witness played snooker with accused one who had asked to be taught how to play snooker. Accused one then went outside and urinated on the verandah. The witness was not happy about it. She went outside and spoke to him; just the two of them. They were able to resolve the issue amicably with the witness telling accused one that she would clean up the urine. They then entered the bar

together. After about 10-15 minutes, about 10-15 people came from other bars into her bar. These people started making noise as they surrounded accused one. The witness did not get to hear what the altercation was all about but they did not assault accused one. The witness failed to control the noise and ordered everyone to get out of the bar. When everyone went out of the bar, she heard people shouting “knife, knife” and then heard that the deceased had been stabbed. She ran outside to where the deceased was lying. With the help of other people, she arranged for transport to ferry the deceased to hospital.

The witness denied that the issue of the urine is what caused the deceased to be stabbed because it had been long resolved before the group of men came into her bar from other bars. The witness also denied that accused two had been involved in resolving the issue of the urine. She also denied that accused two ever told her that accused one had a history of mental illness.

After the State had led evidence from its witnesses, the matter proceeded to the defence case where the accused persons testified and also led evidence from their elder brother Benjamin Musiwarwo who was in their company on the fateful day. The first accused testified that 10 people were attacking him and he had been severely assaulted when he decided to take a knife from accused two’s pocket to defend himself. He said he did this as he was coming out of the bar and his two brothers were on the verandah. The first accused said that these people had started attacking him when he was outside the bar. The first accused said that he knew that accused two had a knife because he had earlier on seen him and Benjamin cutting meat with it.

Accused two denied giving the knife to accused one whom he said he just took the knife from the back pocket of his trousers. Accused two said that accused one had seen the knife when he and Benjamin were cutting meat. The knife belonged to Benjamin Musiwarwo but when they finished cutting meat, the second accused said that he had put it in his pocket.

Benjamin Musiwarwo testified as follows. On the day in question he had come from Harare and had asked his two brothers, accused one and two, to wait for him at Hokonya business centre. When he arrived at the business centre at around 2pm, they started drinking beer in Sky Blue Sports Bar. They were drinking castle beer and then switched to Gold blend. Accused one then went outside and urinated on the verandah of the bar. The bar lady started quarrelling with him. Accused two told the bar lady that accused one had a history of mental illness. She did not listen to accused two. Instead, she went outside the bar and within a short space of time, a mob of people

entered the bar and started having an altercation with accused one. They were assaulting him. The bar lady ordered everyone out. The mob continued to assault accused one outside. Accused one ran to where accused two and the witness were standing and ran back to where he had come from. That is when the witness heard people shouting that someone had been stabbed. He was later apprehended together with accused two by a mob of people. They were even assaulted. This witness said that he did not see accused one taking the knife from accused two. He also said that he did not know who the owner of the knife was. He denied that it was his. He said that if accused two had handed over the knife to accused one, he would not have noticed because he was drunk and was standing at a dark place.

Analysis of evidence

What caused the commotion which resulted in the first accused stabbing the deceased?

From all the evidence that was led by the State and the defence, we are convinced that what caused accused one to stab the deceased was not the issue of the urine but the issue of Tichaona Hokonya having spilled beer on accused two. The State witnesses gave a detailed account of the two separate incidents. It was clear that the issue of the urine happened first and it was resolved amicably between accused one and the bar lady, Susan Ganye. Other State witnesses did not even witness it. They only heard about it after the deceased had been stabbed. Susan Ganye made it clear that the mob that came into her bar and started making noise only came 10-15 minutes after the issue of the urine had been resolved. She was not even aware of the issue that had caused the mob of people to come from other bars and why they were making noise. Susan Ganye impressed the court as a credible witness with no reasons to lie against the accused persons. These are people who had spent the better part of the afternoon drinking beer in her bar. She had even played snooker with accused one who had asked to be taught how to play snooker. The evidence of Tichaon Hokonya and Stallion Kawodza shows that it is Tichaona Hokonya who went and called his colleagues from Hunters Bar after a misunderstanding with the two accused persons after he had accidentally spilled beer on accused two. This is the issue that his colleagues came to resolve. This explains why the bar lady was not even aware of the reason why people had come from other bars and were surrounding accused one and were making noise.

Was the first accused acting in self-defence when he stabbed the deceased?

In terms of s 253 (1) of the Criminal Law Code, for the defence of self-defence to succeed as a complete defence, it must be shown that the accused was under an unlawful attack which must have commenced or was imminent or the accused believed on reasonable grounds that the unlawful attack had commenced or was imminent. It must also be shown that the accused's conduct was necessary to avert the attack or that the accused believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack. It must also be shown that the means used to avert the attack by the accused were reasonable. Further, it must also be shown that any harm or injury caused by the accused was caused to the attacker and the harm caused was not grossly disproportionate to that liable to be caused by the unlawful attack. If it is shown that the means used by the accused to avert the unlawful attack were not reasonable in the circumstances, the defence of self-defence can only suffice as a partial defence. This means that the charge of murder is reduced to culpable homicide.

In *casu* from the evidence led, none of the above stated requirements was satisfied. The evidence that was led does not show that the first accused was physically attacked by anyone inside the bar or that a mob pursued him outside the bar. The accused persons failed to show that when accused one took the knife from accused two, he was being pursued by a mob. It was just their word and nothing else. We are not able to take their word as the truth because they did not impress the court as credible witnesses. They contradicted each other on material issues. For instance, accused one said he took the knife from accused two's pocket as he was coming out of the bar. He said that his two brothers were standing at the verandah yet Benjamin Musiwarwo said that when accused one came out of the bar, accused two and himself were standing in the dark off the verandah. Benjamin also said that the mob was pursuing accused one, yet accused one never spoke of being pursued by the mob off the verandah. The accused persons could not even tell the truth of who the owner of the knife was between accused two and Benjamin Musiwarwo. Whilst they said the knife belonged to Benjamin, Benjamin denied any knowledge of it. He even denied that he had used the knife to cut meat on the day in question.

Evidence from the State witnesses shows that the deceased was stabbed at the verandah, about 2 metres from the door. The accused persons were not able to dispute this. What this means

is that accused one was never pursued by a mob whilst outside the bar. If this had happened, the deceased would not have been stabbed at the verandah then, just 2m away from the door. The fact that the deceased was stabbed at the verandah shows that when the first accused stabbed the deceased, he was not in danger at all. Whilst the pushing could have happened inside the bar, nothing really happened outside the bar except the noise that people made as they left the bar. The first accused in his own words testified that 10 people were attacking him and he had been severely assaulted when he decided to take a knife from accused two's pocket to defend himself. He said he did this as he was coming out of the bar and his two brothers were on the verandah. The first accused said that these people had started attacking him when he was outside the bar. All this was disputed by the State witnesses and two police officers who attended the scene and found no evidence of a fight having happened inside or outside the bar. Even the bar lady who can be regarded as a neutral person said no fight happened. Besides, the first accused had nothing to show for the severe attack that he spoke about. In view of the foregoing, the defence of self-defence does not suffice either as a complete defence or as a partial defence in the circumstances of this case.

Did the first accused intentionally killed the deceased?

Mr *Kabasa* submitted that the first accused should be convicted of culpable homicide because he lacked the requisite *mens rea* for murder as he was drunk and was also under attack by 5 – 10 men. We have already dismissed the defence of self-defence. Voluntary intoxication can only be a defence if it is shown that the effect of the intoxication upon the accused was such that he did not form the intention or did not realise the existence of risk or possibility that death could occur from his conduct. If despite the intoxication, the accused was still able to form the intention and did form the requisite subjective state of mind, he will be found guilty of murder. The fact that the accused was intoxicated can only assist him as a mitigatory factor – See s 221(1) of the Criminal Law Code. *In casu* the first accused did not raise the foundation to show that he did not form the intention or he did not realise the existence of the risk or possibility of death occurring as a result of being drunk or intoxicated. No foundation was laid in respect of this defence whatsoever. It was not given as a defence in the defence outline. Even during trial, it was not mentioned. All that was said was that the accused persons had been drinking beer from around

2pm. Nothing was said about the amount of beer accused one had taken and how intoxicated he was. Nothing was said about the effect of intoxication on him. A defence should be dealt with exhaustively and adequately during trial for it to succeed. A defence cannot be raised for the very first time in the closing submissions as what happened in *casu*. We thus dismiss the defence of intoxication.

Although Mr *Kabasa* did not submit that accused one should not be found guilty of murder because of insanity, there was mention by accused two in his summary of evidence that accused one had a history of mental illness. This issue of accused one having suffered from a mental illness before he committed the offence was extensively dealt with during trial by both parties. However, it was not quite clear why this was an issue considering that it was never mentioned in the defence outline that accused one had committed the offence whilst suffering from a mental illness. Mental illness not having been raised as a defence in the defence outline, there was no need for the parties to delve into this defence during trial. It is in the defence outline that the accused's defence(s) is /are outlined. The defences given then define the direction of the trial. If something is mentioned in passing, like what happened in *casu* in respect of accused two having suffered from a mental illness at some stage during his lifetime, it does not become an issue worth ventilating during trial. Failure by the parties to properly define issues that need to be proven results in a convoluted trial like what happened in the present case.

Be that as it may, in terms of s 227 of the Criminal Law Code insanity can be a complete defence to any charge including murder. If it is proven that the accused was mentally disordered or defective at the time he or she committed the offence, the court is required to return a special verdict of "not guilty by reason of insanity" in terms of s 29 (2) of the Mental Health Act [*Chapter 15:12*]. In terms of s 18 of the Criminal Law Code, the onus of proving the defence of insanity rests on the accused. The defence should be proved on a balance of probabilities. In *casu* we observed that during the defence case accused one categorically stated that although he had suffered from a mental illness well before the commission of this crime starting in 2019, on the day in question he was not suffering from any mental illness. Even accused two and Benjamin Musiwarwo said that on the day in question the first accused was not suffering from any mental illness. The first accused was even medically examined by 2 doctors, Doctor Machera and Doctor Dobbie at the instance of the State before trial commenced. Doctor Machera made findings to the

effect that accused one was well oriented in time, place and person and was fit for trial. She further stated that the factors which caused his mental disorder was substance abuse of alcohol and cannabis. Doctor Dobbie observed that accused one was mentally stable as he was on treatment. Doctor Machera even testified as a State witness. The evidence led did not show that when the first accused committed the crime he was suffering from a mental illness.

In view of the finding that we have already made that accused one was not acting in self-defence when he stabbed the deceased, we thus arrive at the conclusion that the first accused stabbed the deceased with the intention of killing him. Our conclusion is based on the following. When Tichaona Hokonya spilled beer on accused two, the two accused persons refused to accept his apology. When they met him on his way from the toilet, they told him that what he had done was not going to end well. These words came from accused one. When people were then ordered out of Sky Blue Sports Bar, he then asked for a knife from accused two. As he was asking for the knife from accused two, he said "Give me the knife, I am now going to stab people." Accused one verbalised his intention to kill and he was asking for a knife which is a lethal weapon, i.e. a weapon which can kill. Upon taking the okapi knife he stabbed the deceased on the left side of the chest. The deceased sustained a 3 cm wide injury below the nipple and the left lung and heart were perforated. The deceased was pronounced dead on arrival at hospital. The accused aimed at the left side of the chest which houses vital organs such as the left lung and the heart. He used massive force to cause perforation of these two organs. After stabbing the deceased, he immediately fled from the scene. From the first accused's conduct it can also be inferred that he actually intended to cause the death of the deceased. This is a case where the accused exhibited his intention by his conduct and by his utterances. We will thus find him guilty of murder with actual intent.

Did the second accused hand over the okapi knife to the first accused?

Evidence from Tichaona Hokonya was that accused one asked for the knife from accused two and accused two took the knife from the back pocket of his trousers and handed it over to him. His evidence was not discredited by the defence. Nothing shows that Tichaona Hokonya lied against the two accused persons. We do not see why this witness would not simply have said that accused one took the knife from the pocket of accused two if that is what happened. We do not see why Tichaona Hokonya would choose to lie that accused two handed over the knife to accused

one if this is not what happened. Tichaona Hokonya never said anything to incriminate Benjamin Musiwarwo the third brother who had always been in the company of the two accused persons. If Tichaona Hokonya was a malicious person he would have falsely implicated Benjamin Musiwarwo as well. Tichaona Hokonya impressed the court as a credible witness who told the truth of what happened.

The two accused persons said that accused one took the knife from accused two's back pocket as he was being attacked by a mob. Accused one said that he embraced or grabbed accused two as he searched for the knife. We find this evidence hard to believe. Why would accused two stand still as accused one whom he knew to be a person of mental illness was searching for a knife from his pockets? Why would he not try to stop him from getting the knife? The two accused persons cannot be relied upon as credible witnesses. It was clear that accused two wanted to completely distance himself from the knife. He was even denying that the knife was his yet he is the one who had it in his possession. He was saying that it belonged to his brother Benjamin Musiwarwo yet he could not even explain why he kept the knife. He had lied that they had used the knife to cut meat on the day but Benjamin Musiwarwo denied it and said he did not know anything about the knife. This means that accused two had always had this knife and he handed it over to accused one when he asked for it. Accused two had an appreciation of accused one's intentions at the time because accused one said that he now wanted to stab people. The two of them had earlier on threatened Tichaona Hokonya that the issue of him having spilled beer on him (accused two) would not end well. Whilst accused one is guilty as the actual perpetrator of the offence in terms of s 195 of the Criminal Law Code, accused two is guilty as a co-perpetrator in terms of s 196A of the same Act. He is a co-perpetrator because he was physically present during the commission of the offence and he knowingly associated with accused one by handing over the knife which accused one then used to stab the deceased. If accused two had not handed over the knife to accused one, accused one would have not stabbed the deceased because accused one had no knife himself. The two accused persons engaged in stabbing the deceased as a duo. On this basis the conduct of accused one is deemed also to be the conduct of accused two. Accused two is therefore guilty of murder as if he was the actual perpetrator.

In view of the foregoing, we find the accused persons guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act.

Reasons for sentence

In arriving at the appropriate sentence, we took into account the following mitigatory factors. Both accused are first offenders. Accused one is 29 years old and accused two is 35 years old. The two are brothers and it is obvious that their family will be heavily affected by the incarceration of the two at the same time. The two accused persons were drunk. Their behaviour could have been influenced by being drunk to a certain extent. The accused's family paid a beast, bought groceries and provided the coffin for the burial of the deceased.

In aggravation we considered that the accused caused unnecessary loss of life. The deceased died at the tender age of 21 years. The stabbing of the deceased emanated from a small issue of Tichaona Hokonya having spilled beer on the second accused. The two accused persons failed to appreciate and understand that this was a small issue and a mistake at the same time. They refused to accept the apology that Tichaona Hokonya tendered. The accused persons even said that the issue was not going to end well. They were obviously banking on the okapi knife that they had in their possession. Accused one later asked for the knife from accused two and then used it to stab the deceased in the chest. Obviously accused one used massive force because the knife perforated the deceased's lung and heart. The deceased was pronounced dead on arrival at hospital.

It is a cause for concern that murder cases are on the increase in this jurisdiction. There is no longer respect for human life. People are no longer afraid to kill and generally speaking, people are being killed for very minor issues. There is need for the imposition of stiffer penalties to those that are convicted so as to deter the offenders themselves and other would be offenders. A sentence of 25 years' imprisonment for each accused in the present matter will meet the justice of the case. Each accused is thus sentenced to 25 years' imprisonment.

*National Prosecuting Authority, State's legal representative
Laita & Partners, accused's legal representatives*