

THE STATE  
versus  
JUSTICE MATIKINYIDZE

HIGH COURT OF ZIMABWE  
MUNGWARI J  
HARARE, 30 June 2022 & 28 March 2023

### **Criminal Trial**

Assessors: Mr Mhandu  
Mr Kunaka

*C Mutimusakwa*, for the State  
*C Majahana* and *S Bingura*, for the accused

**MUNGWARI J:** Differences between people have existed since time immemorial but it becomes worrisome when relations are thrown out of the window and those who are expected to live in neighbourliness turn to kill each other. The accused in this case was arraigned before this court on a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). The charge from which the allegations arose is that, on 24 October 2018 and at 19985 Stoneridge Park Waterfalls, Justice Matikinyidze (the accused) stabbed Elisha Mvurume (the deceased), who was his neighbour, with a knife on the chest causing mortal injuries.

Prosecution alleged that, on the fateful day, the accused and the deceased's wife had a misunderstanding. The deceased went over to the accused's house with the intention of resolving the issue with his neighbour. The talks degenerated into a brawl and the accused subsequently stabbed the deceased on the chest. He fled the scene and left the deceased lying on the ground writhing in pain. The deceased was taken to hospital where he was pronounced dead on arrival. A postmortem report was conducted on the remains of the deceased and the conclusion was that the cause of death was cardiac tamponade, pericardium heart and liver rupture and a chest stab wound injury.

The accused pleaded not guilty to the charge. In his defence outline he stated that contrary to the State's assertions, it was the deceased who on the fateful day attacked him. His version was that on this day, the deceased came running to his house and pulled him from

where he was standing to an open space. The deceased started to hit him on the head until he fell down. Whilst he was lying sprawled on the ground, the deceased continued to attack him. He said he did not retaliate but instead got up from the ground where he lay and ran back to his house. To his horror, he found the door to his house locked and realized that he was trapped as behind him the deceased was breathing down his neck and was unrelenting in attacking him. At that point the deceased graduated to throwing stones and beer bottles at him. Possibly deceased's other family members had now joined in the attack as the stones and beer bottles came from all directions of the deceased's house. The accused added that prior to this day he had suffered a stroke and was still recovering. His movements were slow and labored. His vision was blurred. At all times during the attack he was protecting his head with one hand while holding his phone with the other. To add to his woes, as a result of the attack, he sustained a deep cut on his hand and his already affected head immediately swelled. He contends that because of this, he could not have stabbed the deceased. In any case, he had no weapon on his person. The accused rounded off his account by stating that he only ran away from the scene because a mob was calling out that he was a thief and urging everyone around to catch him. He ran away because he feared for his life.

### **COMMON CAUSE ISSUES**

The issues which are not in dispute in this trial are that:

1. The deceased and the accused were long time neighbors.
2. On the fateful day, the deceased approached the accused in order to iron out some differences between themselves. A misunderstanding ensued between the two men.
3. The deceased was stabbed on the chest. No one saw who stabbed the deceased or how.
4. The accused fled the scene.
5. The deceased sustained severe chest injuries from which he died.

### **ISSUE FOR DETERMINATION**

When the State's allegations, the defense's narrative and the common cause issues outlined above are put together it is apparent that the only issue which arises for determination is the identity of the person who attacked the deceased. In view of this we proceed to summarise and analyse the witness's evidence in so far as it deals with the identity of the deceased's assailant.

## **THE STATE CASE**

With the consent of the defence, the state opened its case by tendering the autopsy which was sworn to by two pathologists, Drs. Yehilyn Iglesias, and Aisa Serano on 25 October 2018. The court admitted the report in terms of s 278(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (The CP&EA) and marked it as Exhibit 1. It was not in dispute that the doctors had examined the deceased's remains with a view to establishing the cause of his death at Chitungwiza Hospital. Their observations were that, in addition to the chest injury the deceased's body had injuries on the left elbow and left wrist and incise wounds. They detailed their observations as follows:

- “1. Incise wound 7.5 cm large and 4 cm wide in right side of the chest, penetration, deep, with exposure of tissues, blood and internal areas
2. Close and up to the left wrist incise wound 3.5 cm large and a wide con self-defence injuries. Incise wounds
3. Ex corigated plague abrasion lineal in the flexure of the left elbow.”

The doctors concluded that the death of the deceased was a result of cardiac tamponade, pericardium heart, liver rupture and chest stab wound injuries. Another significant condition noted was an occipital lineal fracture. They rounded off the sworn statement with the following comment:

“The object is sharp, with approximately five (5) cm wide and +-25(25) cm large. Trayect up to down in front to the body.”

Undoubtedly the injuries were signs of a violent attack that was perpetrated upon the body of the deceased leading to his death.

In addition to this, the evidence of two State witnesses, namely Veronica Matonhodze and Tichaona Chirinhe was formally admitted in terms of s 314 of the CP & EA as it appears in the state outline. It was admitted without contestation and was to the following effect:

### **Veronica Matonhodze (Veronica)**

On 24 October 2018 at around 5 p.m. the witness, a police officer and neighbour to both the deceased and the accused, heard verbal altercations between both her neighbours. An hour and a half later she heard cries of children and rushed over to investigate. She found the deceased lying in a pool of blood with the accused nowhere in sight. She assisted the deceased to get to the hospital where he was pronounced dead on arrival. Besides advising the court that the accused and the deceased had a quarrel before the deceased turned up dead Veronica's evidence did not advance the state case in any other way.

**Tichaona Chirinhe (Tichaona)**

Tichaona, a duly attested member of Zimbabwe Republic Police was on 29 June 2019, eight months after the incident, tasked by his officer in charge to re-construct the murder docket relating to the accused. He recorded witness statements and the accused's warned and cautioned statement. He did nothing else besides this. His evidence did not add colour to the prosecution's case.

**ORAL EVIDENCE**

The State led *viva voce evidence* from two witnesses namely Stella Chinyemba and Phillip Mvurume. The accused on the other hand testified for the defence and called in his daughter Aila Matikinyidze to testify in his defence.

**Stella Chinyemba (Stella)**

The witness is the deceased's widow. She confirmed that the accused is her neighbour in Stoneridge where she resided with the deceased and their family. At the relevant time, their houses were demarcated by an open space and nothing else. On 24 October 2018, she was present at her house when the confrontation between the accused and the deceased occurred.

Her account of the matter was that earlier that day she had gone to work and the deceased had followed her and informed her that the accused was involving them in his family issues. He also informed her that upon his return home after work he intended to confront the accused about this and iron it out with him. At around 5pm when she returned home she unstrapped her baby from her back. Instead of waiting for her husband who had earlier on indicated that he wanted to solve the matter, she angrily went outside the house and drew closer to the accused's house. She then confronted the accused. An altercation ensued between herself and the accused. The accused shouted and hurled profanities at the witness. He referred to her as a big bodied pea brained woman. Stella felt insulted. She retaliated by declaring that she was going to beat him up and when she was done with him, he would know how it felt like to be thrashed by a woman. After this declaration Stella went back inside her house and the exchange ended. At that point the deceased arrived home from work. They discussed the issue inside the house and Stella dissuaded the deceased from confronting the accused over the issue. Instead they decided to be useful and went outside to water their garden. The garden is approximately 16 metres away from the accused's house. Whilst watering the garden, the accused called out to her to come and get her brother in law's money but she refused. Perturbed by all this, the deceased then enquired from the accused what the problem was and whether the problem could not be solved. He subsequently invited the accused over to his house for

discussions. The accused refused and instead invited the deceased to his house. The deceased obliged and abandoned his chores. He then walked in the direction of the accused's house.

Stella remained behind and continued watering the garden, head bowed as she was engrossed in her task. A short while later, she heard the accused's wife call out to her that the deceased had been stabbed. She raised her head and immediately ran to where the deceased was. She saw that the deceased was holding his midsection with his right hand. The witness said the deceased only uttered words to the effect that "but why Change's father?" Apparently Change's father is the accused. He never uttered another word after that. She assisted him to lie down on the ground and noticed that his shirt was soaked in blood. People gathered around and tried to assist the deceased whilst the distressed children cried out. She was assisted by well-wishers to ferry the deceased to hospital where he was pronounced dead on arrival.

She was clear that she did not see the knife nor any other weapon that was used to assault the deceased with. She also did not see the attack on the deceased. She only got to the scene after the deceased had been stabbed despite having been only sixteen metres away from the scene. She confirmed that the only person that the deceased was in contact with was the accused. According to the witness she thought they were going to talk over the issue man to man. She was surprised to hear the panic shouts that the deceased had been stabbed. Even though she didn't see the accused stab the deceased she was certain it was him because he is the one who the deceased had gone to meet. A few minutes after the two men met, the deceased was stabbed. She did not need anyone to tell her that it was the accused who did so.

The witnesses' evidence was crucial in that she understood and was able to recount the genesis of the misunderstanding. She had been involved in it from the very start. The deceased had only stepped up to protect her even though from the beginning he had indicated a desire to iron it out with the accused. Her narrative on the cause of the dispute was not challenged by the accused in cross examination and so for that reason we took it as the truth. What this does is to establish a motive to settle a score with the deceased because of the gossip mongering and mudslinging that took place on that day between the two families. On the day in issue, their relationship had clearly soured to uncomfortable proportions with the deceased's wife openly challenging the accused and threatening to beat him up to a pulp in full view of other neighbours who had come to watch.

The witness also confirmed that prior to this day relations between the families had been cordial and the deceased enjoyed good relations with the accused. Even though she had a hand in it, she was still surprised by the rapid degeneration of the relations on this day which

led to the demise of the deceased. She dismissed the accused's version of events as nonsensical at the same time stressing that she had no reason to lie against the accused. She struck us as a credible witness, worthy of belief.

We did not place any probative value on the deceased's utterance prior to his passing on because it is hearsay evidence which can only be admitted if it falls within the category of one or the other exceptions to the rule against hearsay evidence. It does not and is therefore inadmissible evidence. We will not allow it to detain us.

**Phillip Mvurume (Phillip)**

The witness, a brother to the deceased and a workmate to the accused, confirmed knowing the accused as a neighbour at the relevant time. Their houses were about three metres apart. On the day in issue, he arrived home at around 6 p.m to find a heated exchange taking place between the accused and his sister in law Stella. He quickly left the house and only came back home after the noise had subsided. When he got home he was summoned by the accused to a place outside the accused's yard close to the road. The accused enquired from him if he had any outstanding monies that he owed him. He did so whilst filing some unknown metal object. The significance of the metal filing evidence was however lost to us as we were not told what it is the accused was filing and its purpose. Nevertheless, the witness was then called by the deceased's wife into the house. The deceased also arrived and the deceased's wife narrated the story to both of them. After a short while the deceased and his wife went to water the garden and the witness remained in the house. About five minutes later he exited the house and saw the deceased coming from the accused's yard and holding his hand on his chest. He then saw the accused coming towards him and running away. The deceased fell down and he rushed to assist him. He arrived after the deceased's wife had already reached him. The deceased's children who had seen him fall were crying and screaming hysterically, calling out "daddy, daddy!" He and the deceased's wife tried to administer first aid upon the deceased by plugging the wound using his socks. According to the witness the deceased was not able to talk because he had lost a lot of blood.

The witness told the court that there were no broken bottles nor stones strewn around the scene. He added that although he was owed a substantial amount of money by the accused he still maintained a cordial relationship with him. He confirmed that the two families enjoyed cordial relations to the extent that the deceased had fixed accused's electricity for free.

When he saw accused running away he did not hear anyone calling out thief. He also saw him running properly and not like anyone who was ailing or was afflicted by any medical

condition. He was certain that it was the accused and nobody else who had stabbed the deceased with an unknown instrument because there was no other person near the scene. His evidence corroborated that of the first State witness Stella in all material respects. We found his demeanour very convincing as his evidence was told coherently with no hint of animosity towards the accused. If anything they had lived well and he would not have had any reason to falsely incriminate the accused. We found him to be a credible witness.

**DEFENCE CASE – Justice Matikinyidze (Justice)**

In addition to what he stated in his defence outline, the accused added detail. He confirmed that his family and the deceased's enjoyed good relations. They had been neighbours for about five years. They were both members of the Apostolic sect. The deceased's family including his wife Stella had been baptised in the accused's church. Further he said in their business dealings they would sub contract each other. The deceased was an electrician whilst he was a carpenter. It was clear to us therefore that relations between the accused and the deceased were good before this incident. There could have been no reason for any falsification of evidence by the State witnesses.

The accused attributed the rapid souring of relations on the day in question to Stella's behaviour. He said Stella had sent one of his children to ask him to come out of the house. When he stepped outside she started insulting him with all sorts of unprintable words alleging that he had insulted her child Tinashe. She then pushed him twice. She pushed him a third time causing him to fall and hitting his head against the wall. His head started to hurt. He had previously suffered a head stroke and was partially paralysed on the left side of the head. Stella spat on him and had to be refrained by a neighbour, Chengeto Mahachi. She went away but not before she had accused him of abusing her brother in law by not paying him.

Crucially the account that the accused had been assaulted by Stella was a new addition to his defence. It was conspicuous by its omission from the defence outline despite it being an essential part of the accused's evidence. Even more crucially, that version of events was not put to Stella whilst she was still on the witness stand in order for her to comment on it. We therefore paid scant regard, if any, to that aspect of the accused's evidence because we viewed it as a clear afterthought which was made with the knowledge that Stella the witness directly accused of it would not be able to answer back. The reason why witnesses are called to testify and are cross examined is not only for them to advise the court of their version of events and to test the truthfulness of their testimonies. It is also to give them an opportunity to comment on contrary versions of events which an accused wishes to present to the court. To omit to ask

a witness to comment on an aspect which is directly linked to them can only be disastrous to an accused's attempt to later on seek the court to accept his version.

The accused went further in his evidence and stated that at around 6.12 p.m, he called Stella's brother in law, Philip, and had a discussion with him on the issue of money which he owed him. The two spoke amicably and thereafter reached an understanding. After the discussion, Philip went back into the house and left the accused outside. The accused remained behind and called out to Stella who was watering the garden whilst still yelling at him. Stella refused to come to where he was. The next thing he heard were footsteps heading towards him. He felt a grip on his hand and someone pull him out of the house. He then tripped over a sack of onions and fell down. Whilst he was on the ground he was trampled upon with booted feet on the head. That is when he realized that it was the deceased. He was also pelted with stones and bottles coming from the direction of the deceased's house. He had to use his cell phone as a shield with which to protect his head from further attacks. When he managed to get the strength to get up he kicked the deceased with booted feet and he fell down. He rushed back to his house and found the door locked. He then fled as some unknown people pursued him calling out "thief!"

During cross examination the accused once again changed his narrative and said that he was suddenly pulled from where he was with his wife and children inside the house by an unknown person as opposed to having been pulled out by the deceased as he had earlier stated. As a result he said he did not manage to fully comprehend what was going on. He was assaulted for about seven minutes and during this time his wife and children did not render any assistance to him. The deceased pursued him when he got up and he tried to escape into his house.

His narrative changed significantly again when the court sought clarity from him. This time he said he did not see his attacker and only saw a white shirt. He also said the attacker did not pursue him as he fell down. That notwithstanding, he maintained that he could not have stabbed the deceased because of the thrombosis attack he had previously suffered on his head which resulted in him being paralysed. Whilst he maintained in his evidence that he had proof of this ailment the court was never put into the full picture of how it prevented him from being able to attack the deceased as alleged. He did not tender any such evidence. His argument becomes hopeless when juxtaposed against his admitted actions. By his own admission he was able to kick the deceased and run away. He managed to evade an attack from all directions of his house with an avalanche of missiles being thrown at him. A person suffering from serious paralysis would not have been able to perform those antics. The descriptions of the events

preceding the death of the deceased by the witnesses do not in any way support the accused's version of incapacity to attack the deceased. What is undoubted is that whatever the ailment he suffered from, it did not incapacitate him mentally or physically to the extent of not being able to stab the deceased and run away.

In any case, if the accused's version of how he was allegedly attacked by the deceased did not make sense, his entire story is rubbished by his behaviour soon after the attack on the deceased. He confirmed that he stood at the corner of the house for a short while after the deceased fell down and watched as Stella assisted the deceased. He also watched as he heard the deceased's children cry but he did not manage to assist them because his vision was blurred and he was also experiencing severe pain and could not assist. We found his story implausible especially in light of the fact that he was seen running away with steady steps and not as one afflicted or in pain. He himself confirmed that he ran away and did not walk away from the scene. If he did not harm the deceased then it was expected that he would have rendered assistance to his long time neighbour who he enjoyed good relations with. He did not do so, leaving us to conclude that he did not assist because he had injured the deceased.

He then said he was not aware as to when and where the deceased had been stabbed as the deceased had only pursued him for a short distance. This however came after he confirmed having come into contact with the deceased. He could not tell the court who else besides himself came into contact with him and could only insist that he did not know what happened to the deceased. The contradictions and untruths in the accused's evidence can only point to the fact that he attempted to exaggerate the threat posed by the deceased to justify his attack on the deceased. In the courts assessment he was not in any danger. We had no choice but to reject the accused's defence as not only false but palpably so. It was informed by a desire to exculpate himself. It is self-serving. The thread of lies was also broken by his own defence witness his biological child Aila Matikinyidze.

**Aila Matikinyidze (Aila)**

The accused should have thought twice before he called his daughter to aid his defence because her evidence served to corroborate all the state witness's evidence. Aila's evidence left us in no doubt as to how the events of 24 October 2018 unfolded and significantly that the accused had a scuffle with the deceased on the fateful day. The 19 year old Aila who then was only 15 years old confirmed that on the morning when she left the house for school her father and step mother had been embroiled in an argument in their bedroom. She saw the fight between Stella and the accused. A short while later, she also saw Phillip conversing with the

accused. She then entered the house and remained inside with other members of the family. From inside the house she heard the accused call out to Stella to come over. She also heard Stella refusing to do so. She then heard the deceased come to their house and enquire from the accused what the problem was. She did not hear their conversation as they spoke in low tones.

She then heard some noise outside. To her it was clear that a scuffle was taking place. She did not do anything as she thought the accused and the deceased would eventually resolve the issue between themselves. Moments later she heard the deceased shout out to her stepmother Chenge's mother that he had been stabbed. Her step mother got up and stood by the doorway and in a panic called out to Stella. It was at that point that Aila went outside and witnessed the deceased lying on the ground. The accused had fled.

The witness' testimony differed materially from that of the accused. Contrary to the accused's version that the deceased came running up to his house and was violent as he pulled him outside she stated that the deceased came up to their house and she heard him ask to speak to the accused. She was clear that the accused was not pulled outside but that he went outside to converse with the deceased.

She further stated that when the deceased asked to speak to the accused she identified him by his voice. This can only mean that if the deceased spoke and accused then came out of the house the accused knew from the onset that the visitor was the deceased, his neighbour of five years. It follows therefore that the accused's assertion that he only managed to identify his attacker by the white shirt he was wearing was not true. The witness was clear that she heard the sounds of a scuffle going on between the two men. It was not the sound of one man being attacked. The next she heard was the sound of the deceased call out that he had been stabbed.

Ironically, this witness' evidence appeared to have been the missing link to the State's case. Aila proved to be a state witness rather than a defence witness. She gave a narrative that matched the State's own account of events. Her testimony corroborated that of the two State witnesses and contradicted that of the accused whose interests it is assumed she had come to serve.

## **ANALYSIS**

In our view the bulk of the issues are determinable by direct evidence. From the evidence of Stella, it was made clear to us that the accused is the only person that the deceased met up with in the short space of time when he left his garden and went to accused's yard to try and solve the impasse between the families. Stella did not witness the scuffle because she concentrated on watering her garden which was sixteen metres away. Phillip also did not claim

to have seen it as he was in the house and only came out in time to see his brother walking towards him holding his midsection. On the other hand, Aila confirmed that there was a scuffle between the two men ending with the deceased shouting out that he had been stabbed and the accused running away. The medical evidence before us also informs us also that indeed a scuffle ensued and that the deceased was in fact being attacked because he was clearly trying to defend himself with the use of his left hand. As a result he sustained incise wounds on the wrist and elbow. The pathologist called them “*self-defence injuries incise wounds*” brought on by the use of a sharp object.

With the totality of that evidence and the accused’s actions soon after the attack on the deceased we find it as a fact that the deceased was attacked with an unknown sharp instrument. He tried to defend himself against that attack. The person he was fighting with was the accused. The deceased fell after the attack. By his own admission, the accused witnessed the deceased fall. He listened to the deceased’s children cry out that the deceased was dying. He nonetheless ran away and lied that he did so because some people were chasing him. He admitted engaging in a fight with the deceased regardless of who he says was the aggressor. Phillip also saw the accused running away from the scene at the same time that the deceased fell to the ground. He was running with a steady gait which again puts paid to his claim that his vision was blurred by the blood on his face or that he was incapacitated by the thrombosis which afflicted him. This is all direct evidence which establishes a number of facts in this case and points to the involvement of the accused in the attack on the deceased in one way or another. The only aspect where there is no direct evidence and on which the court will call into aid the principles of circumstantial evidence is the question of who stabbed the deceased.

### **CIRCUMSTANTIAL EVIDENCE**

The proper use of circumstantial evidence can be regarded as settled in our jurisdiction. In the case of *Muyanga v The State* HH 79/13 this court laid down the principles which govern the use of circumstantial evidence. It said:

“The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no-one else; and
- (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation by any other hypothesis than that of guilt of the accused and

such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. See *S v Shoniwa* 1987 (1) 215 (SC) and the cases therein cited.”

Although circumstantial evidence is not less important than direct evidence it may correctly be regarded as less straight forward in that with direct evidence a witness testifies to things which he perceived with his own senses such as hearing, seeing or touching. With direct evidence once it is accepted it is capable of proving an accused’s guilt to the threshold required by law whereas with circumstantial prosecution is simply asking the court to infer or deduce from the totality of established facts that no other fact or facts existed other than that alluded to. The established facts and the deduced facts when taken together may then be used as a basis of convicting the accused of the offence charged. The totality of the evidence must lead to the unavoidable conclusion that the accused committed the offence. The starting point is therefore for the court to decide what the established facts are. It must analyse the conclusions which can be drawn from those proven facts. If they point only to the guilt of the accused, then it can safely return a verdict of guilty. Where however the court concludes that the facts lead to more than one reasonable conclusion the circumstantial evidence fails to pass the test of establishing the guilt of an accused person beyond reasonable doubt. Deducing findings from one set of established facts to reach the conclusion that a separate set is proved necessarily requires a court to undertake a logical and rational process of reasoning. It is dangerous for a court to ground its conclusions on a hypothesis, guesstimate or supposition.

In this case we have already outlined the proven facts. For completeness we restate them as that:

The deceased and the accused were long time neighbors; on the fateful day, the deceased approached the accused in order to iron out some differences between themselves. A misunderstanding ensued between the two men leading to a scuffle; the deceased ended up with mortal stab wounds from a sharp object; the accused was during the attack apparently trying to defend himself; the deceased was not in physical contact with anyone else other than the accused. Following that meeting the accused’s wife called out to the deceased’s wife who was sixteen metres away that the deceased had been stabbed. The deceased’s wife in turn rushed over and arrived first followed by Phillip and others.

As already stated, the issue which the circumstantial evidence seeks to establish is the identity of the person who inflicted the stab wounds because no one saw who did it. It follows

from the approach outlined above that those proven facts must lead to the inescapable conclusion that it could only be the accused and nobody else who stabbed the deceased.

As already said the accepted evidence is that the only person who came into physical contact with the deceased is the accused. He admitted and the witnesses all said that the accused fled the scene soon after the deceased fell down. The deceased shouted that he had been stabbed as per the evidence of Aila and the deceased's wife when she was advised by accused's spouse. The accused had no explanation as to what could have happened to the deceased.

We earlier rejected his story of him being chased by people who called out that he was a thief as a fabrication. It is unthinkable that people could have come to his homestead and started shouting that he a was thief who had to be apprehended without him stopping to ask what wrong he had done or to call the assistance of his neighbours whom he accepts to have been in good books with. Instead, what is undoubted is that the accused was the only person with the opportunity to have stabbed the deceased. He had the motive of settling the dispute between them which apparently also involved that he owed the deceased's brother Phillip some substantial amount of money. In our view, the other conclusion which can be drawn from the facts is that some other unknown assailant gate-crashed onto the scene when the accused and the deceased were discussing their dispute and stabbed the deceased. The law however does not speak to any conclusion that can be drawn from the facts but to a reasonable conclusion. A farfetched and imaginary attack by an unknown assailant in circumstances where the accused was together with the deceased but did not see that assailant is nonsensical. The only logical and inescapable inference which can be drawn from all the established facts is that the accused is the one who stabbed the deceased. No one else except him was with the deceased. If his fleeing the scene was innocent, he should have given that innocent explanation instead of completely dissociating himself from the incident. If it was someone else who had stabbed the deceased as he wanted the court to believe, there was no reason why the accused should not have been the first to come to the aid of his neighbour, church mate and workmate of sorts. The inference that it is him who stabbed the deceased is therefore consistent with the proven facts.

The circumstances taken cumulatively create a chain of events that leaves us with the unavoidable conclusion that the crime was committed by the accused and no one else.

## **DISPOSITION**

It is clear that the accused's defence that he did not attack the deceased and that it was him who had been under siege by the deceased, some members of the deceased's family and

strangers who were shouting that he is a thief cannot hold because as already shown it is palpably false. Instead, the accused attacked the deceased who tried to defend himself but failed. He stabbed him in the chest with a sharp object and left him to die. It is against that background that we have no apprehension that the state managed to prove its case against the accused beyond reasonable doubt. In the circumstances the court finds the accused guilty of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act.

### **REASONS FOR SENTENCE**

Strange as it may seem, the counsel for the defence implored this court to pass a stiffer sentence of between 20-25 years imprisonment whilst the state called for an imprisonment term of 20 years. Needless to say, this court is always mindful of the need to strike a balance between the offence and the offender whilst at the same time ensuring that the interests of society are also taken into consideration. It is therefore not a case of what the defence or state counsel asks for from the court but a proper consideration by the court of the sentencing principles in accordance with the law.

That notwithstanding, counsel for the prosecution, urged the court to make a finding that the accused committed the murder in aggravating circumstances. She suggested that the accused premeditated the commission of the murder. It is a requirement that following a conviction of murder the court must decide on whether the murder was committed in aggravating circumstances. Such circumstances are set out in Section 47(2) and (3) of the Code. It is not necessary to cite the provisions of s 47(2) and (3) of the Code in *extenso*. The relevant part in s 47(3) provides as follows:

#### **“47 Murder**

(3) A court may also in the absence of other circumstances of a mitigating nature or together with other circumstances of an aggravating nature regard as an aggravating circumstance the fact that –  
the murder was premeditated”

*In casu*, it is difficult to conclude that the accused pre-planned the murder. What is not in doubt is that prior to the murder the accused had a fall out with the deceased and his wife. Within a short space of time the differences culminated into a war of words. We however have no evidence that the accused then set out to harm the deceased as a result of this. Indeed a scuffle ensued between the accused and the deceased, leading to the stabbing of the deceased. The use of the unknown sharp object by the accused, could as well have been opportunistic. We are uncertain of what it was or where it came from. What we are certain of is its size as per the post-mortem report which measured the size of the injuries that were perpetrated upon the

deceased and which caused the deceased's demise. We are also certain that accused's intolerance of the deceased that day led him to overreact even when the deceased did not pose any danger to him. Any suggestion therefore of premeditation by the state is misplaced.

In addition, the court did not find that there were other factors listed in s 47(2) and (3) of the Code which could be classified as aggravating circumstances for purposes of applying the aforesaid. It is accepted therefore that this murder was not committed in aggravating circumstances as envisaged by s (47) (2) and (3) of the Code.

Once we have found that the murder was not committed in aggravating circumstance then it means we are at large to sentence the accused as per the normal sentencing options after having considered the mitigating and aggravating factors.

In mitigation the court considered that the accused is a first offender with a wife and four children who are dependent on him. It appears from counsel's submissions that these are the only factors that fall in the accused's favour.

What aggravates the accused's case on the other hand and is unsettling is that violent offences committed within communities continue to be on the rise. Murder is a crime which society must always take a dim view of. It is the duty of the courts therefore to uphold the sanctity of human life and impress it upon everyone that the murder of another human being will not be tolerated. Because of this there is no doubt that invariably the offence attracts a significant term of imprisonment. However once a life is lost, it is lost forever and no amount of punishment on the accused can bring the accused back to life. Parties need therefore to be reminded of the need to be slow to resort to violence when resolving differences that they may have with each other.

The accused used an unknown sharp object. It is a lethal weapon which was used to brutally murder the deceased. He was reckless in his conduct as signified by the stabbing on the chest. The chest is a delicate part of the body. On impact the sharp object perforated the heart. Thereafter the deceased staggered whilst holding his midsection. He collapsed in full view of the children and within a short space of time was dead. The accused must have appreciated and foreseen the risk of serious injury or death resulting from the use of that weapon in the manner and place in which he stabbed the deceased.

In a brazen and indifferent manner the accused left his neighbour of five years to die. He did not render any assistance even when he saw him collapse and fall down, but instead, chose to watch the deceased writhing in pain from a short distance away after which he then decided to run away from the scene. He paid scant heed to the children's cries for their father.

From these facts we are able to conclude that the accused was not remorseful. It is equally disconcerting to note that throughout the trial the accused did not show any signs of remorse. He was intent on trying to hoodwink the court into believing that he was the one who was under attack from the deceased. In the process he exposed himself for not being contrite and as someone eager to escape liability by whatever means possible.

Against the accused too, is the fact that the deceased died within the children's sight. Not only the deceased's children but even the accused's own children who exited the house in time to see the deceased collapse and then subsequently die. This inevitably made the crime more brutal and callous. The remarks of TSANGA J in the case of *S v Tevedzayi* HH 206/18 are relevant in that she outlined the negative effects of violent acts carried out in full view of children by their parents and the need for counselling thereafter. Aila was certainly not spared and even more so when she was asked to re-live her experience through testifying against her own father in the cause of his neighbour's death.

A lengthy custodial sentence is in these circumstances called for.

Accordingly accused is sentenced to 20 years imprisonment.

*National Prosecuting Authority, State's legal practitioners*  
*Manyangadze Legal Practice, accused's legal practitioners*