

THE STATE
versus
ANYWAY PONDO

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 17 May, 30 November 2022, 27 and 28 March 2023.

Assesors. Mr *Barwa*
Mr *Mpofu*

V Mtake, for the state
BMachanzi, for the accused

Criminal Trial

MUNGWARI J: Anyway Pondo and Keith Matenena were charged with the offence of murdering 73 year old Langton Mandibvira. We discharged Keith Matenena the second accused at the close of the state case and gave reasons for our decision. The trial continued in respect of the 1st accused. This judgment therefore relates to the first accused, Anyway Pondo (hereinafter the accused).

The indictment indicates that the accused faces a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code). The allegations are that on 13 June 2021 the accused unlawfully and intentionally caused the death of the deceased by assaulting him with fists, booted feet and hitting him on a gravel road several times resulting in mortal injuries.

In detail, the allegations giving rise to this charge are as follows:

On 13 June 2021, the deceased a male resident of Ruware Ranch in Marondera met the accused as he was walking along a road close to Southlawn Park School. The deceased was speaking in English. The accused took offence of the deceased's conduct. He inquired from him if the deceased was referring to him but did not wait for the deceased to respond. He immediately began to assault him with open hands and booted feet all over his body. He thereafter left him, lying injured on the road. The deceased was ferried to hospital for treatment. His condition deteriorated and he died on 27 June 2021. A postmortem was

conducted on the remains of the deceased. The pathologist's conclusion was that death was due to brain damage, subarachnoid hemorrhage in the right hemisphere and moderate head trauma.

The accused pleaded not guilty to the offence and in his defence outline stated that this is a case of mistaken identity as he never left the farm on the day in question nor attended any soccer match as alleged. He told the court that he never met the deceased and never knew him during his existence. On the fateful day he had remained behind securing the bricks and tools at Southlawn farm where he worked as a bricklayer. His colleagues only known as Diva, Knowledge, Stephen and Creddy's father went to watch a soccer match at Karimba farm in Marondera. Later in the day he had visited Keith Matenena's house to enquire from him why his colleagues had taken long to return. He found Keith in the company of his wife. He denied partaking of alcoholic beverages and said he was only implicated in this offence because Chiedza Matura claimed to have recognized his voice as that of one of the deceased's assailants and because his shoe prints matched those found at the scene of the assault. In essence, he raised the defence of an alibi as he claimed to have been elsewhere at the relevant time.

Issues

When the state's allegations and the defense's arguments 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 on the road on the fateful day. The matter therefore turns on the facts.

State case

In its endeavour to prove its case, the state placed reliance on some exhibits as well as evidence secured through formal admissions and *viva voce* evidence. It opened its case by tendering a copy of the medical affidavit in respect of the examination done on the deceased. After his admission, on 14 June 2021 at Marondera Provincial Hospital for treatment, the deceased was examined by Doctor Vera a general medical practitioner stationed at that hospital. The doctor noted the following injuries on him:

"Swollen face, periorbital ecchymosis, red eye, confusion"

He concluded that the injuries were serious and were likely to have been caused by a blunt object. He observed that the amount of force exerted was severe and the possibility of permanent injury was likely. With the consent of the defence counsel the affidavit authored by Dr. Vera was tendered as exhibit no 1. In line with the doctor's diagnosis of serious injuries the deceased later died on 27 June 2021, thirteen days after his admission at Marondera

Hospital. Following his death the remains were sent to Sally Mugabe hospital for an examination by a pathologist in order to ascertain the cause of death. The state availed a copy of the postmortem report that was prepared by Dr. Martinez as exhibit no 2. His conclusion was that the cause of death was a result of “Brain damage, subarachnoid hemorrhage in the right hemisphere and moderate head trauma.” With the consent of the defence Dr. Martinez’s evidence was also formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act. The cause of death of the deceased was therefore uncontentious.

Tashinga Mwandira, Chiedza Matura and, Grenna Rwodzi gave *viva voce* evidence on behalf of the state. The court called for the evidence of Goodson Goreko in terms of section 233 of the Criminal Procedure and Evidence Act [*Chapter9.07*]. The accused was the sole witness in his own defence. Below, we deal with the relevant evidence of the witnesses.

Tashinga Mwandira(Tashinga)

He is eleven years old. His evidence was crucial in that he was an eye witness. He told the court that he knew Keith Matenena as a former resident of Southlawns Farm. He was close to Keith to the extent that he would affectionately refer to him as “Keith” regardless of their age difference. He however confessed that he did not know the accused prior to the incident. On the fateful day and towards sunset, he was coming from a place called Buwereza where he had gone to play with other children from the village. Visibility was still clear when he saw the deceased who he knew as a village head walking alone along the road and speaking in English. He saw Keith who was dressed in a blue jacket standing in the school yard some twenty meters away. He then saw the accused approaching the deceased and ask whether he was referring to him. Keith tried to restrain the accused who resisted the overture. It was at that point that he took a closer look at the accused and recalled that he had seen both the accused together with Keith earlier in the day coming from Tari’s store. He saw the accused assaulting the deceased with open hands. He did not wait to see the end of it but ran off to call his elders whom he thought could restrain the two. Along the way he met a certain lady who he only knew as “Mundevere” and informed her about the assault. When he came back to the scene with Grandmother Buwereza, Simba’s mother and others who included Mundevere, he found Keith and the accused gone. The deceased was lying on the tarred road bleeding from the eyes, ears and nose. He noted a foot imprint on the deceased’s chest.

In cross examination the witness told the court that he recognized the accused because he had seen him earlier with Keith who he knew very well. They were coming from Tari’s store. He made it clear in his evidence that he had correctly identified the accused because of

this. He confirmed having seen Keith trying to restrain the accused from assaulting the deceased but he resisted. The accused had purposefully walked up to the deceased and assaulted him. Because he only knew Keith by name, he reported to the elders that he had seen Keith and another man assaulting the deceased when in fact it was only the accused who he saw assaulting the deceased. The witness further stated that he was sure that if Keith were to be interrogated he would disclose the name of the assailant. He only knew the accused by sight and not by name. He was adamant that it was the accused he had seen assaulting the deceased.

The child witness struck us as very credible. We hold that view because there are instances when he clearly said he did not know some things. He never sought to supplement that with falsehoods. We believed his narrative that he did not only manage to identify the accused but recognized him from an earlier encounter and from his association with Keith who he knew so well that when he reported the assault to the elders he told them that he had seen Keith and another man assaulting the deceased. The witness demonstrated that he had no motive to lie against the accused particularly because he wasn't really known to him. He was however certain that he had seen the accused viciously assaulting the 'english' speaking deceased and being restrained by Keith.

Chiedza Matura (Chiedza)

She was another crucial eye witness. Chiedza confirmed that she is the person commonly referred to as Mundevere in their community. She is a former workmate of both Keith and the accused. She told the court that she had come from watching a soccer match with the deceased who was drunk and Keith. They parted ways as she went to pick up her child from the place where she had left her at Southlawn farm. On her way from there she met Tashinga and another little boy. They were running and panting. Upon enquiry Tashinga stopped long enough to inform her that he had seen someone who was being assaulted by the road. The other boy did not stop as he sped past her presumably to inform those ahead. She ran to the scene and saw the accused using open hands and booted feet to stamp the deceased on the chest. The accused also assaulted the deceased on the head with clenched fists. After the accused left the scene, she approached the deceased and observed that he was unresponsive as he lay sprawled on the tarmac. He was bleeding from the mouth. She started stopping motorists and redirecting them so that they would not run over the deceased. She then turned and went to call for assistance. She came back with grandmother Buwereza and others. She only left the scene when people had gathered around the deceased.

Chiedza stated that she positively identified the accused at the time when he stepped on the deceased's chest just before he left the scene. She knew him prior to this incident. They had previously worked together on a daily basis at Southlawn farm, albeit in different divisions. She could not have mistaken him for anybody.

In cross examination she refuted the accused's assertion that she was not known to him as she even reminded him that, at some point in time he was entangled in a love relationship with her friend called Munashe's mother. She disputed any suggestion of mistaken identity. She was adamant that the accused was present at the scene. She also told the court that whilst it was nearing sunset, visibility was still clear and illumination was aided by the tower light at the nearby compound. With this source of light she was able to observe the accused. She maintained that she was not mistaken in her identification of the accused.

We found the evidence of this witness believable. No amount of cross examination could unsettle her and make her give conflicting testimonies. She gave her testimony clearly and convincingly. She also proved that she had no reason to falsify any evidence against the accused. The accused himself did not suggest any such motive. He did not dispute that he was the witness's former workmate after all.

Grenna Rwodzi(Grenna)

She was the investigating officer in the matter. She investigated the matter and recorded the accused's warned and cautioned statement in which the accused was denying the offence. She told the court that she had investigated the accused's alibi. According to her, his alibi had fallen through as the accused's supervisor Goodness Goreko had informed her that the accused was not at work on the material day and time. She had recorded statements from Goodness Goreko and other state witnesses.

The witness confirmed that there was no identity parade that was carried out in order to identify the deceased's assailant because the question of who the perpetrator was did not arise. The perpetrator had already been identified.

No meaningful cross examination was conducted leaving the witness's testimony unscathed.

Defence Case-Anyway Pondo

To a large extent the accused maintained the story he alluded to in his defence outline with some few additions. He maintained that he did not know the first witness prior to the offence but that he knew the second witness, Chiedza as he would see her occasionally when she came to visit his workplace. He confirmed that he enjoyed a cordial relationship with

Chiedza and removed any suggestions of falsification of evidence in light of the good relations. He denied assaulting the deceased and told the court that he was arrested on mere suspicion. In detail, he told the court that on Sunday 13 June 2021 he remained behind at Southlawn farm, his workplace for the month preceding the incident. He had been engaged at the farm as a brick moulder. On the fateful day, his eight workmates left the workplace to go and watch soccer at a neighboring farm at around 1300 hours. They never returned to work that day. He also never left the workplace as he remained behind safeguarding the tools and the bricks. Leaving the workplace was not an option for him because there was the danger of stray cattle destroying the bricks which were still moist. In addition to this the same workplace was also his place of abode. He had no need to go anywhere as he was already at home.

During cross examination it became evident that the accused was not truthful. He materially departed from his own defence outline and contradicted himself. For instance, in his defence outline he had claimed that he did in fact leave the workplace after the soccer match when he went to visit Keith at his house. The purpose of the visit was to enquire on the whereabouts of his colleagues from Keith as they had taken long to return to base after the soccer match had ended. His assertion therefore that he was at the workplace throughout the day was not true as by his own admission he had at some occasion later in the day left the workplace. He had been in contact with Keith on the day and after the soccer match had ended. When the court sought clarity on this aspect, he made a volte-face and distanced himself from his defence outline but that did not assist in clearing the contradictions. If anything it exposed him as an untruthful person. He had inadvertently let it slip that he left his workplace and had been in contact with Keith after the soccer match. Coincidentally this was the time when the assault on the deceased occurred.

In the end he shredded his own evidence of an alibi and placed himself at the same place as Keith, corroborating the state witnesses' evidence that they had indeed seen the two men together. It equally supported the investigating officer's assertion that she had investigated the alibi and found it to be untrue.

Any doubt was completely wiped away by Goodson Goreko's evidence which eliminated any suggestion of an alibi and even added more detail than envisaged.

Goodson Goreko(Goodson)

The witness an elderly man, was called to testify at the instance of the court. His evidence was that on the day in question at around 8am, the accused informed him that he was not able to work and subsequently took his speakers, a battery inverter and memory card and

left for the compound. He came back around 5pm and was visibly drunk. When he arrived the accused indicated that he was hungry. Goodson cooked sadza for him and after eating the accused indicated that he wanted to go out but would return shortly. The accused left the workplace and came back at around 7 p.m. In a drunken stupor he had confessed to him that he had assaulted someone badly. He however did not give him any details. The witness said he let it lie and did not read too much into what he had been told. The accused left and went back to the compound. Three men came asking for the accused and he directed them to the compound where the accused had gone. A short while later, he noticed the accused passing through their workplace in the custody of security details who had arrested him.

The witness was cross examined by the defence but did not change his story. It was put to him that the accused did not drink beer but the witness clearly indicated that the accused did drink beer and on the day in question he was drunk. He was also clear that he was the only one who was at the base as the accused had gone to the compound whilst the rest went to watch a soccer match at Karimba farm. His evidence served to further confirm to the court the untruthfulness of the accused's testimony relating to his alibi and his whereabouts on the day in question. The accused was not at Southlawn farm at the material time. The court found the evidence of the witness Goodson Goreko credible. He had no interest in the matter. He worked and lived well with the accused at the farm as evidenced by him catering for accused's requests for food and the accused's ability to confide in him. He had no motive to falsely incriminate him.

Analysis

The evidence of Tashinga Mwandira and Chiedza Matura which we found credible relates to the identification of the accused. In a long line of authorities, courts have always been cautioned against readily believing a witness's evidence of identification. For it to be satisfactory a witness's evidence of identification must be completely reliable. In *S v Mtetwa* 1972 (3) SA 766 at 768A-C HOLMES JA stated that:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait and dress; the result of identification parades, if any, and of course, the evidence by or on behalf of the accused. This list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighted one against the other, in the light of the totality of the evidence, and the probabilities."

Our view is that the evidence of the witnesses in this case is satisfactory. The only blemish we find on Tashinga's evidence is that he told us that he did not look at the accused long enough. He had however already recognized him as the man he had seen earlier coming from the shops with Keith. If there was any gap in his evidence it was bridged by the fact that he managed to identify Keith, the accused's companion on that day. The accused on the other hand confirmed that he was in Keith's company after the soccer match on that day. He was therefore not mistaken in his identification. He properly identified the accused. There was still day light at that time. The witness said visibility was still very good.

In fact, that it was so is supported by Chiedza's evidence. She arrived at the scene much later and also said though it was getting dark visibility was still present. The aid of a nearby tower light equally served to light up the place. In her own testimony Chiedza said she did not only identify the accused, she recognized him. Chiedza, saw Keith and the accused. They were both known to her. The accused and Chiedza were acquaintances of sorts. They were known to each other prior to this incident. They had worked at the same company and would see each other daily. Furthermore the accused had had a love relationship with Chiedza's friend Munashe's mother. There was therefore no question of her mistaking someone else for the accused.

In *S v Nkomo* 1989(3) ZLR 117 (S), the Supreme Court held that good identification does not need corroboration or support but poor identification does. Examples of good identification include cases where the witness observed an accused over a long period or many times or where the accused was well known to the witness. As already stated, in this case Tashinga had observed the accused on two separate occasions. Chiedza had seen the accused on the scene and knew him very well. Both of them had seen the accused when visibility was good. The assault took place on a wide macadamised road. There were no other people or obstructions on the road. Only the deceased and the accused were on that road. That made perception very clear and uninterrupted. It follows therefore that the accused was very close to the witnesses when the assault on the deceased took place even though he did not see them. The witnesses observed the accused's features at very close range.

We are thoroughly satisfied with these witnesses' identification of the accused. We deem it completely reliable. Once this is accepted, the evidence places the accused firmly in contact with the deceased at the tarmac well after 6p.m. on the material day. We have already indicated that his alibi was investigated and is hopeless. It is our finding that the accused was at the scene on the date and time of the fatal assault on the deceased. He was irritated by the

deceased's manner of speaking and reacted by beating him up to a pulp. He left him bleeding from the mouth, ears and nose.

The causal connection between the accused's actions and the medical findings seals the accused's fate. It is our finding that the accused assaulted the deceased until he bled to his death suffering a head trauma and brain damage in the process. He exerted excessive force which resulted in the deceased sustaining a swollen face amongst other serious injuries. Dr. Vera concluded that the injuries were likely to have been caused by a blunt object and this corroborates the state witnesses' evidence of how the deceased sustained the mortal injuries.

The witnesses indicated that they saw the deceased bleeding from the ears, nose and eyes soon after the assault, a clear indication that the deceased had sustained serious head injuries. Taking the deceased's advanced age of seventy-three years into account care must have been taken by the accused. Instead he assaulted the geriatric on delicate parts of the body. The accused must have and he indeed foresaw the possibility that his conduct may cause death but was reckless as to whether it did. He continued to assault the deceased by stamping him on the chest and hitting him against the gravel road several times leading to head injuries and subsequent death. Keith even tried to stop the accused from assaulting the deceased but he was rebuffed.

In the final analysis, we have no apprehension to hold that:

- i. The accused was present at the crime scene
- ii. The accused accosted the deceased as he walked along the tarred road speaking in English which language was misunderstood by the accused
- iii. He then asked whether the deceased was referring to him. He assaulted him severely. The assault was witnessed by Tashinga Mwandira and Chiedza Matura, independently of each other. They both recognised the accused and their recognition cannot by any standard be faulted
- iv. The accused's conduct in its totality, his use of excessive force, his brutality of using booted feet to trample on the deceased's chest leave us without a doubt as to his intention

It is against the above background that we are convinced that prosecution managed to prove the accused's guilt beyond reasonable doubt. He is accordingly found guilty of murder as charged.

Reasons for Sentence

In mitigation, counsel for the accused Ms *Machanzi* submitted that the accused is a 21 year old first offender who was 18 years old when he committed the offence. She argued that due to his age, the accused is an immature youthful offender and urged the court to spare him from a lengthy imprisonment term. She cited authority for this proposition, *Chininga v The State SC 79/2002* which held that youthfulness constitutes an extenuating circumstance as it is brought on by lack of maturity and a mental condition susceptible to external influences. She suggested a sentence of between 10-15 years and stated that the proper aim of criminal procedure is to reform the offender so that he may conform to the social order.

What the accused and his counsel appear unaware of is that sentences for murder just like the crime itself are now codified. The first step in the assessment of a sentence in murder cases is for a court to make a finding of whether or not the murder was committed in aggravating circumstances. Legal practitioners should be aware that it is crucial for them to address the court on this aspect before making general submissions in mitigation. The general aspects in mitigation will only work in favour of the accused if the court does not find that the murder was committed in aggravating circumstances.

Section 47(4) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides as follows:

“(4) A person convicted of murder shall be liable—
(a) subject to sections 337 and 338 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], to death, imprisonment for life or imprisonment for any definite period of not less than twenty years, if the crime was committed in aggravating circumstances as provided in subsection (2) or (3); or
(b) in any other case to imprisonment for any definite period.”

From this provision, the court’s hands are tied in relation to the sentence it can pass after a conviction for murder where it finds that the killing was committed in aggravating circumstances. In that case, the court only has three options, namely to pass a sentence of death or imprisonment for life or an imprisonment term which is not less than 20 years.

Ms *Machanzi* subsequently addressed the court and alluded to the murder having been committed in aggravating circumstances particularly that the deceased was above 70 years of age as per s 47(3)(b) and suggested a sentence of 20 years imprisonment for the accused.

Counsel for the state, Ms *Mtake* conceded that the murder was committed in aggravating circumstances as this was a murder of a defenceless geriatric which was committed without any provocation. She urged this court to impose a sentence of 25 years.

We have considered that, the accused mercilessly bludgeoned the drunk and defenceless 73 year old to death after taking offence from the deceased’s manner of speaking.

The savagery and barbarism of the attack was unmitigated, and the accused gave the deceased no opportunity for survival. The deceased bled from the ears, mouth, and nose leading to head injuries. The accused was determined to kill the deceased and did not take heed of his companion's pleas to desist from his aggression towards the deceased. The old man was subsequently hospitalised and died 13 days later, having suffered a painful death.

In addition to this, the deceased was 73 years old. The offence of murder was therefore committed in aggravating circumstances and this increases the accused's moral blameworthiness.

After arriving at a finding that the murder was committed in aggravating circumstances, as well as consideration of the mitigating factors, we would have sentenced the accused to an imprisonment term of 22 years. However, because he has been incarcerated since June of 2021, he has already served a 2 year sentence. The court will therefore deduct the 2 years already served.

Accordingly the accused is sentenced to **20 years imprisonment.**

National Prosecuting Authority, state's legal practitioners
Maruwa Machanzi Attorney, accused's legal practitioners