

THE STATE
versus
MIKE FOYA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 1, 6 & 7 June 2023

Criminal Trial

Assessors: Mr Mhandu
Mr Mpofu

Ms A Mupini, for the State
T Mpofu, for the accused

MUTEVEDZI J: Two close friends were on their way from a beer drink. Both of them were thoroughly inebriated. Whether it was intended to be a prank or it was reality nobody will really know. If it was a prank, it unfortunately went horribly wrong. One of the friends boasted that he was in love with the other's wife. It sparked an argument which degenerated into a fight. The boastful friend was beaten and left for dead. He indeed was found dead the next day. That led to the allegations of murder in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code) which the accused is facing. The state alleges that on 9 October 2022 at Aberdeen farm in Mvurwi, Mike Foya (the accused) unlawfully and with intent to kill or realizing that there was a real risk or possibility that his conduct might cause death and continuing to engage in that conduct despite the realization of the real risk or possibility, assaulted *Innocent Chawira* (the deceased) with clenched fists on the face several times until he fell to the ground. The deceased sustained injuries from which he died.

The accused pleaded not guilty to the charge of murder but pleaded guilty to the lesser charge of culpable homicide as defined in s 49 of the Criminal Law Code. The prosecution accepted the accused's limited plea. The agreed facts are that the accused and the deceased

were friends. On 9 October 2022, after a beer binge, the two friends decided to go home. It was around 2200 hours. Both of them were so intoxicated that they hardly knew their way home. They had to ask for directions from one *Ellen Kamangira* at a farm called Disi Farm. On their way, the deceased started boasting that he was in a romantic affair with the accused's wife and that he had sexual intercourse with her. At first the accused, presumably out of drunkenness did not pay much attention to his friend's lurid allegations against his wife. We are not sure but it appeared the deceased wanted to knock sense into the accused for ignoring such a serious matter because after spewing the vitriol and was ignored the deceased clapped the accused three times on the cheeks. The unprovoked violence must have sobered him up a little because immediately thereafter he apologized to the accused. Some moments later, the madness seized him again and he once more assaulted the accused by clapping him and kicking him with booted feet. The accused in a bid to ward off the assault retaliated by hitting the deceased with clenched fists four times on the face. The deceased fell to the ground. As already said, he died from the injuries sustained. The accused proceeded to his homestead. Tarisai Martha found the deceased's dead body the next morning.

The deceased's remains were conveyed to hospital where a pathologist, Doctor *Yoandry Olay Mayedo* carried out a post mortem examination. The prosecutor tendered the report as an exhibit. The pathologist concluded that death was due to mechanical asphyxia, manual strangulation, global subarachnoid hemorrhage and severe head trauma.

From the above facts, the accused admitted that he was negligent in the one or more of the following ways:

1. He did not pay regard to the amount of force which he used when he assaulted the deceased. It resulted in him applying excessive force which led to the deceased's death
2. He did not pay regard to the fact that the part of the deceased's body which he aimed at was vulnerable

Given the above evidence, we are satisfied that the acceptance by prosecution of the accused's plea of guilty to the lesser charge is an informed decision. Against that background, the accused person is found not guilty and is acquitted of the charge of murder. He is found guilty of the lesser charge of culpable homicide as defined in s 49 of the Criminal Law Code.

Sentence

The accused stands convicted of the offence of culpable homicide. He killed his friend in a drunken brawl. He is 31 years old. Counsel who represented him urged the court to take into account that he is indeed a youthful offender. This court has accepted in the past that the Constitution of Zimbabwe, 2013 in s 20 accords the status of youth on any person between the ages of 15 and 35 years. Admittedly the accused is an adult. Youthfulness however comes with its own traits such as the making of decisions which are not well thought out such as in this case.

The accused is an unsophisticated farm worker. He has a family comprising a wife and two minor children aged 12 and 6 years. He is the sole breadwinner for the family. The court will remain alive to the repercussions on the family of any custodial sentence which might be imposed on the accused. They will have no one to fend for them.

The accused pleaded guilty to the charge. Needless to say pleas of guilty are valuable to the expeditious resolution of criminal cases. Criminal trials particularly in this court are often a prolonged battle with extended hours being expended in the maze of seeking the truth. In that process huge amounts of material resources are needed for the payment of witness expenses. An accused who pleads guilty must therefore be rewarded for the savings which he/she brings to the administration of justice. Where the courts reward an offender, it also becomes an incentive for other offenders to recognize the importance and the advantages that come with a plea of guilty.

The court equally accepts that the accused acted out of provocation by the deceased who taunted him for having an extra marital affair with his wife. As if that was not enough, the deceased went on to assault the accused who then retaliated and killed him. The deceased was therefore the initial aggressor. The situation was compounded by the fact that the accused was intoxicated. He simply lost it as a result.

In addition the accused has been in custody from 11 October 2022 when he was arrested. He is slightly short of eight months in pretrial incarceration. The court considers pretrial detention as punishment on its own. It is necessary therefore to subtract such periods from the sentence which the court may impose on the accused.

As already indicated, the accused killed his close friend. We are sure it is something that he will have to live with for the rest of his life. The Constitution emphasizes the sanctity of human life. No one has the right to take away a life. That sacrosanct position is evident even in the circumspection with which courts are allowed to impose capital punishment on offenders

convicted of capital offences. What mitigates the accused's moral blameworthiness however is that he appears contrite. We are advised that he assisted with resources at the deceased's funeral. The state has not controverted that so we take it as true.

Against that above background the accused cannot escape imprisonment. The court will however have to find a balance to that imprisonment and the accused's interests as already indicated. One way of achieving it is through the suspension of a significant portion of the term on conditions. This is a case in which sentences in the range of ten years imprisonment are usually commensurate with the gravity of loss of life. The court will however remove two years as a reward to the accused for pleading guilty. It will also remove another year to compensate for the period the accused has already spent in custody.

In the circumstances, the accused is therefore sentence to **7 years imprisonment of which 4 years imprisonment is suspended for 5 years on condition the accused does not within that period commit any offence involving violence on the person of another or involving the negligent killing of another for which he is sentenced to imprisonment without the option of a fine.**

*National Prosecuting Authority, state's legal practitioners
Masawi & Partners, accused's legal practitioners*