

THE STATE
versus
JOSPHAT MUKUMBA
and
AUGUSTO SARANYIKA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 19 & 20 June 2023

Assessors: *Mr Mpofo*
Mrs Chitsiga

Criminal Trial

B Murevanhema, for the State
B Mwatara, for the 1st accused
W Nziradzemhuka, for the 2nd accused

MUREMBA J: The State accepted limited pleas of culpable homicide to the charge of murder that the accused persons are facing. The following was the statement of agreed facts between the State and the defence.

1. “On the 24th day of July 2022 at round 2200 hours, Peter Pilolo and Tafirenyika Chireya (the deceased) went to Diana Katerera’s house where Peter Pilolo wanted to see Diana Katerera whom he alleged to be his girlfriend. They knocked on the door resulting in Diana Katerera opening the window and shouting “mbavha, mbavha” meaning “thief, thief” as she suspected them to be thieves. Peter Pilolo fled leaving Tafirenyika Chireya (deceased) behind.
2. Diana Katerera’s neighbours, Tariro Mutedzwa and Evidence Kuzvinzwa rushed to her house and the accused persons arrived some minutes later and found the deceased still there. They quizzed the deceased who was not responding since he was drunk.
3. Accused one started assaulting the deceased with open hands. The accused plucked switches from a Musasa tree and struck the deceased all over the body. They also poured cold water on him saying that it would neutralize his drunkenness.

4. The assault took appropriately 20 minutes and the accused persons dragged the deceased by pulling him by the legs while facing upwards. They dumped him at a footpath about 100 metres away from Diana Katerera's homestead. He was found on the 25th of July 2022 lying face upwards by Diana Katerera's daughter Christine Mandonda, but he was still breathing. She informed Diana Katerera and accused one. On the same date when the village head and witnesses went to the scene, they found the deceased dead.
5. The accused persons were arrested with the assistance of the village head Michael Murwira and other villagers who made a report to ZRP Dema and Sergeant Nyerukai attended the scene and recovered some switches. One was found besides the deceased's body and the other one at Diana Katerera's homestead. A post mortem was conducted by Doctor Martinez who compiled a post mortem report which states that death was due to brain damage, severe brain edema and head trauma."

After the pleas had been recorded, the State counsel read out the agreed facts. The defence counsels then submitted that they had fully explained to the accused persons the essential elements of the offence of culpable homicide and that the accused persons fully understood and were admitting to them. They explained that they were satisfied that the accused persons' pleas were unequivocal. One switch weighed 0.068 grams. The other weighed 0.130 grams. With the consent of the defence, the State counsel went on to produce the post mortem report and the two switches that were used in assaulting the deceased together with their respective weighing certificates. We convicted the accused persons of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

After making submissions in mitigation Mr *Mwatura* for the first accused urged the court to impose an effective custodial sentence not exceeding two years. In support of this sentence, he cited a couple of culpable homicide cases wherein the accused persons were sentenced to effective imprisonment of not more than 2 years. He referred to *S v Mlambo* HMT 19/18 wherein the accused who was a security guard shot at thieves who had come to steal at the farm where he was guarding. One of the thieves was shot dead. Mr *Mwatura* said that the security guard was sentenced to 3 years' imprisonment of which 2 ½ years' imprisonment was suspended on future good behaviour leaving him with an effective custodial sentence of 6 months. Mr *Mwatura* also referred to the case

of *S v Mupakati & Anor* HMT 50/19 saying that two accused persons assaulted a person whom they suspected to be a thief using switches and he died. The first accused person was sentenced to 4 years' imprisonment of which 2 ½ years was suspended on condition of future good behaviour leaving him with an effective 1 ½ years' imprisonment. The second accused person was sentenced to 4 years' imprisonment of which 2 years' imprisonment was suspended on condition of future good behaviour. Mr *Nziradzemhuka* for the second accused, after making submissions in mitigation, implored the court to impose community service. He also submitted that should the court decide to impose an effective custodial sentence, it should impose an effective custodial sentence of 2 years. The two defence counsels emphasised that the accused persons were first offenders who had pleaded guilty to the charge. They had assaulted the deceased on the belief that he was a thief and had used switches which are not lethal weapons.

On the other hand, Mr *Murevanhema* for the State, after making submissions in aggravation, submitted that this is a case which calls for a lengthy custodial sentence in view of the highly aggravatory factors of the case, namely that the deceased was just a drunk person who was severely assaulted for a very long time, poured cold water on, dragged and left to sleep in the cold the whole night yet he had not stolen anything. Mr *Murevanhema* submitted that such violence should not be condoned. He further submitted that the cases that Mr *Mwatura* referred to are not relevant to the present case because the circumstances surrounding their commission were not explained and these are not cases which fall on all fours with the present case. Mr *Murevanhema* referred to the case of *S v Mabena* HB 148/13 wherein the accused was convicted of culpable homicide after killing his brother in a fight. The accused was sentenced to 10 years' imprisonment of which 3 years' imprisonment was suspended on condition of future good behaviour. Mr *Murevanhema* submitted that the present case is even worse because there was no fight between the accused persons and the deceased. The deceased was just being assaulted and he was not retaliating. Mr *Murevanhema* prayed for a sentence of 10 years' imprisonment with 3 years being suspended on condition of future good behaviour.

We hasten to point out that the penal provision for culpable homicide provides for a fine of up to or exceeding level 14, imprisonment for life or any shorter period or both a fine and imprisonment. So, the penal provision caters for a sentence anywhere from a fine to imprisonment for life. See s 49 of the Criminal Law (Codification and Reform) Act. A judge may thus impose a

fine, community service, a prison sentence to be served immediately, suspended imprisonment or imprisonment for life. This is so because culpable homicide cases cover a wide radius of circumstance and culpability. In other words, circumstances of culpable homicide offences vary hugely. There are situations where the accused intended to kill but is not guilty of murder because of the existence of a partial defence, e.g., provocation. In some situations, the accused did not intend to kill but death resulted from an unlawful act or from negligence. In this category there are various situations in which negligent causing of death can arise. Some of the most common are the following: negligent driving leading to fatal accidents; negligent accidents in industries and mines causing death; negligent failure to prevent deaths from dangerous conditions on land and premises; negligent use of firearms; assaults leading to death where the perpetrators did not have the intention to cause death but where death was reasonably foreseeable. See Prof. G Feltoe *Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]* LRF, 2012 @ P 56. These various situations mean that sentencing should vary by case. However, what should be borne in mind is that the harm caused by any offence that results in a death is immeasurable and no sentence can make up for the loss of life. Therefore, the sentence that is imposed is not a measure of the value put on the life of the deceased. This is why in some cases, for instance cases involving organisations, fines can be imposed. The fine is a punishment for the offence and does not represent the value of a human life in money. This is also why the maximum sentence of imprisonment for life is unusual. Such a sentence might be necessary or warranted in cases of public safety concern, i.e when an accused is a risk to the public or a danger to society. The sentence may also be imposed in cases which border on murder but the State was not able to prove beyond reasonable doubt that the accused acted with actual intent or that he or she realised that there was a real risk of death and took a conscious risk of causing death. See Prof G Feltoe *Commentary on the Criminal Law (Codification and Reform) Act [Chapter 9:23]* LRF, 2012 @ p 61. So, the sentences that are imposed are meant to punish accused persons for the offences committed. As such the sentence should properly reflect the culpability of the offender and the unique facts of each case. In other words, the sentence should be proportionate to the offence committed.

Unfortunately, our penal provision does not have sentencing guidelines to guide judicial officers and neither does it lay out specific mitigating and aggravatory factors that the judicial

officers should consider. Judicial officers are therefore largely guided by how cases have been sentenced in the past (precedent). As to which past cases will guide a judicial officer in a particular case largely depends on the past cases the lawyers in the matter refer to. Naturally defence counsels refer to past cases with lenient sentences whereas State counsels refer to past cases with stiffer sentences. The presiding judicial officer will exercise his or her discretion and decide which past cases to follow. This explains why there is a huge variation in sentencing practices amongst the judiciary in this jurisdiction. The dilemma that we have today is about deciding which past cases to follow. On one hand we have the defence counsels making reference to past cases that have lenient sentences and want us to follow suit. On the other hand, we have the State counsel making reference to a past case where a stiffer sentence was passed and would want us to follow suit. We need to point out that circumstances of assaults leading to death vary from case to case. Some cases are not far from being an accident, while others may be just short of murder. So, over and above the usual mitigatory factors that reduce the sentence and the usual aggravatory factors that increase the severity of a sentence that judicial officers normally consider, judicial officers should also consider the unique facts of each case. The unique facts may include factors such as the brutality of the offence, the reason(s) behind the commission of the offence, the vulnerability of the deceased and the impact of the offence on the deceased's family. The list is not exhaustive. Therefore, when judicial officers refer to past cases, they should not do so blindly. A comparison of the facts should be done. Therefore, when lawyers refer to past cases, they should make a comparative analysis of the facts so as to properly guide the court. It is not enough to simply say that in a past case the accused assaulted a thief to death and he was sentenced to 4 years' imprisonment of which 2 years was suspended on condition of future good behaviour and that therefore the present court should follow suit. A number of questions come to mind. What were the full circumstances of the past case? Were the circumstances of that case similar to the circumstances of the present case? Was the accused's moral blameworthiness in the past case the same as that of the accused in the present case? Past cases with similar facts provide better guidance to judicial officers.

In sentencing the accused persons before us we will consider the following factors in mitigation. The accused persons are first offenders aged 48 years and 44 years respectively. It was submitted that both were drunk on the day and this diminished their appreciation of events.

Accused persons are family men with responsibilities to look after their families. Whilst the first accused is not formally employed, the second accused is formally employed at Union Hardware as a forklift operator. The accused persons pleaded guilty thereby showing remorse and they did not waste unnecessary time. When the accused persons committed the offence, they had responded to a shout by a neighbour at around 10pm that there were thieves at her place. The neighbour is a woman who lives with her daughter. She had been a victim of a theft before. This is what caused the accused persons to assault the deceased when they found him standing at her verandah. The accused persons will live with the trauma of having killed someone for the rest of their lives. The accused persons are said to be in the process of trying to engage the deceased's family through their village head in a bid to pay customary damages for killing the deceased. The family is said to be refusing to engage with them.

In aggravation we will consider that the accused persons caused unnecessary loss of life of the deceased and the courts frown upon such behaviour. We will also consider the unique facts of the case that are distinguishable from the facts of the cases that Mr *Mwatura* referred us to. Whilst the accused persons responded to a shout by a neighbour that there were thieves at her place, the accused's conduct when they got to her place was grossly unreasonable. They found the other neighbours Tariro Mutedzwa and Evidence Kuzvinzwa already at the place. The alleged thief had not run away and neither did he attempt to run away when he saw the accused persons arriving. They asked him questions which he did not respond to because he was drunk. People could see that he was drunk. The accused's reaction of then going on to severely assault him using switches is shocking. Nobody else joined in the assault. The assault was unwarranted because when they were assaulting the deceased, he was not resisting, fighting back or running away. The question is, was there any need then for continuing to assault him for about 20 minutes under the circumstances? If they believed that he was a thief, why did they not take him to the police? In any case the deceased had not stolen anything from the neighbour's house. He was just standing at the verandah, very drunk.

As if the assault with switches was not enough, the accused persons went on to pour cold water on the deceased saying that it was going to make him sober and this was in July, one of the coldest months of winter. Thereafter, the accused persons went on to drag the deceased by pulling him by his legs while he was facing up and dumped him at a footpath about 100m away from the

homestead where they had found him. The post mortem report shows that the deceased sustained severe injuries and the cause of death was brain damage, severe brain edema and head trauma. One wonders why the accused persons decided that after severely assaulting the deceased and pouring cold water on him, they should leave him to sleep in the cold the whole night. At daybreak he was found at the same place where they had left him. He was still lying facing up. This means that the deceased never moved or turned the whole night. He was still breathing though. However, he passed on a short while later. This is a person who probably would have survived if the accused persons had taken him to the police or to hospital instead of leaving him to sleep in the cold the whole night. The accused persons' behaviour was grossly unreasonable and cannot be condoned.

This is a bad case of culpable homicide which calls for effective imprisonment despite the mitigatory factors enumerated above. Community service will be a mockery and a miscarriage of justice in the circumstances of the present case. The accused persons' blameworthiness is very high for they went on to assault a person they could clearly see that he was drunk and was offering no resistance at all. They could have simply taken him to the village head or to the police. No wonder why the deceased's family is refusing to engage in any discussions with the accused persons over payment of damages. Society should realise that even in instances where a thief is caught, people should not take the law into their own hands by assaulting them. There is need to respect the rule of law by handing over such people to the police so that they are dealt with by the law.

We are in agreement with the State counsel that in the circumstances of this case, a lengthy term of imprisonment in the region of 10 years' imprisonment with a portion suspended on condition of future good behaviour will meet the justice of the case. The objective is to rehabilitate and deter the accused persons from such behaviour in future. Other would-be offenders should also be deterred.

Each accused is thus sentenced to 10 years' imprisonment of which 4 years' imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving violence on the person of another and for which upon conviction, he is sentenced to imprisonment without option of a fine. Effective 6 years' imprisonment.

National Prosecuting Authority, State's legal practitioners
Jambo Legal Practice, first accused's legal practitioners
James majatame Attorneys At Law, second accused's legal practitioners