

STATE
versus
EDWARD CHIZHOMBE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 & 17 March, 5 & 19 June 2023

ASSESSORS: Mr Chakuvinga
Mr Chimonyo

Criminal Trial

Ms C Mutimusakwa, for the State
P Marava, for the accused

MUREMBA J: The accused who is alleged to have assaulted his wife Catherine Masiye from the 22nd to the 24th of April 2022 resulting in her death denied the charge of murder as defined in s 47(1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*].

In denying the charge the accused vehemently denied assaulting the deceased in any manner and at any day or time. The accused said that the death of the deceased was due to her prior serious medical conditions. The accused said that even the post-mortem report supports his defence as it is stated that no visible injuries were noted on the deceased's body. The accused said that the assault allegations were a fabrication by the deceased's relatives who wanted to fix him for not having paid lobola for the deceased.

To prove its case the State produced the post-mortem report that was compiled by Dr Mayedo after examining the remains of the deceased. It states that the cause of death was septic shock, peritonitis; rupture of the duodenum and severe abdominal trauma. Other significant conditions that the doctor noted were parietal occipital subarachnoid hemorrhage and head trauma. During trial the post-mortem report was interpreted by Dr Javangwe. He took us through the report and said that Dr Mayedo had noticed the following injuries on the body of the deceased: a bruise or abrasion at the back, hemorrhage on the membranes which cover the brain as a result of blunt trauma to the head. This was seen when he opened the head. There was fluid in the lungs. There was no visible trauma on the abdomen but when it was

opened some dirty brown fluid/liquid was seen inside. The doctor observed that the dirty fluid had come from the ruptured duodenum – the first part of the small intestine which connects to the stomach. There was a hematoma around the duodenum. The doctor concluded that all this is what resulted in the causes of death already explained above. Dr Javangwe explained that septic shock is widespread or overwhelming infection causing organ failure. Peritonitis is caused by leakage in the intestines. When bowels rupture, the bowel material goes into a cavity where it is not supposed to be. Dr Javangwe explained that if a person suffers blunt trauma (injuries resulting from an impact with a dull, firm surface or object) to the abdomen they may rupture their bowels and *in casu* the duodenum was ruptured meaning that there was blunt trauma to the abdomen. Dr Javangwe explained that the post-mortem report does not show that the deceased died from some underlying conditions. He said that it is not common for the duodenum to rupture from nowhere. It can rupture after blunt trauma. Dr Javangwe said that there was a link between the alleged assault and the causes of death as shown on the post mortem report. He said that the examination showed that the deceased suffered blunt trauma. The right eye was reddish also suggesting blunt trauma.

Although the accused denied assaulting the deceased, *viva voce* evidence which the State led from Rosemary Masiye, Pemba Pemba and Elizabeth Masiye shows that he did assault the deceased. It is common cause that on 22 April 2022, the accused and the deceased spent the day at Pemba Pemba and Elizabeth Masiye's homestead curing tobacco. These two are husband and wife and Elizabeth Masiye was the deceased's older sister. Pemba Pemba and Elizabeth Masiye said that the accused and the deceased left around 8pm for their home. Pemba Pemba who was not feeling well went to the bedroom to sleep whilst Elizabeth Masiye walked the two out of the yard. Elizabeth said that when she got to the rock that is behind her kitchen she returned. When she was now walking to the bedroom, she heard the deceased crying out saying, "Sister, you have forsaken me". Pemba Pemba who was sleeping in the bedroom said he also heard the same words. Elizabeth said that when she heard these words, she followed the accused and the deceased. When she caught up with them near the rock behind her kitchen, the accused was holding the deceased by her right hand, above the wrist. Elizabeth said that she asked what was happening. The deceased said that the accused was assaulting her. Elizabeth said she then asked the accused why they were fighting and the accused's response was that the deceased was foolish. Elizabeth said that she advised the two to stop fighting and to go to their home in peace. The two then left. Pemba Pemba said that when Elizabeth came

to the bedroom, he asked her why the deceased had cried out saying, “Sister, you have forsaken me?” and Elizabeth narrated to him what she narrated to the court.

Pemba Pemba and Elizabeth Masiye said that on 23 April 2022 they left their home very early in the morning around 6am going to the shopping centre where they wanted to get some sacks for packaging their tobacco. Just after leaving their homestead and when they were about 8 metres away from the rock the accused was assaulting deceased the previous night, they picked up one plastic shoe belonging to the deceased. They proceeded to the shops and collected their sacks. On their way back, they met with the deceased who said was coming to their place to look for her shoe and hat which she had lost the previous evening as the accused was assaulting her. They told her that they had picked up the shoe only and not the hat. As they were talking about the hat, the deceased then saw her hat at the place where they were standing and picked it up. The deceased said that she had been assaulted at that very place which was a gum tree plantation area. The deceased asked the two if they wanted to see the switch marks on her body. Pemba Pemba refused to see saying that it was improper for him to see her naked body. The deceased lifted her blouse for Elizabeth to see. Elizabeth said that she saw some switch marks on the back and these marks had turned greenish. The deceased explained that the accused had assaulted her all the way home. The deceased said that she did not know why the accused had assaulted her.

Pemba Pemba and Elizabeth Masiye said that from that place they proceeded to the accused and the deceased’s place where they found the accused sleeping. Elizabeth asked him if they had had a peaceful journey home the previous night and he said yes. She did not ask him further. Later on, the four of them set for Pemba Pemba and Elizabeth Masiye’s homestead. When they reached the gum tree plantation, the deceased addressed Pemba Pemba and said that the accused had assaulted her at that place the previous night. She also indicated to the switches the accused had used in assaulting her. The accused who was present remained quiet. He never commented. As they continued to walk and got to the turn-off, the deceased said she had been assaulted at that place as well. The accused remained quiet. The deceased said that the accused had plucked a switch from a Mupangara tree and assaulted her with it. She showed Pemba and Elizabeth the Mupangara switch the accused had used on her. A Mupangara tree is a thorny tree. When they got to the gate leading to Pemba Pemba and Elizabeth’s homestead, the accused remarked that he had assaulted the deceased at that place/gate and the deceased confirmed it. Again, the deceased showed Pemba and Elizabeth the switch the accused had used. They then entered the yard. When they got to the rock behind

the kitchen, the deceased said that this was where the assault had started. This was the rock where Pemba and Elizabeth had picked up the deceased's shoe. This was the rock where Elizabeth had caught up with the accused holding the deceased's hand after the deceased had cried out that her sister had forsaken her. Elizabeth Masiye said that at the gate where the accused personally said that he had assaulted the deceased, he had actually bragged about it. He said, "*Pano pakarohwa munhu zvekaMwari chaizvo*" meaning that he had severely assaulted the deceased. The accused never explained why he had assaulted the deceased and the deceased did not say why she was assaulted. The accused would simply say that the deceased was foolish.

Pemba and Elizabeth said that they then spent the day of 23 April 2022 with the accused and the deceased working on the tobacco until 5pm when Pemba Pemba indicated that he wanted to go to some place to collect a tobacco bail presser. The accused volunteered to accompany him. The deceased indicated that she wanted to go to her place and that she was leaving with them. The accused ordered her to remain at Pemba Pemba's place. He said that he would come and collect her from there upon his return, but the deceased was adamant. The accused plucked a switch from a Mutsamvi tree which is near their bathroom and started assaulting her with it all over her body whilst she was standing near the kitchen. He assaulted her for a short while – about 10 minutes and then pushed her into the kitchen where Elizabeth was. He took the keys, locked the door and handed over the keys to Elizabeth through the window. Pemba Pemba and the accused then left.

Elizabeth Masiye said that when she remained with the deceased in the kitchen, the deceased started pushing the door. Out of fear that her door might be damaged, Elizabeth unlocked the door for her and she followed the accused and Pemba Pemba. Elizabeth said that was the last time she saw her sister alive. Pemba Pemba said that the deceased caught up with them after they had walked for 130-140 metres from his homestead. An altercation ensued between accused and the deceased as the accused was asking her why she had followed. The accused started to assault the deceased with open hands. Pemba Pemba said that he had to go between the two of them in order to restrain the accused. However, the accused managed to kick the deceased who then fell into a ditch which was beside the road. Pemba Pemba said he did not see where the deceased was kicked as he was trying to restrain the accused. The ditch she fell into was about 90cm deep. It is a gully that was caused by soil erosion. When she fell, she assumed a sitting position. Pemba Pemba said he advised the deceased to go home.

They then left her still sitting in that ditch as they proceeded to look for the bail presser. Pemba Pemba said that was the last time he saw the deceased alive.

After getting the bail presser, Pemba Pemba and the accused parted ways as Pemba Pemba was now going back to his home. The accused said that he wanted to see some friends of his. The accused had also spoken of intending to attend a memorial service that night. Pemba Pemba said that his homestead is about 1.1 km to 1.2 km from the accused's homestead. He said he enjoyed good relations with the accused as brothers in law. He said that he had no reason to testify falsely against him. He said that he was not aware of any bad blood between the accused and the Masiye family. Elizabeth Masiye's evidence was also to the same effect. Pemba Pemba and Elizabeth Masiye said they heard about the deceased's death on the following day.

There is no account of how the deceased left the ditch and how she proceeded to her home, but she made it home. Her home happened to be in Rosemary Masiye's stand. Rosemary Masiye was her mother. Rosemary Masiye (82 years old) told the court that she decided to give her daughter a place to build within her stand after she had returned home following her divorce from her first husband. The deceased was 45 years old. She was now staying with the accused who was also a divorcee. It was Rosemary Masiye's evidence that although the accused had not paid any lobola for her daughter – the deceased, she had accepted him as her son-in-law. She said that she is the one who used to cook for the two. So, they would come to her place to eat every day. She said that on 23 April 2022 the two went to assist Pemba Pemba and Elizabeth Masiye with curing their tobacco but they did not come to collect their supper upon their return in the evening. Rosemary said that on the morning of 24 April 2022, she decided to proceed to their homestead to find out why they had not come to collect their supper. Rosemary said when she knocked on the door no one responded. She opened the door as she was calling out the deceased's name at the same time. Still there was no response. She said that she then saw the deceased lying on the floor gasping for air. She was alone. Rosemary said that she asked the deceased if she had been assaulted. The deceased responded by nodding her head twice and she then passed out. That is how the deceased died. Elizabeth said that she then cried out drawing the attention of the people who then gathered. That is how people learnt of the deceased's death. Apparently the accused had not come home the previous night. The deceased had slept alone.

It was Rosemary Masiye's evidence that the accused was in the habit of assaulting the deceased. She said that although she was not happy with the accused's behaviour, there is

nothing that she could do about it because she did not want to ruin or destroy her daughter's marriage. She said that as a mother she was embarrassed to ask why the accused was always assaulting her daughter. She said that she never realized that these assaults would result in her daughter's death. She said that the deceased had 5 children from her previous marriage whilst the accused had 3. Elizabeth said that because of the assaults, the deceased who used to be big had grown thinner.

Pemba Pemba and Elizabeth Masiye said that the deceased and the accused were always having misunderstandings and the accused was always assaulting the deceased. The two said that the accused and the deceased never explained the cause of this. The two described the accused as a very short-tempered man. He was much younger than the deceased.

Elizabeth Masiye said that the accused used to assault the deceased almost every day. She said that before she got married to Pemba Pemba, she used to confront the accused after he would have assaulted the deceased and he would also assault her. She insisted on showing the court the several scars that she said she sustained on her back after being kicked by the accused. We allowed the lady prosecutor and interpreter to see. They confirmed that she had several old scars. She said that the accused had no respect for her as a sister in law. She explained that after the death of the deceased she went on to pick up the broken pieces of the switches that the deceased had shown them on the 23rd of April 2022 as she was telling them that the accused had assaulted her on the way home on 22 April 2022. The State produced six switches. We observed that some of them were thorny. She said that at one time the deceased was sutured 5 stitches above the right eye after having been assaulted by the accused. Elizabeth said that on the day that the deceased passed away she observed a lot of marks and scars on her body. This was corroborated by the mother of the deceased, Rosemary Masiye. The two said that they had examined the body of the deceased after she had passed on.

Pemba Pemba and Elizabeth Masiye said that on the two days the accused and the deceased came to their place to assist them with their tobacco no one drank beer. Elizabeth Masiye is a Moslem and she does not allow any beer at her home.

We find the accused's evidence that he never assaulted the deceased on 22 and 23 April 2022 unconvincing. It was outright false. Pemba Pemba and Elizabeth Masiye gave a detailed narration of the events of these two days. They corroborated each other in all material respects. They could not have made up such a detailed story and be able to testify about it separately in court without contradicting each other. Even under cross examination they remained unshaken. Their evidence was so clear such that we are convinced that this is not a case of witnesses

having lied against the accused because of bad blood. There was no bad blood at all. The deceased's family had allowed the accused to stay with the deceased for two years despite the fact that he had not paid any lobola for her. In the defence case the accused admitted that the Masiye family had welcomed him as a son-in-law. He even said that there was no bad blood between him and the deceased's family. The accused clearly departed from what he had said in his defence outline about there being bad blood between him and the Masiye family. He even admitted to having a cordial relationship with Pemba Pemba his brother-in-law.

From what Pemba Pemba and Elizabeth Masiye explained, it is clear that the accused perpetrated a severe assault on the deceased on 22 and 23 April 2022. The accused is even said to have bragged about it saying, "*Pano pakarohwa munhu zvekwaMwari chaizo*". The injuries as reflected on the post mortem report are confirmation of the severe assault the deceased suffered at the hands of the accused. She suffered a ruptured duodenum, severe abdominal trauma and head trauma. Whilst an accused has no duty to prove his innocence, in a case like the present one, where the State witnesses would have given overwhelming evidence against him and there is independent evidence such as a post mortem report which corroborates their evidence, the accused has a duty to rebut that evidence. If an accused fails to rebut the prosecution case at defence case stage, he runs the risk of getting convicted. Whilst an accused has the right to remain silent and not to testify or to be compelled to give self-incriminating evidence in terms of s 70(1) (i) of the Constitution of Zimbabwe, 2013, he or she must realize that he has a duty to rebut the prosecution case once a *prima facie* case has been established against him or her. So, if an accused decides to be economic with the truth and not explain things fully, he or she runs the risk of being convicted. An accused must therefore present evidence which rebuts the prosecution evidence at the time that he is given to present his defence if he or she wants to escape a conviction. This is why in terms of s 70 (1) (h) of the Constitution, an accused is entitled to adduce and challenge evidence. It is on this basis that the accused has a right to call independent expert witnesses to challenge the evidence presented by the prosecution.

In *Osman and Another v Attorney General, Transvaal* (CCT 37/97) [1998] ZACC 14; 1988(4) SA 1224 @ para 22, MADALA J said:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk the prosecution's case may be sufficient to prove the elements of the offence."

What this means is that whilst the State has a duty to prove the guilt of the accused beyond reasonable doubt, the accused has a duty to adduce evidence which rebuts the prosecution's case once the prosecution has produced sufficient evidence to establish a *prima facie*. If the accused does not, he or she runs the risk of being convicted. In *casu*, it was not enough for the accused to continue to deny that he assaulted the deceased in view of the contents of the post mortem report which clearly speak to a severe assault on the body of the deceased. The accused proffered no explanation as to how the deceased sustained those injuries. The accused wanted us to believe that the deceased was not assaulted when the evidence was so glaring. He continued to say that the deceased died as a result of some underlying medical condition, which thing was not supported by the post mortem examination. All the State witnesses denied that the deceased had some underlying medical condition. It was only during the defence case that the accused said that the deceased had cancer. This was a falsity. If the deceased had cancer, the post mortem examination would have revealed this. By completely denying having assaulted the deceased, the accused did not produce enough evidence to rebut the State's *prima facie* case. He also failed to produce medical expert evidence to show that the deceased died of underlying medical conditions such as cancer. The State therefore managed to show that there is a link between the assault that the accused perpetrated on the deceased and what caused the death of the deceased.

However, from the assaults that the accused perpetrated on the deceased, we cannot say that the State managed to prove that when the accused was assaulting the deceased, he intended her death or he did realize that there was a real risk of death arising out of his actions and nonetheless persisted with his actions. What the State managed to show was that the accused had developed a culture of assaulting the deceased during their marriage and prior to the deceased's death, on 22 and 23 April 2022, he had severely assaulted her. It is our considered view that, by persistently assaulting the deceased with switches and fists and kicking her with booted feet resulting in her falling into a ditch, the accused negligently failed to realize that death may result from his conduct or he realized that death may result from his conduct and negligently failed to guard against the possibility of death occurring. The accused was careless in his conduct towards the deceased.

We therefore find the accused not guilty and acquitted of the charge of murder but guilty of culpable homicide as defined in s 49 of the Criminal Law (Codification and Reform) Act.

Sentence

In mitigation we considered that the accused is aged 33 years. He is a first offender. He has three children who are dependent on him. What is aggravatory is that he stands convicted of a serious offence of culpable homicide. This is a very bad case of culpable homicide which is aggravated by the continued assaults that the accused perpetrated on the deceased. The deceased explained to Pemba Pemba her brother-in-law and Elizabeth Masiye her sister in the presence of the accused that on 22 April 2022 the accused had severely assaulted her at 5 spots as they were going home from Pemba Pemba and Elizabeth Masiye's place. At the gate to Pemba Pemba's place the accused had even bragged about it. On 23 April 2022, the accused assaulted the deceased with a switch all over her body in the presence of Pemba Pemba and Elizabeth. He assaulted her for about 10 minutes. After that he assaulted her again in the presence of Pemba Pemba and went on to kick her resulting in her falling into a ditch which was 90cm deep. He even left her in that ditch. She had to find her way home alone. On the next morning she died. The accused had not even come home the previous night. The cumulative effect of all these assaults was the death of the deceased. The deceased was severely assaulted and sustained very serious injuries - abdominal trauma, head trauma and a ruptured duodenum. This is a clear case of domestic violence that resulted in death. The accused had not even paid lobola for the deceased. He was being fed by the deceased's mother and staying at the deceased's mother's place. The accused was an ungrateful boyfriend. His moral blameworthiness is very high. He had a culture of assaulting the deceased as he pleased every now and then for reasons that are best known to him. Community service as proposed by the defence counsel will be a mockery of justice. 7 years' imprisonment with 2 years suspended on condition of future good behaviour as proposed by the State will also be lenient considering the aggravatory circumstances of the case. A stiffer term of imprisonment is called for so as to rehabilitate and deter the accused and other would-be offenders.

Accused is thus sentenced to 13 years' imprisonment of which 3 years' imprisonment is suspended for 5 years on condition he 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 the option of a fine. Effective 10 years' imprisonment.

National Prosecuting Authority, State's legal practitioners
James Majatame Attorney at Law, Accused's legal practitioners