

THE STATE
versus
NESBERT KASEKE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 28 March & 27 July 2023

Assessors: Dr Mushonga
Mr Gweme

Criminal Trial

F Furidze, for the State
I Goto, for the accused

MUTEVEDZI J: The accused faces a charge of murder in contravention of s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). The indictment alleges that on 18 June 2020 at Chikukwa Mine Compound in Christon Bank, Nesbert Kaseke (the accused), unlawfully and with intent to kill or realising that there was a real risk or possibility that his actions could lead to death and persisting with his conduct despite that realisation of the risk or possibility, assaulted Terrence Nyemba (the deceased) with a shovel three times on the head. The deceased succumbed to the injuries inflicted. The chronology of events on the fateful day went as follows:

The deceased had at some time lend a history textbook to the accused. He wanted it back. The State did not disclose why he demanded it back using what we perceived to be unmitigated violence. He proceeded to the accused's residence armed with a machete and brusquely asked for the book. The accused who was in his house then came out brandishing a shovel. He hit the deceased with it twice on the head. The deceased collapsed in a hip. The accused followed that up with another shovel-blow to the head. He was only refrained from further assaulting the deceased by one Obey Chafuruma. The deceased went to make a report of the assault at Christon bank Police after which he proceeded to Concession Hospital to seek medical treatment. He was admitted into hospital and was later transferred to Parirenyatwa Hospital where his condition deteriorated until he died on 22 June 2020. An autopsy conducted

on his remains concluded that death was due to brain injury, temporo occipital sugatead haematoma and severe head trauma.

The accused pleaded not guilty to the charge. He alleged that it was in fact the deceased who was aggressive towards him on the day in question. The deceased had approached his house with a machete with which he wanted to stab him. He tried to defend himself resulting in a violent altercation between them which resulted in the injuries which caused the deceased's death.

State Case

The State opened its case by applying to produce a confirmed warned and cautioned statement made by the accused to the police and confirmed by a magistrate. The defence did not object and the court duly admitted the statement which became Exhibit 1. In addition the prosecutor also applied to tender the post mortem report. Once again it was unopposed and the autopsy became Exhibit 2 in the trial. Thirdly, the prosecutor applied to produce the certificate which described the weight of the shovel and the machete which were allegedly used in the commission of the offence. By consent the certificate was admitted and became Exhibit 3. Lastly the State sought the formal admission into evidence of the testimony of Tariro Kunonga in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP & E Act). Once again the application was unopposed and the testimony was formally admitted as it appeared on the State's summary of evidence. He was the investigating or rather the arresting detail. He went to the scene when he received the report concerning the assault. He found the deceased unconscious. He had a deep cut on the head. He referred him to hospital and later arrested the accused on 23 June 2020.

Grace Chimombo

She is the deceased's widow. The accused is her neighbour. On the night of the murder, she said she was tending her baby in their kitchen hut when she heard commotion outside. The deceased was demanding his book from the accused. He got up from where he was and presumably proceeded to the accused's residence. When the noise intensified, she said she went out but not before she had again heard a man called Obey calling out to the accused to stop what he was doing because he could kill the old man. That was apparently in reference to the deceased. When she went out she saw the accused holding a shovel and being restrained by Obey. The deceased was lying prostate. He was bleeding from the mouth and the nose. The back of his head was injured and was also bleeding. It also had swellings which however were not bleeding. She said she then ran out to call the deceased's mother and did not witness what

transpired thereafter. She said at the scene the accused appeared violent when Obey was restraining him. He was about ten metres away from where the deceased was lying. All this happened in the evening when it was already dark. Under cross examination the witness conceded that she did not witness what had transpired at the time that the deceased had left their residence and went to the accused's place. She only attended the scene after the assault. She therefore could not comment on the aggression and violence allegedly exhibited by the deceased towards the accused. She could not equally dispute the accused's version of events that the deceased wanted to destroy his (accused's) house.

Tawanda Nyazvigo

The witness was a neighbour to both the deceased and the accused. On the fateful night around after 1700 hours he said he observed the deceased repairing his bicycle at his residence. The deceased was in the company of his young child whom he later assaulted. The child sought refuge at the witness's house. He was trembling. He asked him what the matter was but the child couldn't answer. He appeared very afraid and remained so until the deceased came to collect him. When the deceased went back to his residence, Tawanda said he heard him insulting the accused. He demanded his book from the accused. The deceased later returned to the witness's house and advised him that either he (the deceased) or the accused was going to die that night. It was getting darker and was now around 1800 hours. In all this the accused remained seated at his door step at his residence. The deceased then threatened that may be the accused hadn't heard it properly that he wanted his book back. He cantered towards the deceased's residence. On arrival he set up a light at the accused's hut door and instructed the accused to look for the book now that he had light. The witness said he was only about seven to ten metres away. When deceased gave the accused the light he returned to his residence. A while later the deceased started talking again asking the accused if he had found his book. The accused remained quiet. He went into his house to sleep. At that point the deceased armed himself with a machete and proceeded back to the accused's residence. The hut in which the accused was sleeping was a pole and daga structure. The deceased poked the walls of the hut with the machete three times. He completely pierced part of the walls. He then proceeded to the door. He continued insulting the accused, insulting the accused's parents and used profanities in the process. He still demanded his book. The witness further said he momentarily went back into his own hut to tend to his pots. When he came out he gathered that there was a fight going on between the accused and the deceased. When he got to accused's residence, the deceased was lying near the hut. The witness observed that the deceased was badly injured. He

poured water on him to revive him. That momentarily succeeded. The accused's hut was damaged extensively. Under cross examination he advised that the deceased was inebriated. He restated that the deceased was aggressive and violent to the extent of destroying the accused's hut and threatening to harm him.

Obey Chafurama

He was at the material time, a neighbour to both the accused and the deceased. On the night in question he heard the deceased shouting on top of his voice insulting the accused. He said as he went out to investigate he saw the deceased holding a machete with which he was damaging the accused's house. The witness went closer and saw that the deceased was clobbering the accused's house. At that moment the accused came out of his hut running afraid that he would be attacked. He had earlier closed his door. The accused met the deceased right at the door of the hut as the accused tried to bolt out. The deceased had the machete in his grip. He threatened to chop the accused. He was drunk and could have done anything to the accused. He blocked the accused's way before aiming a strike at the accused. The accused then used a shovel which he was holding to block the strike. He in turn hit the deceased three times on the head. The accused did not say anything which the witness heard all this time. The witness said at that time he rushed and took away the shovel from the accused. He threw it away. Counsel for the accused chose not to seriously cross examine given that the witness's evidence was clearly favourable to his client. Thereafter the prosecutor closed the state case.

Defence Case

The accused gave evidence under oath. He stated that on the fateful night he had tried by all means necessary to restrain himself after the deceased attacked him at his residence. A year earlier the deceased had lend him a textbook. He now demanded it back. The accused advised the deceased that he wasn't sure where exactly the book was but was nonetheless going to look for it and return it. The deceased who appeared drunk seemed like he couldn't comprehend what the accused was explaining. He continued demanding the book back. The accused kept his cool and remained silent. The deceased then threatened that the accused was a very young person whom he was going to kill without any consequence befalling him. The accused said he was petrified. He closed the door to his hut and remained inside. The insults from the deceased went on for about two hours. The deceased later came to the accused's residence where using a machete he started damaging the hut in which the accused was sleeping. The hut which, as already said, was built of pole and daga started collapsing. The accused said he in fear and trepidation, then picked up a shovel which was under his bed to

either defend himself or to make good his escape from the collapsing hut. He opened the door but was immediately hit on the side of his stomach with a machete. He fought back and said he hit the deceased first on the legs with the shovel. The deceased appeared like he was falling but regained his balanced and came straight back at the accused. The accused said he then struck the deceased twice more after which he fell to the ground. Obey arrived at the same time and snatched the shovel away from him. The accused seized the opportunity to get clear out of what he thought was danger. Nothing meaningful came out of the prosecutor's cross examination. The accused remained steadfast on his version of events. He soon thereafter closed his case.

Common cause issues

There are several issues which are undisputed in this trial. They are the following:

- a. The deceased was behaving very badly on the fateful night. In fact he was extremely violent not only towards the accused but also towards his only family as illustrated by the assault of his very young son. The boy had to run to their neighbour for protection.
- b. In relation to the accused, the deceased appeared to have been incensed by the non-return of a textbook which he had lend to the deceased almost a year previously.
- c. The deceased attacked the accused in his home. He first insulted the accused by hurling profanities at him for more than two hours. That appeared to have had no effect because the accused kept his calm, retreated into his hut and closed the door. The deceased then decided to literally burn down the house. He armed himself with a machete and cut down the poles and strings which bound the accused's hut together. It started to collapse.
- d. When his hut was under siege, the accused decided to escape. He armed himself with a shovel for purposes of defending himself or aiding his escape whichever would become necessary.
- e. When he attempted to escape from the hut the deceased blocked the doorway and tried to strike him with the machete.
- f. It was at that point that the accused used the shovel to block the machete strike as well as to strike back at the deceased. He hit the deceased with the shovel three times. He says he struck him on the thighs. The deceased collapsed in a hip.
- g. The deceased died from the injuries sustained in that brawl.

The Issue for Determination

The accused in his defence argued that he was defending himself against an unlawful, unprovoked and very violent attack by the deceased. The only issue for determination in this case is therefore whether or not the full defence of defence of person is available to the accused. An accused's justification on the basis of defence of person is provided for under s 252 of the Criminal Law Code. To successfully plead it, an accused must satisfy the requirements indicated in s 253. It states the following:

“253 Requirements for defence of person to be complete defence

- (1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if –
 - (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
 - (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and
 - (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
 - (d) any harm or injury caused by his or her conduct –
 - (i) was caused to the attacker and not to any innocent third party; and
 - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
- (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, any knowledge or capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

The requirements have been interpreted and explained by this court in several decisions. Their meaning is no longer virgin ground and therefore need no authority. What is clear in this case is that if the accused had not acted in the manner he did, the deceased was going to kill him. The threats of any man who has the bravery and impertinence of attacking another who is literally hiding in his own home cannot be taken for granted. The deceased had been on the accused's case for hours on end. He had pointedly and ominously advised their neighbour Tawanda Nyazvigo that that night either he (the deceased) or the accused was going to die. The attack was no longer a threat. It was well in motion when the accused attempted to flee and found his doorway blocked by the deceased who was fully armed. The only weapon the accused had was a shovel which he had found inside his hut. In his own testimony the accused only intended to use the shovel if the worse came to the worst otherwise he wanted to employ it as a shield in his escape. He was attacked before he even opened the door. He was left with

virtually no option except to take the deceased head-on. His attack of the deceased was necessary to avert the danger which loomed. The means he used to do so cannot be deemed to have been unreasonable. A machete is certainly a more lethal weapon than a shovel. The blows he landed were directed at the deceased and not at any third party. It was only the deceased who was injured in the attack. As we pointed out earlier, the situation was a swim or sink scenario for the accused. He had a choice either to sit back and die or to attack the deceased in the manner he did. The injuries he caused the deceased though they unfortunately turned fatal were not disproportionate to the harm that the deceased wanted to direct towards him.

We are convinced therefore that the accused satisfied all the requirements of the defence in such a way that it is fully available to him. The State case was hopeless. What it means is that the prosecutor fell short in discharging the onus on her to prove beyond reasonable doubt that the accused is guilty of the offence of murder. In the circumstances we are left with no choice but to acquit the accused. **It is therefore directed that the accused be and is hereby found not guilty and is acquitted.**

*National Prosecuting Authority, State's legal practitioners
Masiya-Sheshe & Associates, accused's legal practitioners*