

THE STATE
versus
TINASHE MAZEMO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 3, 4, 5 & 7 July 2023

Criminal trial

Assessors: Mr. Mpofu
Mr. Gwatiringa

T Mukuze, for the State
Miss M Moyo & Miss A Mushayabasa, for the accused

MUREMBA J: The accused who is alleged to have murdered his young brother pleaded not guilty to the charge of murder.

The State's allegations are as follows. On 1 July 2022, the accused who was staying with his parents had a dispute with his family members over his behaviour and he became violent. The family members then sought refuge at the deceased's place of residence. On the next morning when the family members returned home the accused was still violent and he blocked them from entering the house. The deceased arrived and tried to talk to the accused, but the accused stabbed him with a kitchen knife on the left side of the lower region of the back near the ribs. The post mortem report states that death was due to hemopneumothorax, left lung laceration, severe thoracic trauma due to stab wound.

In his defence outline, the accused stated that he indeed had a misunderstanding with his family members on 1 July 2022, but the deceased was not part of the misunderstanding. On the next day he fought with the deceased. The deceased is the one who picked up a knife and was injured during the ensuing struggle as the accused was trying to take away the knife from him. The accused stated that he did not kill the deceased and he never had the intention to kill the deceased.

During trial the State produced the post mortem report which states that the deceased died due to hemopneumothorax, left lung laceration, severe trauma due to stab wound. Hemopneumothorax is the condition of having both air and blood in the chest cavity. This can occur due to an injury in the lung or chest. The pathologist observed a stab hole between the 9th and 10th rib near the spinal bone.

The State went on to produce the accused's confirmed warned and cautioned statement wherein he said:

"I have understood the caution of the charge being levelled against me. I admit that I stabbed the now deceased Nomore Anold Mazemo once with a kitchen knife. I stabbed him on the back. I am getting to know it right now that the now deceased later died. That is all."

What is clear from the warned and cautioned statement is that the accused made an admission that he stabbed the deceased. He did not say that he was fighting with the deceased as he sought to say in his defence outline. The accused's defence outline is a departure from what the accused told the police the day after he had stabbed the deceased. The accused never said that the deceased was injured as they were struggling for the knife. The new version that the accused gave at trial was clearly an afterthought. In any case the stab wound that the deceased sustained is not consistent with an injury that was sustained accidentally when two people were struggling for the knife. It would have been understandable if the deceased had fallen on top of the knife, but this is not what happened. According to the evidence of the parents of both the deceased and the accused, the deceased did not fall down at any stage.

Both parents, Garikai Mazemo (59) and Ranganai Guma (52) testified to the effect that on 1 July 2022, in the evening they had a misunderstanding with the accused (28) at their house in Eastview, Caledonia, Harare over two cellphones which the accused had taken. He said that he had sold one of them belonging to his mother and he intentionally broke the second one which belonged to his other young brother when his mother demanded it from him. The accused became violent when he was being questioned about the cellphones. He went on to hold his father by the collar and took an iron bar intending to assault him. The father managed to break free and the whole family ran out of the house out of fear and went to sleep at the deceased's place. On the following morning when the mother went back home with her grandson, she found the accused sleeping in the passage by the door. When she knocked, he opened the door, but in doing so, he attempted to strike her with a catapult which she dodged and it hit the makeshift kitchen hut

outside. She ran away from the house and sent for the father to come. When the father came, he found his wife standing about 18 – 20 m away from the house. At that very moment the deceased who was now on his way to work arrived. He was using the road that passes through his parents' home. When he found them standing by the road away from the house he asked them why. When they explained to him what had happened, he said he was going to the house to talk to the accused. He proceeded to the house and left them standing by the road.

It was the mother's evidence that when the deceased got to the house, he never entered as the accused was standing by the door pacing up and down holding some of her kitchen knives, and a small scissors. She said she then saw the deceased raising his crossed arms as if to block a blow from the accused. The deceased immediately turned around to run away and at that very moment the accused stabbed him on the back. She said she did not witness the actual stabbing but she saw the accused still holding the knife after it had already stabbed. The knife now had blood. At that very moment the deceased cried out that he had been stabbed and he ran a little before he fell down. She said that she must have blinked at the time the accused was stabbing the deceased. It was her evidence that she clearly saw everything that happened as she was very close. She said that there was never a fight between the accused and the deceased. The mother's evidence rebuts the accused's evidence during this trial that he fought with the deceased. The mother's testimony is consistent with the accused's confirmed warned and cautioned statement that he stabbed the deceased.

Unfortunately the father did not see anything. He said that when the deceased left for the house to talk to the accused, he was looking down. He only raised his head when he heard his wife saying that the two were now fighting. He said without looking he started to run to the house with the intention of assisting the deceased. He said that as he was running, he then met with the deceased who was running towards him crying saying that he had been stabbed by the accused. When he asked him where, the deceased lifted up his shirt. The father said he saw a severe wound. He said that he immediately thought of looking for a motor vehicle to ferry the deceased to hospital. He said that he left the deceased still walking, but he later fell down. The father said because he was running, he did not witness the stabbing. However, the father just like the mother also said that the deceased was stabbed whilst standing. He only fell down after he had been stabbed. Therefore, the injury that the deceased sustained is consistent with the testimony of the mother that

the deceased was stabbed by the accused as he was now running away from him. This means two things. Firstly, there was never a fight between the accused and the deceased. Secondly, the two never wrestled for the knife. The parents even corroborated this when they said that the deceased never entered the house yet the knife that the accused used was his mother's kitchen knife which had been in the kitchen. This means that it is the accused who had the knife and not the deceased. The mother said that she had seen the accused holding some knives pacing up and down in front of the door before the deceased arrived. The accused's defence that it is the deceased who had taken the knife is just but a lie.

During the defence case when the accused was being led by his lawyer to narrate what had happened, he was at pains to explain how the deceased ended up being stabbed accidentally. He simply said that they had a misunderstanding after the deceased had asked him why he was still angry with his parents. Thereafter they started exchanging words which resulted in them fighting. He said that the deceased then picked up the knife which was on the ground and when he wrestled and managed to take it from him, the deceased was accidentally stabbed. The accused said that the deceased fell down and then rose and started to run saying that he had been stabbed. The accused however changed that story when the court asked him to clearly explain how the actual stabbing had happened. The accused said as they were wrestling for the knife, they both fell down and as he was taking away the knife from the deceased, the deceased was stabbed in the process. The accused was now saying that the deceased was stabbed as they were both lying on the ground. Clearly the accused was not being truthful. If he was being truthful, he would not have changed his version of how the deceased was stabbed. Besides, his version that the knife had been outside the house was totally new. The parents said that the knife had been inside. If they had lied about it, the defence counsel ought to have challenged them during cross examination but she did not. Their version went unchallenged. This means that what the accused was now saying during the defence case was just an afterthought.

The accused failed to explain how the deceased sustained a stab hole from his explanation of how the deceased was accidentally stabbed. From the explanation that he gave, the deceased ought to have been grazed or cut by the knife instead of being stabbed. There is a difference between stabbing and cutting. With stabbing the knife moves perpendicular to and directly into the victim's body rather than being drawn across it. To stab is to pierce or to wound with a pointed

tool or weapon – there is deep penetration. A stab wound is deeper than it is long but a cut is longer than it is deep. In *casu* the deceased was pierced in the lungs. The stab hole penetrated from the back, between the 9th and 10th ribs. This means that the wound was deep. The deceased was therefore not accidentally stabbed as the accused wanted us to believe. His mother told the truth that he stabbed the deceased.

The deceased had not done anything wrong. All he was trying to do was to pacify the situation between the accused and their parents when the accused started to fight him. When he turned in a bid to flee from the accused who was armed with a knife, the accused then stabbed him on the back and he used severe force which resulted in the lungs being pierced. Under the circumstances the accused could not have intended anything or any other outcome other than death. Whilst it cannot be said that he had intended to specifically kill the deceased, what is clear from his conduct starting from the evening of 1 July 2022, is that he just intended to cause death. Initially he dragged his father into his bedroom and lifted the bed to take a tyre lever so that he would attack him with it.

The father managed to free himself and the whole family ran away and had to seek refuge at the deceased's place where they spent the night. That night the accused said he slept in the passage by the main door armed with knives, scissors and a catapult. When his mother came back in the morning, he opened the door and attacked her with a catapult. Fortunately, she managed to dodge and escape. When the deceased came, the accused then stabbed him. The accused was just violent and he did not want anyone to come near the house hence he killed the deceased. The actions of the accused show that he just wanted to kill anyone who came his way. So, it could have been anyone – his mother, his father or anyone. He just had so much anger in him. In his own words during the defence he said that out of anger he had turned the house upside down on the night of 1 July 2022, after the family had run away. The mother said that after the arrest of the accused, she had found the whole house in a mess. Things were strewn all over the house.

What further shows that the accused desired death was that after stabbing the deceased who continued to run away, he started pelting him with the catapult. The mother said this. He did not even render any assistance to the deceased after he had fallen down. Instead he went back to stand at the door of the house threatening to deal with anyone who dared approach him. A crowd which had gathered was scared to get to the house to apprehend him. The accused was only arrested by

the police who came armed with a firearm. By that time he had calmed down and was seated in his bedroom. However, he still had his weapons in his possession including the murder knife.

The killing of the deceased was deliberate and intentional. We thus find the accused guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Sentence

In mitigation we took into account that the accused is a 29-year-old first offender. When he committed the offence, he was 28 years old. He is therefore youthful. He will have to live with the stigma of having killed his young brother for the rest of his life. He suffered pretrial incarceration for a year awaiting trial as he was never granted bail.

In aggravation we took into account that the accused stands convicted of murder which is a very serious offence. He senselessly killed his blood brother. The deceased had not done anything wrong to him. All he was trying to do was to pacify the situation between the accused and their parents. The accused was just being violent towards the whole family. The mother said that the accused was taking some intoxicating substance, although she was not able to see what substance it was. She said that she saw the accused smoking this substance on the 1st of July 2022 when she was questioning him about the phones that he had taken. The accused refused to take responsibility for his actions. He showed no remorse throughout the trial. He continued to lie that the deceased died accidentally yet evidence adduced from the parents show that he deliberately stabbed the deceased. He even went on to pelt him with a catapult after stabbing him. This shows that the accused desired nothing but death. He started exhibiting his intention to kill on the evening of the 1st of July 2022, when he pulled his father by the collar as he intended to assault him with a tyre lever. The whole family had to run away from home and put up at the deceased's house until the next morning. When the mother went back home, he attacked her with a catapult. When the father was called, he was afraid to confront the accused. When the deceased then came and confronted the accused, the accused butchered him with a knife. Accused demonstrated that he is a person who has no respect for his own parents yet these are the same parents who were looking after him and feeding him. His wife had left him and he had gone back home to live with his parents. This shows that he could not adequately provide for himself. Although he was working as a tout at the

terminus, he was now taking items from the house and selling them. The worst part is that he did not want to be asked about it. Since he was into drugs, there is a strong likelihood that he was doing this in order to get money to buy drugs. He deserves a stiffer penalty. Hopefully he will be rehabilitated by the time he gets discharged from prison.

We would have sentenced the accused to 30 years' imprisonment, but since he has already spent 1 year in prison awaiting trial, we will deduct that 1 year from his sentence. Accused will thus be sentenced to 29 years' imprisonment.

Conclusion

In the result:

1. The accused is found guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].
2. The accused is sentenced to 29 years' imprisonment.

*National Prosecuting Authority, State's legal practitioners
Mutumbwa Mugabe & Partners, accused's legal practitioners*