

THE STATE
versus
CLEOPAS KUMIRE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 8 February 2024

Assessors: Mr Barwa
Mr Jemwa

Criminal Trial- Sentencing judgment

K Chigwedere, for the State
K T M Mukanganwi, for the accused

MUTEVEDZI J: The offender, Cleopas Kumire, an epileptic patient was initially arraigned before the court charged with the crime of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). He was accused of having assaulted Wilson Chiyadzwa notoriously known by his moniker Gunners due to his violent tendencies and provocative conduct. We found during trial that the deceased person in a state of inebriation either from illicit alcohol or drugs had used unrestrained language to mock offender by making reference to his epileptic medical condition. The deceased, totally unprovoked, had crudely boasted that he could beat the offender until he (the offender) was healed of the epilepsy. In its judgment, the court was of the considered view that the deceased's conduct was unwarranted and amounted to provocation in the extreme and that the offender was therefore entitled to the partial defence of provocation. That resulted in him being convicted of the lesser crime of culpable homicide, a competent verdict to the crime of murder.

In our main judgment, we painted the following picture:

“It is common cause that the accused is indeed an epileptic patient. While epilepsy is generally considered a disease it is equally viewed as a disability in some societies because it severely inhibits a person afflicted with it from competently doing their day to day activities or remembering things. ¹ In other societies, it is stigmatised for no apparent reasons. In my view

¹ <https://epilepsysociety.org.uk/about-epilepsy/wellbeing/living-long-term-condition#:~:text=Epilepsy%20is%20considered%20a%20disability,a%20long%20period%20of%20time.>
Accessed on 20 October 2023

making reference to someone's medical condition or disability in a negative way as was done by the deceased in this case amounts to an obnoxious comment. I have no doubt that at times statements can leave more indelible emotional bruises than physical scars may do. Taunting such as the deceased employed in this case is a classic form of bullying. It is a non-physical or intangible form of abuse which entails being derisive and contemptuous of another person on the basis of their illness or disability. It is damaging cruelty aimed at harming someone emotionally. It is demeaning and is cowardice of the highest order. The deceased must, in this case have been aware that the illness was the accused's weakest spot. In his drunken and near senseless stupor he aimed for it."

The above sums up the trauma that the offender was subjected to by the deceased. Though it cannot excuse him of the unreasonable action he took thereafter to fatally assault the deceased, it must weigh a lot in mitigation.

In my view, this court in the case of *S v wankie* HH 831/15 proposed very useful guidance which must be followed in sentencing offenders convicted of culpable homicide when it advocated for a proper assessment of an offender's degree of negligence in the commission of the crime. It put it thus:

"The greater reason why the specific degree of negligence must be established in a charge of culpable homicide is for purposes of sentence. The more severe form of negligence there is the greater the penalty must be."

It is therefore important to assess the offender's degree of negligence in this case. The facts as already highlighted above are that when the deceased was being a nuisance to the offender, he (the offender) took a plank which was used to support the boot lid of the car he was repairing. With it and in a state of anger he hit the deceased on the head. The deceased did not take the assault seriously as shown by his complete neglect to seek medical attention or to report the assault to the police. He lived with it until the next day. He must have also acknowledged his wrongness which led to the brawl. He was the aggressor in all that happened. One of the witnesses said he had at some point remonstrated with the deceased who went away but soon returned to become a worse nuisance. He was drinking illicit alcohol. It won't therefore be an exaggeration to find that he contributed to his own death in a more serious way than the obvious. The offender's actions were not outrageous. They were ordinary and thus his degree of negligence remained at the ordinary level.

The sentences applicable to an offender convicted of culpable homicide are prescribed under s 49 of the Code which states as follows:

"Any person who causes the death of another person-

(a) Negligently failing to realise that death may result from his or her conduct; or

(b) Realising that death may result from his or her conduct and negligently failing to guard against that possibility;

Shall be guilty of culpable homicide and liable to imprisonment for life or any definite period of imprisonment or a fine up to or exceeding level fourteen or both.”

Counsel submitted that his client is a first offender, who was born on 8 November 1987 which made him 35 (thirty-five) years at the time he committed this offence. He must be seen as a youthful person whose behaviour is affected by the exuberance and rashness of youthfulness. He is a family man with a wife and three minor children, two with his current wife and one born from a previous relationship. He worked as a self-employed mechanic at the time this offence occurred. It was the family’s source of income. Needless to point out that revenue stream was cut due to his incarceration at the commencement of this trial. I have already stated that he is an epileptic patient. His condition affected him even during these proceedings when he occasionally requested to be seated because he felt dizzy. Counsel further submitted that the Zimbabwe Prisons and Correctional Services medical facilities do not have enough stocks of the medication which the offender takes to alleviate his condition. As a result, he suggested that the offender be sentenced to three years imprisonment wholly suspended on conditions of future good behaviour and of performing community service.

On the other hand whilst acknowledging that the offender is an epileptic patient, the prosecutor urged the court not to lose sight of the gravity of this offence. She said a life was lost. The irreversibility of that fact requires that the court shows its displeasure at those who perpetrate violence. She also referred the court to the case of *S v Wadson and Another* HH 232/16 whose ratio was that a medical condition on its own even where it is chronic is not a good reason why an offender should receive special treatment. It must, for it to carry weight, be supported by other mitigatory factors. The prosecutor equally acknowledged that the offender’s degree of negligence was ordinary but found comfort in the case of *S v Sahumani* HH 454/20 where this court reasoned that the sentence in every case where an offender has caused the death of another whether intentionally or negligently must reflect the abhorrence with which society views such conduct. She rounded off by suggesting a sentence in the region of fifteen years imprisonment.

There is no doubt that a life was irreversibly lost. It is sad. We have already however concluded that the offender’s degree of negligence was in the ordinary; that the deceased in a large measure contributed to his death by his uncouth conduct. The offender will live his entire life haunted by the idea that he killed someone. It is not easy and therefore becomes a

punishment on its own. He was prior to this incident an honest man who strived to feed his family by honest means. The court cannot turn a blind eye on that. We also are aware of the considerable period that the offender has spent in pre-trial detention.

Lastly, much as both the prosecutor and counsel for the offender extensively cited the Criminal procedure (sentencing guidelines) Regulations, 2023, they missed the point that those regulations were promulgated in August 2023 well after this offence had been committed. The guidelines do not have retrospective effect and cannot therefore apply to this case.

In the circumstances the offender is sentenced as follows:

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, the state's legal practitioners
Mugiya Law Chambers, accused's legal practitioners*