

STATE
versus
JOSEPH CHOGUGUDZA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 7, 8, 9 and 14 March and 7
and 15 November 2022 and 26 January 2023

ASSESSORS: 1. Mr Barwa
2. Mr Mpofu

Criminal Trial

Mr *Murevanhema*, for the State
Mr *K Mawodzwa*, for the Defence

MUNANGATI-MANONGWA J: Judging by the number of femicide cases that this court is dealing with, one can justifiably conclude that the fight against gender-based violence is far from over. This is one of the numerous cases in which a woman lost her life at the hands of her husband whose egotism can best be described as beyond measure. The accused a 51 year old man faces a murder charge as defined under s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The allegations by the state are that on 12 April 2021 at Mandimu Village Chief Musana Shamva the accused unlawfully assaulted Emerina Gangira with a VGA computer cable several times all over the body thereby causing injuries from which Emerina Gangira died.

The accused pleaded not guilty to the charge and accordingly this court entered a “Not guilty” plea. The accused’s defence outline can be summarised as follows: The accused states that the deceased left home without informing anybody and came home late. When the accused quizzed her as to where she had been she became violent and attacked the accused with various household utensils. She then grabbed the accused’s private parts. The outline states that in self defence the accused “grabbed an electric cable and struck the deceased several times on her body” for her to

release him. The outline further highlights that after the deceased released the accused, the deceased then confessed to being in love with a man from the neighbourhood whom she refused to disclose. The outline further refers to the deceased confessing to being in love with three other men and having apologized for such behavior. It states that the two parties agreed that they would go to the shrine and the deceased would confess to other wives. The accused further states in his outline that he slept in the same room as the deceased and the following morning the accused, deceased and his other wives went to the shrine. After the prayers the deceased went to her bedroom whilst accused went into his room only to be called that the deceased had collapsed on her back at the door step to her room. Attempts at first aid were unsuccessful. The accused states in the outline that he did not constructively cause the death of deceased. He states that the deceased could have sustained head injuries when she collapsed at her door step.

In leading evidence, the state with the consent of the defence produced a postmortem report compiled by Dr Mayedo a pathologist who examined the body of the deceased and concluded that the cause of death was head trauma, respiratory failure and cerebral contusion. The court accepted the report as exhibit 1. The state further produced without issue the accused's warned and cautioned statement duly confirmed by a Magistrate and same is part of the record as exhibit 2. The VGA computer cable used to assault the deceased was produced with the defence's consent and stands as exh 3.

The first state witness to give oral evidence was one Elisha Chogugudza a 7 year old boy. The deceased is the boy's mother. He stated that he was asleep and was woken by the noise in the room. He stated that the accused started to hit the deceased with a VGA cable. It was his evidence that the beating was indiscriminate as the accused was beating the deceased on the head, the stomach and the arms. His mother fell down and the accused continued beating her. His evidence was that the accused beat the deceased four times. According to this witness, the deceased had during the day gone to buy sugar and she had brought sugar home in the afternoon whilst the father was away. This witness was adamant that it is the accused who first beat the deceased and that the deceased did not retaliate or hit back. He then related how the next morning the mother collapsed after going to the prayers and the father had beaten her again. He was told that his mother had died. It is noted that he also referred to the fact that the accused was feared as he used to assault with a

rattan cane made of tent material. It is however not clear whether the accused had used the rattan when he assaulted the deceased for the second time after she had collapsed.

This witness was shy and was sometimes confused as regards the times of the day but his evidence on what he observed during the night of the beating was quite clear. Given that he is of young age and seemed traumatized by the loss of his mother the court considers that he fared fairly well in his evidence and during cross examination. The child witness gave evidence on 12 March 2022 nearly a year after the occurrence hence some details could have escaped him due to his age and short memory but he had an idea of what transpired on the night of 12 April 2021.

The next witness to give evidence is Sophia Garwe. She is the accused's nephew and neighbour. She related how on the fateful morning the accused came to her home and informed her that he had killed his wife. He collapsed and after being revived the two went to the accused's homestead. She was confronted with a scene of the deceased's wives and children wailing including Elisha whom she later took away. She stated that she observed the deceased lying on the ground facing upwards her upper body naked although she was wearing a skirt. The body was near the deceased's bedroom laying on the sand. The ground on which the body laid was wet. She went to inform the other neighbours and the village head about the incident. She stated that the accused disappeared and she was not aware where he went to. She noticed that the deceased had injuries on her head, her arms and shoulders. She related how upon the accused's return at a later date one of his wives approached her stating that the family was afraid of the accused and she referred her to the village head. A citizen's arrest was then effected on the accused. The witness was clear during cross examination that she did not witness the assault, is not aware of how the deceased sustained the injuries but what she told the court is what the accused told her when he came to her home and what she personally observed upon arriving at accused's home. Her evidence was not hearsay and the court has no reason to disbelieve her.

The State called the Investigating officer Nyasha Chagutira. The witness stated that this murder case was allocated to him to investigate. He proceeded to the accused's home in the company of two other police officers. Upon arrival he observed the body of the deceased lying facing upwards on wet ground which had no stones but only sand. Upon examining the body he noticed that the body had wounds on the head, shoulders, hands and legs and blood was coming out of the wounds. He ferried the body to the mortuary. It was only on 31 May 2021 that he was

able to arrest the accused person and upon duly warning him as per the law, recorded the accused's warned and cautioned statement.

The witness stated that he took the accused for indications. He stated that the accused freely indicated the room that the deceased used to occupy which is where the first assault took place. He was then shown where the accused assaulted the deceased for the second time which is where the body was lying. The witness stated that the accused showed him where he had hidden the cable used in the assault, he recovered the same from a room referred to as a storeroom. The witness told the court that upon interviewing the accused he stated that he had assaulted the deceased upon hearing rumours that the deceased was being promiscuous. Further, that he had indiscriminately assaulted the deceased in her room with a cable using a torch to illuminate the room and that Elisha the deceased's son was in the room during the assault. The officer further stated that the accused indicated that after the initial assault the accused and his wives had gone to the shrine and at the shrine deceased was groaning and the accused had threatened that if she continued groaning he was to assault her further.

The witness stated that upon their return from the shrine the deceased fell down and the accused thought that the deceased was pretending hence he assaulted her further. The witness denied the theory advanced by the defence that death could have resulted from the fall. It was the witness' evidence that upon enquiry of the deceased's health he had been told that prior the assault the deceased was in good health. The witness had drawn a sketch plan as per the indications by the accused. The witness was an honest witness who made it clear that he could not comment on issues pertaining to the defence of self defence being relied on by the defence neither could he comment on the issue of the fatal blow leading to the deceased's loss of life. The witness's evidence on the indications made and the alleged statements made to him including the confirmed warned statement was not challenged under cross examination. The State closed its case.

The defence called one witness the accused himself. He told the court that he has twelve (12) wives and he made a rule that none of them should go anywhere without telling him. On 12 April 2021 the deceased went away without telling him. He stated that he later heard the deceased singing in her room and he confronted her on why she had gone away without telling him since everyone had to be at home by 6.00pm. It was accused's evidence that the deceased told him that he had no right to ask her as he had spent the whole day with his other wives. He alleged that the

deceased who had a mental problem would at times when she had an attack become very angry. As stated in his defence outline, accused told the court that the deceased attacked him with kitchen utensils and grabbed his private parts. He grabbed a cable and started hitting her with it where after she released his privates and asked for forgiveness. He stated that he asked deceased what had delayed her and she indicated that she had met two men whom she did not know and they had fondled her whole body. He stated that thereafter he slept in the same room with deceased.

He indicated that the following morning he went to the shrine to pray in the company of deceased and his other wives between 5.00am and 5:30am. He then remained with his (six) 6 wives including the deceased whom he asked to explain to the rest of the wives what had happened to her. It is the accused's evidence that he did not force the deceased to confess but wanted the other wives to know that if they walk alone they risked experiencing what the deceased experienced at the hands of the two unknown men. After that they went home, he shortly heard that the deceased had collapsed. He ran to her, tried applying first aid to no avail and he then went to the neighbour Sophia Garwe and upon his return he was told his wife had died. Of note is that the accused admitted to assaulting the deceased with a cable in the presence of the deceased's son Elisha.

The accused performed badly during cross-examination denying common cause facts and only admitting after being pressed. At one time he denied assaulting the deceased with a cable yet in his defence outline and indeed oral evidence he had admitted to that. He disputed that the deceased had head injuries as related by the witnesses only to admit after the state referred to the postmortem report. He lied that he had surrendered to the police when in essence a citizen's arrest was effected on 31 May 2021 nearly two months after the commission of the offence and he was then handed to the police. During cross examination the accused admitted that he had no evidence of the deceased engaging in an extra marital affair. The accused admitted under cross examination that the deceased was of good health before the assault. He admitted to making indications but denied assaulting the deceased for the second time after leaving the shrine. Of note is the fact that the accused had stated in his defence outline that the wife had indicated that she was in love with a man from the neighbourhood and three other men. Yet in evidence he changed the story and informed the court that the deceased had said that along the way from the shops two men had groped her or indecently assaulted her. So, the story was no longer of the deceased having several

lovers but that of being sexually attacked by unknown men. The witness prevaricated in his evidence and the court finds him not to be a reliable witness. The accused did not call any witnesses and the defence closed its case.

It is common cause that the accused assaulted the deceased all over the body as per his admission and as per his son's evidence. The accused also confirmed this to the investigating officer who came as a witness. The injuries sustained also indicate that the assault on the deceased was indiscriminate as is apparent from the post mortem report. Exh 1 shows the injuries on the right eye, upper chest, neck and face, abrasions on shoulders, arms and right parietal abrasion, right frontal parietal hematoma, right frontal abrasion, brain injury (described as cerebellar contusion). The injuries are also shown by markings on the body diagram on p8 of exh 1 and appear on the upper part of the body. There are notable wounds on the front of the head and the back of the head. This explains the findings by the doctor that the cause of death was cerebellar contusion, head trauma and respiratory failure.

Whilst the accused denies further assaulting the deceased after the morning prayer his son attested to the father beating the deceased. He stated under cross examination that "he returned from the garden and went to the prayer meeting. When they returned my mother fell down and he continued to assault her. He then went to Mupanga residence and when he returned, he fled. He was later arrested." This evidence resonates with the allegations that when the deceased fell down after the morning prayers the accused further beat the deceased. The investigating officer also testified to the effect that upon interviewing the accused he indicated that when the family went to the shrine to pray in the morning the deceased was groaning. When they returned and she fell down the accused thought that the deceased was pretending and he further beat her up. This is further buttressed by the indications made by the accused himself where he pointed at the place marked "I" where he indicated that is the place the deceased fell and collapsed and he continued hitting her as per exhibit 5.

The accused's neighbor Sophia Garwe narrated that the accused went to her home and advised that he had killed his wife. In the confirmed warned and cautioned statement the accused admitted to assaulting the deceased until she died. The accused never stated that he made the statement under duress; he never challenged the confirmed statement hence the court accepts that accused admitted to causing the deceased's death even before his court attendance. It is common

cause that before the beating the deceased appeared healthy, this the accused confirmed in court. It is the assault that caused her demise.

The accused seeks to raise the defence of self defence in his defence outline. That the deceased had grabbed his testicles and hence he had to assault her. He further seeks to say the deceased was the aggressive party. This is denied by the son Elisha who gave evidence that his mother did not retaliate. Even if the court were to take that the deceased had grabbed the accused's private parts, there was thus no need to continue to assault the deceased after she released him. Neither was it necessary to further assault deceased in the morning after prayers more so when she appeared unwell. Apparently, the accused never in his confirmed statement indicate that the deceased had grabbed his private parts. Rather he accused her of being promiscuous. Thus the court finds that the defence of self defence is an after thought. Equally the court does not believe the accused's allegations that the deceased was promiscuous. The accused admitted in court that he had no evidence of any unbecoming conduct of the deceased. It is apparent that this was an afterthought in that in his defence outline the accused stated that the deceased had admitted to being in love with a man in the neighbourhood and confessed to be in love with three other men. Yet in evidence he stated that he beat the deceased because she had said she had met two men she did not know who fondled her body. The two statements are irreconcilable. The court disbelieves the accused and finds that he is a villain who used terror to put his family in line as evidenced by his evidence that it was unacceptable for any of his wives to leave the homestead without his knowledge. He also forced the wife to confess. Although he denied forcing the deceased to confess he indicated under re-examination that the purpose of confession was to make his other wives realise that walking alone was not good. He recklessly assaulted the deceased indiscriminately fatally injuring her resulting in her death. That most blows were directed to the upper part of the body shows an intention to kill. The recklessness is further exhibited when he assaulted the deceased after she collapsed.

The attempt by the defence to say that the injuries were a result of the fall is untenable. This is because Mrs Garwe and the police officer who saw where the deceased's body was lying confirmed that there was sand and no stones. Neither was the body near any foundation of the accused's house which could have caused the head injuries as intimated by the accused. Moreover, the injury on the deceased's head was not only at the back but there was a frontal wound as well.

It is this court's finding that the accused realising that there was a real risk or possibility that his conduct may cause death, he continued to assault the deceased despite the risk or possibility that death could ensue. The accused is thus found guilty of murder.

SENTENCE

In determining the appropriate sentence for the accused the court took into consideration both the mitigatory and aggravatory circumstances as placed before the court by the counsel for the accused and the state counsel respectively. The court takes note that the accused is 52 years old, married to twelve wives, has 45 children 28 of which are below the age of 18 years. Definitely the accused has a huge family responsibility as the family relies on him for sustenance. The defence counsel submitted that the accused had paid 10 head of cattle to appease the deceased's relatives as per African custom. Whilst no confirmation has been rendered by the deceased's relatives the court has no reason to disbelieve that such a gesture was rendered as the accused named the purported recipient of the cattle as one Enock Gangara.

It is not in dispute that the accused is a first offender. However, the crime of which the accused has been convicted of is a very serious one. A life was lost. The accused did not show any contrition as his attitude bordered on justifying his actions. He sought to picture the deceased as promiscuous and yet he admitted that he had no evidence to substantiate his allegations. In essence the deceased had done nothing wrong apart from going to the shops to buy sugar a normal chore which any housewife could do. It is apparent from his evidence that he meant to give the deceased as an example to his other wives as per his own words. The wanton assault by the accused on the deceased which was done indiscriminately using force and causing fatal injuries from which she died cannot go unpunished. The idea that a married man "owns" his wife body and soul does not have a place in this modern day age. That the accused treated his wives with heavy handedness is apparent from his own words uttered in his evidence in chief. This was no ordinary assault as some of the blows were aimed at the head and deceased suffered brain injuries among other injuries.

Section 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides for imprisonment for life were there are no aggravating circumstances. This reflects how serious the legislature considered the offence to be. Whilst it is appreciated that as per African custom an accused can atone his sins by paying the family of the deceased it is obvious that a life lost can

never be compensated for to the full. The deceased's family lost a daughter, Elisha lost a mother and witnessed the assault which led to his mother's death. The trauma will live with Elisha for the rest of his life given that he was exposed to a high degree of violence at such a tender age. The extent of the psychological effect and damage on him remains unknown in the absence of a report from a psychologist. Further society and indeed accused's family needs to be protected from a tyrant like the accused. He therefore needs to be incarcerated for a lengthy period of time as advocated by the state. The submissions by the defence counsel pertaining to two Masvingo cases of *S v Juliet Matongo* HM9/20 and *S v Brighton Bhasikiti* HM68/20 which pertained to culpable homicide cases do not apply herein. The accused has been convicted of murder a far more serious offence the sentencing regime of which materially differs from that of culpable homicide. It is unfortunate that dependants will always have to suffer from the effects of having a breadwinner taken away from them for a lengthy period of time as the accused gets incarcerated. This is unavoidable were the breadwinner lands at the dip end of crime.

Given the foregoing, the accused is sentenced to 20 years imprisonment.

National Prosecuting Authority, applicant's legal practitioners
Mugiya & Muvhami, respondent's legal practitioners