

THE STATE
versus
JAPHET CHIMUNHONDO

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 23 November 2023

Sentencing Judgment

Assessors: Mr Mabandla
Mrs Chitsiga

A Masamha, for the State
N Zvidzai, for the accused

MUNGWARI J: The offender is Japhet Chimunhondo also known as Daiton Mutuvha. He appeared before the court charged with the crime of murder. The proven facts were that the accused's accomplice Nomore Mavhura's wife had passed on to her husband, information that the deceased who was a tobacco farmer had received a substantial amount of money as proceeds of the sale of his crop. Nomore Mavhura then co-opted the accused in a plan to rob the deceased. The accused obliged and travelled from his home to Mavhura's place for that purpose. On the night of the botched robbery which turned out into a murder, the two armed themselves with a knife which they had purchased earlier that day. They proceeded to the deceased's homestead after nightfall. They located the victim from his sleeping arrangements at his home and barged into the hut which he used as his bedroom. The deceased resisted the intrusion. A fight ensued during which the offender forcefully stabbed the deceased twice, once on the cheek and once on the chest, resulting in his death some ten minutes later. As already stated, the robbery was botched. The assailants were unsuccessful in getting the money. All that the offender got away with was the deceased's blood on his clothes as a memento. After a contested trial, the state successfully proved beyond a reasonable doubt that the accused committed the offense. We duly convicted him. He therefore stands convicted of the offense of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Code).

The State counsel implored the court to find that the murder was committed in aggravating circumstances, as envisaged in s 47(2)(a)(iii) and (iv) of the Code and s 8(b) of the Criminal Procedure (sentencing guidelines) Regulations SI 146/23 (the guidelines). The defence counsel did not contest this argument because it is irrebuttable. The murder was clearly committed in the course of a robbery. We therefore find that indeed the murder was committed in aggravating circumstances. Furthermore, the offender and his accomplice pre-planned the attack. They discussed the modalities and even went out of their way to purchase a knife for use in the robbery. In the dead of the night, they barged into the deceased's bedroom and killed him in cold blood before fleeing the scene. The deceased died instantly.

Although currently, the presumptive penalty for a murder committed in aggravating circumstances is 20 years that law only came into existence in the latter half of 2023 yet this offence occurred in 2020. The sentencing guidelines were not meant to operate retrospectively. It follows that the court is bound by the sentences which are prescribed for a murder committed in aggravating circumstances namely that it may sentence the offender to death, to imprisonment for life or to a definite term not less than twenty years imprisonment.

Which one of the sentences to impose is an exercise largely dictated by the weight of the mitigation and aggravation submitted by the defence and the prosecution respectively.

1. Personal circumstances:

The offender is a 40-year-old peasant farmer who earns very little from his enterprise. His wife passed away while he was incarcerated, leaving him as the sole guardian of their four minor children, aged 16, 14, 12, and 10. The children's custodian, who is his sister, is currently hospitalized and ailing. He is a first offender. The fact that he is a first-time offender suggests that he is less likely to reoffend. The probability of an offender reoffending is assessed based on various factors, such as whether the offender committed the crime under the influence of drugs or was part of a gang, or whether the crime was committed while the offender was under legal restraint, such as being on bail. Past convictions also indicate an offender's predisposition to reoffend. While we were not informed of any past convictions, the fact that the offender has an alias raises some concerns as we were not informed on whether he committed any under his other name. It is however speculative.

It appears from the pre-sentencing hearing that these are the only factors that the accused could advance as personal factors in mitigation of sentence.

He claimed to have been subjected to pre-trial incarceration of 18 months and requested that this be deducted from his final sentence. However, this assertion cannot hold water as the

offense was committed in September 2020, and the offender was on the run until his apprehension in September 2021. Arising out of his propensity to flee after a clear demonstration of the said he inevitably did not qualify for bail as he was considered a flight risk. The pre-trial incarceration that he was subjected to was a consequence of his own actions and cannot be claimed for his benefit.

The offender also implored the court to consider as mitigatory, the fact that his leg was injured. The circumstances leading to the injuries make this difficult. The offender was injured on the leg after he violently resisted arrest. The police had to shoot him on the leg in order to subdue him. He brought this on himself and cannot then claim it as a mitigating factor.

On the other hand, the deceased was a young life aged 29. The examining doctor who conducted the autopsy indicated in the post-mortem report that he was in good health prior to his demise. He also determined the cause of death as stab wounds, with the chest wound being 15 cm long and 10 cm deep, indicating that significant force was exerted by the offender. The use of a knife by the offender which ordinarily, is viewed as a lethal weapon and the part of the body at which it was directed also makes it aggravatory. He aimed at the deceased's delicate part of the body which is the chest. In the end the weapon which he used was expected to inflict the injuries it ended up causing. A life was lost and can never be replaced.

Mr *Masamha* for the State confirmed having made vain efforts to get a written impact statement from the deceased's widow due to the remote geographical location where she stays. She however informed him that that since the demise of the deceased, life has been difficult. She was unexpectedly thrust into the life of a widow saddled with the duty to look after the young children aged 7 and 12 without assistance from anyone and without any form of compensation from the offenders. She also experienced trauma during the trial due to rumours circulating in the village that she may have been one of the robbers' girlfriends, depriving her of the opportunity to mourn her husband.

Considering all the factors presented in mitigation by the offender and the aggravating factors in this case, it is clear that the aggravation outweighs the mitigation. The loss of life due to greed and the presence of multiple aggravating factors make the murder senseless and extremely brutal. It is also worth noting that the offender's accomplice, Nomore Mavhura, is currently serving a 30-year sentence. The principle of uniformity suggests that they should be treated similarly unless there are valid reasons not to do so. In this case, such reasons exist. The offender struck the fatal blow, displayed no remorse, and fled the scene, while his accomplice showed remorse by assisting the police and willingly subjecting himself to trial. Considering

the offender's lack of remorse and possible risk of reoffending, he deserves to be removed from society for a significant period of time, more than his accomplice. Therefore, the offender is sentenced to **35 years imprisonment**.

*National Prosecuting Authority, the State's legal practitioners
IEG Musimbe and partners, accused's legal practitioners*