

THE STATE
versus
MACDONALD KADENHE

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 7 September & 5 March 2024

Assessors: Mr Barwa
Mrs Gwatiringa

Criminal Trial – sentencing judgment

A. Mupini, for the state

N. Usavi, for the accused

MUTEVEDZI J: The offender Macdonald Kadenhe and the deceased were close relatives. The offender’s mother was a sister-in-law to the deceased. In African custom, the deceased would generally be regarded as a father to the offender. They appear to have had a close relationship. On the fateful night they were drinking beer together. They drank into the late hours of the night. Their friends had earlier quit the beer party and left the two still drinking. In the midst of that binge, the deceased was said to have reprimanded the offender about how he was neglecting his sick wife. The offender did not take kindly to the chastisement. A misunderstanding broke out leading to the offender fatally assaulting the deceased. At trial the offender argued that he did not have the intention to kill the deceased but accepted he had negligently caused his death. Prosecution accepted that limited plea to culpable homicide. The court equally determined that the state’s acceptance of the limited plea was well made. We then duly convicted the offender of the crime of culpable homicide.

In the case of *S v Wankie* HH 831/15 this court alluded to guidelines which are useful to follow when sentencing offenders convicted of culpable homicide. It emphasised the need to properly assess an offender’s degree of negligence in causing the death when it said:

“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.”

The starting point in a case of this nature is therefore to assess the offender's degree of negligence. What has been accepted in this case is that the offender and the deceased had been friendly to each other. They were both drunk. They fought over something really petty- a clear sign of drunkenness. Both counsels urged the court to take into account that the parties were inebriated. The appropriateness of taking intoxication on the part of the offender as mitigation is however questionable. It is important that the offender had voluntarily consumed the home brewed alcohol. The law in this jurisdiction prescribes how intoxication must be treated. It differentiates between voluntary and involuntary intoxication. In section 221(2) the Code provides as follows:

221 Intoxication no defence to crimes committed with requisite state of mind

(1) If a person charged with a crime requiring proof of intention, knowledge or the realisation of a real risk or possibility—

- (a) was voluntarily or involuntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime; but
- (b) the effect of the intoxication was not such that he or she lacked the requisite intention, knowledge or realisation;

such intoxication shall not be a defence to the crime, but the court may regard it as mitigatory when assessing the sentence to be imposed.

(2) Where a person is charged with a crime requiring proof of negligence, the fact the person was voluntarily intoxicated when he or she did or omitted to do anything which is an essential element of the crime shall not be a defence to any such crime, nor shall the court regard it as mitigatory when assessing the sentence to be imposed. (Underlining is for my emphasis).

Clearly in this case, the offender was convicted of culpable homicide, an offence which is based on negligence. He was voluntarily intoxicated. The court is therefore proscribed from considering that voluntary intoxication as mitigating the offender's moral blameworthiness in its assessment of the sentence to be imposed on him. Both the prosecutor and counsel for the offender were therefore not correct when they urged the court to take the fact of the offender's intoxication into account. What cannot be questioned however is that the offender's negligence was on the ordinary side.

As already indicated, the offender killed his relative. It will haunt him for the entirety of his life. Zimbabwe upholds the sanctity of human life. It is the reason why those who kill even without intention still get punished by the law. This was a needless loss of life which the court frowns at. The punishment imposed on the offender must reflect that. The deceased was a family man. No doubt his family will never be in the same position again. They lost a father and a breadwinner.

What mitigates the accused's moral blameworthiness however is that he fits into many of the factors which the courts have been directed to regard as mitigating in s 9 of S I 146/2023 (the Sentencing Guidelines). They include that the offender is a first offender; that he readily admitted to his wrong doing and pleaded guilty and that he has shown evidence of genuine remorse or contrition. Throughout his trial, the offender hung his head in shame. Now sober, it must have dawned on him that he had caused his relative's death for a matter as trivial and stupid as a reprimand for him to care for his sick wife. If anything, he ought to have been grateful to have an advisor like the deceased.

Further, the offender is a family man. It is admitted that his wife is of ill health. He also has one minor child in addition to the two adult ones. He was equally the breadwinner for the minor child and the ailing spouse. The court will also not lose sight of the fact that the offender has been in custody for almost one and a half years now. He was not admitted to bail from the time he was arrested.

But as already pointed out this is a case where a life was irreversibly lost. It is inescapable that much as the court will endeavor to balance the offender's interests against those of society generally and the deceased's family particularly, the offender will somehow go to prison.

Ordinarily, for culpable homicide sentences in the range of ten years imprisonment are regarded as meeting the justice demanded by the loss of life. I am cognizant of the fact that an offender can be sentenced up to life imprisonment but view such penalties as being reserved for the worst cases of culpable homicide.

Given the above, the offender is sentenced to **10 years imprisonment of which 3 years imprisonment is suspended for 5 years on condition the offender 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.**

Effective sentence - 7 years imprisonment.

MUTEVEDZI J:.....

National Prosecuting Authority, state's legal practitioners
Nyakutombwa Legal Practice, accused's legal practitioners