

THE STATE  
versus  
ERIC KAGORO  
and  
BRIAN KAGORO

HIGH COURT OF ZIMBABWE  
MUTEVEDZI J  
HARARE, 18 January & 14 June 2024

**Assessors:** *Mr Gweme*  
*Mr Gwatiringa*

### **Criminal Trial - Murder**

*D H Chesa*, for the state  
*C Tachiona*, for first accused  
*G Hoyi*, for second accused

MUTEVEDZI J: In this case one of the state's key witnesses was a boy aged about seventeen years. He chose to testify in Shona. Unfortunately, his Shona was so dominated by street lingo that the court interpreter could hardly understand it. Despite repeated admonishments to stick to proper Shona, the boy found himself frequently drifting into the comfort of his colloquialism and geekspeak resorting for instance to phrases such as '*ngezha ikabva yajamuka*' which after a struggle, the interpreter advised us simply referred to the boy's father's fury! It then occurred to us that the transformation that our indigenous languages are undergoing is unrestrained. The youth are prepared to adulterate the languages to suit their tastes and times. At the rate they are doing it, Shona, Ndebele and other local languages face the risk of extinction. The courts will be faced more and more with witnesses who speak such mixed languages. As shown in this trial, the youngsters are non-conformists yet their evidence may be vital for the resolution of cases in court. The language barrier must be broken. Court interpreters must therefore find a way of bridging that gap instead of expecting today's generation to bend backwards. They take no prisoners. The only way out is for court interpreters to learn the jargon and integrate it into the formal languages before interpreting into the official court language.

- [1] The murder itself demonstrates typical filial ingratitude. The boy we spoke of in the introductory paragraph was dearly loved by his father. We are not sure whether it was because he was the youngest, the most obedient or because he spoke so sweetly that the father gave him all the attention. That love unfortunately spooked the boy's elder siblings Eric and Brian. They hated their father for it so much that they ultimately decided to kill him.
- [2] Erick Kagoro and Brian Kagoro (hereinafter first and second accused respectively) were arraigned before this court facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Code). The allegations by the State were that on 19 June 2022 and at Plot 116, Nyagambe Farm, Marondera the accused persons unlawful and with intent to kill or realizing that there was a real risk or possibility that their conduct may cause death but continuing to engage in that conduct despite their realisation of the risk or possibility, caused the death of Zivanai Kagoro (the deceased) who was their father, by tripping him to the ground and strangling him. The assault resulted in the deceased sustaining mortal injuries.
- [3] The background as already hinted, was that on 19 June 2022 at around 1600 hours the accused persons and the deceased had a misunderstanding. The two accused persons confronted their father accusing him of always favouring his youngest son named Kaphas Kagoro (Kaphas). The first accused, is alleged to have tripped the deceased, sat on him before strangling him. He stood up and grabbed a wooden log with which he intended to finish off the deceased but was blocked by Godfrey Kachutu. After a while both the accused persons took wooden logs and charged towards the deceased. Sensing danger, the deceased picked an axe to defend himself. The two accused retreated but the deceased ran after them. Kaphas and Tsungirirai Kagoro (Tsungirirai) followed the pack. Just outside the homestead, they found the first accused astride the deceased and strangling him. The second accused had the deceased's head wedged between his legs in an effort to immobilize him. Kaphas and Tsungirirai intervened and restrained the accused persons before taking the deceased into his kitchen hut. The deceased collapsed the following day and was taken to Marondera Provincial Hospital. He died on 22 June 2022. An autopsy was conducted on his remains by Doctor Olay Mayedo who concluded that the cause of death was severe brain oedema, left parietal contusion and head trauma.

[4] The first accused pleaded not guilty to the charge. He explained that on the fateful day he left home early in the morning to attend some sporting activities at a place called Dhenzi. He only returned around 1800 hours and had a stopover at the local shops. The deceased later also arrived at the shops in the company of his friends called Mutasa and Dickson Supu. When he was leaving the shops, the deceased directed the first accused to follow him home together with his younger brothers, the second accused and Kaphas. The first accused added that when he got home, he went into the kitchen hut and sat next to the deceased who was still in the company his friends. The second accused sat outside on some brick-and-mortar bench. At some point, the deceased left the hut. Just after he did so, the first accused said they suddenly heard noise. They went outside to check the source of the commotion. To his surprise, he said he found the deceased attacking the second accused. When they tried to restrain him from attacking the second accused, he turned on his friends Mutasa and Supu. The first accused enquired from the deceased, why he was assaulting everyone. The deceased turned on him and assaulted him by pulling his dreadlocks. A neighbour, Godfrey Kachutu restrained the deceased who suddenly picked an axe and ran towards both accused persons. They both fled to their bedroom which was a distance from the kitchen hut where the initial fight was. The deceased followed them. Left with no choice they ran and hid in a nearby tobacco barn. The deceased took the blankets which were in the accused's bedroom and left. The accused later returned to their bedroom where they slept under a black plastic sheeting until the next morning. In the morning the first accused said he was then advised by one Rusere that the deceased had collapsed. The second accused and him both ran to where the deceased was. They lifted him into the kitchen hut where they rubbed salt on his shoulders, armpits and feet. When his condition didn't improve, they ferried him to hospital where he eventually died.

[5] The second accused also pleaded not guilty. He said he had spent the better part of that day at the shops in the company of his younger brother Kaphas Kagoro. The deceased was drinking beer with his friends at home. The first accused had gone for a sports event at a place called Dhenzi. The deceased later came to the shops in the company of his friends. When the first accused arrived at the shops, the deceased directed all of them to go home. On arrival, they entered the kitchen hut where Tsungirirai, Kaphas, Godfrey Kachutu, Mutasa and the deceased were sitting. The second accused said he remained outside because the hut was too small. He sat on a built-up bench just outside the

kitchen. The deceased suddenly came outside. At the same time, the second accused said he saw that as an opportunity to go into the hut but the deceased held him by the neck tightly. He said he struggled to free himself. Those inside the hut came out when they heard the noise only to find the deceased sitting astride the second accused. With the assistance of the deceased's friends, the second accused said he managed to free himself. He narrated the events which followed in the same way that the first accused had told the court. His additions were that when alarm was raised that the deceased had collapsed, they ran to his aid. They found him lying on the ground on his back. They carried him into the kitchen. He noted that his left hand was motionless. The first accused rubbed salt onto the deceased body. When his condition did not improve, they ferried the deceased to Marondera Hospital. The first accused provided money for transport. When the deceased died, they were arrested by the neighbourhood watch officers.

#### **State case**

[6] The prosecutor opened his case by applying to have the evidence of Tsungirirai Kagoro expunged from the record. The defence consented and it was duly excluded. Further he applied to have the evidence of Godfrey Kachutu (which was similar to the evidence of Kaphas Kagoro that we will deal with extensively in later paragraphs of the judgment) as it appeared on his statement to the police and the evidence of Bekinkosi Hove was admitted as it appeared in the state's summary of evidence, formally admitted into evidence in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Criminal Procedure & Evidence Act). Once again, the defence consented and the evidence was duly admitted. In summary, Godfrey Kachutu's testimony simply corroborated the evidence of Kaphas which we will summarise a while later. Bekinkosi is the police officer who investigated the murder. He said he observed bruises on the deceased's left hand, on both shoulders and on his back. The prosecutor then led *viva voce* evidence from the following witnesses:

#### **Kaphas Kagoro**

[7] He was just fifteen years old when the murder was committed. As already mentioned, he was the deceased's youngest son and younger brother to both the accused. On 19 June 2022 at around 1600 hours, he witnessed Dickson Supu stealing from Agnes Makusele's tuckshop. Dickson Supu placed the money under a cardboard box. He said he couldn't countenance the thief's depravity. He went behind the thief and took the

money. He said when he told his brother the second accused about the money the second accused cautioned him against informing the shop attendant because he wanted to personally tell her. The second accused then went and inquired from the shopkeeper if she had missed any money. At first, she denied but later confirmed that indeed her money was missing. The witness said he then gave her back the stolen money. It was USD fifteen dollars.

[8] The second accused in connivance with the thief wanted the witness to change his story to say the money had not been stolen in the first place. They wanted him to be deceitful and collect the money from the shopkeeper. The witness said he refused. It infuriated the second accused who began to assault him. The deceased asked the youngster to go home. He complied, went home and changed his shirt which had been torn at the time the second accused assaulted him. He later returned to the tuck-shop. At the time he had assaulted the witness, the second accused had threatened that he was going to wait for the first accused and advise him of what had transpired. In fact, that threat had been occasioned by the deceased's remarks that the accused persons could assault the witness now but he was going to retaliate when he grew up.

[9] Indeed, at the return of the first accused, he was advised all that had happened by the second accused. He arrived when it was getting dark. He called the witness aside. As soon as they got there the first accused slapped the witness who said he immediately knelt down as a sign of submission. When he tried to stand, the second accused held both his hands from behind. The first accused slapped the witness four more times. The witness then managed to free himself and ran away. He did not go far. He picked a half brick and hit the first accused with it on his hand before using a side road to escape home.

[10] As the first accused was assaulting Kaphas, the shopkeeper who had earlier missed her money send a message to the deceased advising him that the accused persons were assaulting the witness. The deceased proceeded to the shops but found that the witness had already gone home. Kaphas said his side was swollen and that upset their sister called Tsungirirai. She took him back to the shops. When they arrived at the shops, the two accused were in an altercation with the deceased. Kaphas, Tsugirirai and the deceased then decided to go home together.

[11] The two accused followed behind them and were shouting. When they arrived home, the accused also arrived. One of them proceeded to their bedroom. The second accused

picked some bricks but was restrained by Kachutu. He didn't hit anyone. This occurred near the two accused's bedroom. When they went to the main hut the first accused tripped the deceased to the ground. He grabbed him by the collar. Kaphas intervened and pulled the first accused's hand from the deceased. Kachutu also held Kaphas who shouted that the first accused was strangling the deceased. Kaphas pulled the first accused by his dreadlocks. He stood up and the deceased also stood up. Suddenly both accused pulled poles from the plate drying rack. They menacingly advanced towards the deceased who panicked and picked an axe. Kachutu was restraining everyone. The second accused was still hurling insults at the deceased who chased him. In retaliation the second accused started throwing tree logs at the homestead. The first accused pretended that the issue was over. He got into the kitchen hut. The second accused remained outside and continued shouting and threatening the deceased. The deceased walked towards him. At that point the first accused also followed.

[12] Kaphas and Tsungirirai remained in the house but he later decided to follow the trio. A few metres from the homestead, he said he found the second accused once more astride the deceased's chest and strangling him. Kaphas tried to restrain him. The first accused arrived and hit Kaphas with a log on his arm. Kaphas went after the first accused leaving the deceased and the second accused still grappling. Tsungirirai and others later arrived and managed to restrain the accused. The deceased could no longer walk on his own. They had to assist him back home. Although he didn't indicate where exactly, he complained that the accused persons had injured him. The accused were both unrelenting. They followed and continued hurling insults. Kaphas said before they slept, they went to take the blankets which were being used by the accused. They returned and sat in the kitchen hut for a long time. The deceased was speaking incoherently and strangely. His tone had changed. In the morning, one old man called Ruiske came to their premises. The deceased asked Kaphas for a pen because he wanted to write Ruiske's phone number. The deceased appeared sick. Kaphas said he then went back to sleep but shortly after, he was called by his sister because the deceased had collapsed. He had fallen on his left side and could no longer speak. He was holding his left hand which appeared non-functional. They assisted him back into the hut.

[13] Later, the accused persons arrived. The deceased was already in the blankets. They looked for a car to ferry him to hospital. It was the second accused who went with the deceased. After he took the deceased to hospital, the second accused would return

home to feed everyone with reports which were completely different from the condition of the deceased. At the hospital he had advised the medical personnel that the deceased had fallen. He hid the fact that he and accused one had assaulted him. On the second day of the deceased's admission, the second accused left hospital ostensibly to buy food for the deceased. He returned home and advised everyone that the deceased was getting better and that he would be coming home with him the following day yet he knew the deceased was gravely ill. It was only on the next morning that the second accused refused to go back to hospital after their elder sister and an uncle had called to say they were visiting the deceased in hospital. He requested the first accused to go. When he did, the first accused found that the deceased was so ill that he could not even eat on his own. He died on 22 June 2022.

[14] The witness dispelled any suggestion that the deceased was afflicted with any life-threatening ailment before the assault. He also rubbished the accused's claims that they had administered first aid to the deceased when he collapsed in the morning following the night of the assault. He said all that they had done was to change the deceased's clothes.

[15] Under cross examination by counsel for accused one, the witness denied that the deceased had started drinking beer with his friends in the morning. He said he had only seen him drinking later in the afternoon at the shops with his friend called Mutasa and others whom he couldn't remember. He added that the accused were often violent and disrespectful to the deceased particularly when they returned home drunk. He was also emphatic that although the deceased had taken alcohol, he wasn't drunk. He also said the deceased was never the aggressor. He had only intervened to prevent the accused persons from assaulting the witness. Under cross examination by counsel for accused two, Kaphas admitted that he wasn't in good books with both accused persons largely because of their uncouth behaviour. He was far younger than both of them. Most of the time they were drunk but he had never tasted beer all his life. They disrespected their father but he always obeyed him. He also conceded that when the deceased picked an axe, the accused persons had retreated but said they remained armed and didn't go far.

### **The Defence Cases**

#### **Eric Kagoro**

[16] Whilst incorporating his defence outline into it, he gave evidence in his defence. He said on the fateful day, he left home around 0800 hours proceeding to attend some

sporting event. He only returned home around 1800 hours. On arrival he was told that his younger brothers had had an altercation earlier in the day. The second accused told him that the altercation started when he had told Kaphas that as someone who was going into form one, he should not have been at the shops at that late hour. They had ended up shoving each other.

[17] The first accused then asked where Kaphas was and was told that he had gone to Eddie's place. He waited for Kaphas' return. He returned at the same time that the deceased also arrived. The deceased immediately ordered the first accused to take his younger brothers home. Kaphas immediately went home. The deceased was buying beer at the shops with his friends namely Dickson Supu and Mutasa. The deceased later went home ahead of both accused. Before long he returned and once more directed that they go home. The first accused said he advised him that they would follow shortly. The deceased left and proceeded home.

[18] When the first accused got home, he said he went into the kitchen hut where the deceased was. Accused two remained outside. The deceased went out and he thought he was going to relieve himself. There was noise outside. They all went out and saw deceased assaulting the second accused. The deceased's friends restrained him. The second accused ran away at that opportunity. The deceased remained and started assaulting his friends who ended up running away also. The first accused said he then asked the deceased what was going on but the deceased suddenly held him by his dreadlocks and pulled them. They struggled against each other. In that struggle they both fell to the ground. The younger brothers came and restrained him. He said he got a chance to stand up. Later, Kachutu advised the accused that the deceased had gotten hold of an axe. He advised the accused persons to retreat. They did and went off to where they slept. Whilst there the deceased followed. He took all the blankets away. The accused escaped into a nearby tobacco barn where they later took a plastic sheeting that is used for tobacco curing and covered themselves with it all night.

[19] In the morning the first accused said he was advised that the deceased had collapsed. On checking he found that the deceased had fallen on his back. He had hit his head in the occipital area. They took him inside the house, took salt and started rubbing him on his hands, under the feet and on his shoulders. After a while they noted that the condition wasn't changing. It needed medical care. He took the money which he had and gave the second accused whilst he ran to the road to procure transport. They got a

car and the second accused took the deceased to hospital. He went to visit the deceased on the third day after his admission but sadly it was also the day that the deceased died. The first accused denied having any issues with the deceased. He said the deceased was generally a person of good character who only became angry when provoked. He further said in his view, the deceased had sustained the mortal injuries when he hit his head against the ground at the time the two of them were struggling against each other. Worse so, the deceased appeared like someone who was becoming mentally ill because he would experience visual hallucinations. He said he was sober on the day in question although he drinks opaque beer only. He rounded his testimony by advising that he is only twenty-nine years old, went up to form four although he did not write the O'level examinations.

[20] Under cross examination by the prosecutor, he admitted that when he heard that the deceased had picked an axe, he had only run for about a hundred metres and that he was not scared about the deceased because he was a person who had always loved his children. He further conceded that although the deceased had suffered many injuries, he in turn had only minor bruises.

**Brian Kagoro**

[21] He also incorporated his testimony into his evidence in chief. He added that the deceased was into repairing radios. On that day he was repairing his friend Dickson's amplifier. When the accused left home that afternoon, he had left the deceased at home with Dickson and Mutasa. Dickson was the one who was being sent to buy beer. When he got to the shops, he met his younger sibling Kaphas who was whiling up time with a girl who worked in the tuckshop. The girl had left to fetch some firewood. Dickson had entered the shop and stole some money. Kaphas had taken the money from where Dickson had hidden it. He said he advised Kaphas to return the money to the girl but he had had said he wanted to consult Dickson first. The second accused said he then threatened Kaphas that if he didn't return the money, he would tell the shop owner. When Dickson arrived, he had demanded the money from Kaphas. The shop attendant didn't want the theft to be known by the shop owner. The accused further alleged that Kaphas' had a problem that when the accused tried to make him see reason, he would always look down upon him. On that day he had cautioned Kaphas against being at the shops that late when he was due to go for form one.

[22] He added that when Kaphas went home he was not sure what he told the deceased.

When the first accused returned from the sports event the second accused told him all that had happened regarding the altercation he had earlier had with Kaphas. When the deceased arrived with his friends, he instructed both the accused and Kaphas to proceed home. The deceased left but soon returned and directed them once more to go home. They complied and followed him. His story tallies with that of accused one on what happened when they got home

[23] Under cross examination by the prosecutor, he admitted that Kaphas was only telling the court how he saw things. He admitted that the deceased had never before this incident been violent towards him or the first accused. He however alleged that the deceased had challenges with some people in the neighbourhood when they provoked him.

### **The Issues**

[24] This to us, is a case which turns on its facts. It essentially is anchored on the credibility or otherwise of the testimonies of the witnesses on either side of the divide. The State's case is heavily reliant on the evidence of Kaphas Kagoro. We said earlier that he is an unremarkable and unsophisticated boy. He was only fifteen years old at the time this crime was committed. He must have found himself really between a hard place and a rock. He testified against his own siblings. Yet the person who was killed was also his own father. He struck us as a highly honest boy. His demeanour in the witness stand did not betray any signs of hatred towards his brothers. He spoke about them with a lot of respect in spite of the despicable allegations against them. When he was confronted and slapped four times by the first accused person following an earlier assault by the second accused at the shops on the material date, we were told and that went unchallenged that he knelt before his elder brother as a sign of respect. That appears to have been his character through and through. If his honesty needed any support it was provided by the way he handled the issue of the money which had been stolen from the tuckshop. At a time his own brother and his peer were pressuring him to lie about that money in order to prejudice the shopkeeper for their own benefit he steadfastly refused to conspire with them. If it were any other impressionable boy, chances to have succumbed to the temptation dangled by the senior sibling and his cohort were very high. He stood by his principles despite the tender age. No wonder why he was the deceased's blue-eyed son.

[25] Apart from those general observations we made, his story about this incident was told with coherence and clarity which equally belied his young age. We noted that it would have been difficult for him to spin a yarn that stood so well even under intense cross examination by counsels for the accused person. He was bound to trip if it had been the case. His acceptance that at one time the deceased had also armed himself with an axe was a telling point. If anything, that appeared to support the accused persons' story. But he indicated that the deceased had only done so in order to ward off the threat of the accused who were charging at him with logs. That version of events is inadvertently supported by the accused themselves. They both accept that the deceased was generally of a non-violent disposition especially towards his own children. The witness would not have known that for the accusations to stick the deceased was not supposed to be seen as the aggressor. That innocence is what made us believe his narration of events that the accused attacked the deceased.

[26] Kaphas's testimony was supported by that of Kachutu which was admitted in terms of s 314 of the Criminal Procedure & Evidence Act. Legal practitioners must know that when they accept the admission of evidence of witnesses in terms of s 314 they divest their clients of the opportunity to challenge such testimony in court. The court is left with no choice but accept it as it is stated in the state's summary of evidence or the witness's statement. The evidence of Kachutu corroborated the story told by Kaphas.

[27] Looked from the other side, the stories of both accused made little sense if any. The deceased appeared to have no reason for fighting with them. True his favourite son had been assaulted earlier but he had taken it as a father. At the time it happened which when he would have been expected to be angriest, he had not shown any hostility towards either of the accused persons. We are advised by the witnesses, that it was actually the accused's habit to disrespect their father. Yet in their own admissions he had not been violent towards them at any stage.

[28] The first accused alleged that the deceased must have fallen at the time they grappled each other and hurt his head on the ground. He said the deceased had held him by the dreadlocks. It is true that the deceased was at some point held by the dreadlocks. He however twists that to suit his own agenda. The person who held him in that way was not the deceased but Kaphas in a bid to rescue the deceased who was being sat upon and being choked. The deceased was not violently pushed to the ground, sat on and choked on one occasion but twice. First, he was tripped and violently felled to the

ground near the kitchen hut at the homestead. The second time was just outside the yard when once more Kaphas and his sister came to his rescue.

[29] Both the accused persons are deceitful men. If we believe Kaphas' testimony, which we have already conclude we do, the second accused not only wanted to steal the shopkeeper's money which had already been stolen, but actually wanted an innocent child to be complicity to his shameful conduct. He did not stop there because at the time that he took the deceased to hospital he lied about what had happened to him by alleging that the deceased had fallen when he knew that he had been injured in a violent brawl. Without concluding so, it is possible that the treatment of the deceased may have taken a turn for the better had doctors attended to him in the full knowledge of what had taken place. Worse still the second accused was dishonesty to his own family by lying to them about the condition of the deceased from the day he went to hospital until his death. It was not necessary to do so and only makes the second accused appear like a compulsive liar.

### **The defence of person**

[30] What we discern from the above positions is the accused persons' feeble attempt to rely on s 253 of the Code which provides for the defence of person in the following terms:

- “(1) Subject to this Part, the fact that a person accused of a crime was defending himself or herself or another person against an unlawful attack when he or she did or omitted to do anything which is an essential element of the crime shall be a complete defence to the charge if: -
- (a) when he or she did or omitted to do the thing, the unlawful attack had commenced or was imminent or he or she believed on reasonable grounds that the unlawful attack had commenced or was imminent, and
  - (b) his or her conduct was necessary to avert the unlawful attack and he or she could not otherwise escape from or avert the attack or he or she, believed on reasonable grounds that his or her conduct was necessary to avert the unlawful attack and that he or she could not otherwise escape from or avert the attack, and
  - (c) the means he or she used to avert the unlawful attack were reasonable in all the circumstances; and
  - (d) any harm or injury caused by his or her conduct
    - (i) was caused to the attacker and not to any innocent third party; and
    - (ii) was not grossly disproportionate to that liable to be caused by the unlawful attack.
- (2) In determining whether or not the requirements specified in subsection (1) have been satisfied in any case, a court shall take due account of the circumstances in which the accused found himself or herself, including any knowledge or

capability he or she may have had and any stress or fear that may have been operating on his or her mind.”

[31] The requirements of the defence are largely self-explanatory. In their closing submissions, counsels for both accused did not even mention their clients’ right to the defence of person which appears in their defence outlines. Instead, their emphasis was on the lack of intention to kill by the accused persons. We are sure that the omission was informed by the inapplicability of that defence as shown by the evidence. The indisputable position from the evidence before us is that the deceased was not the aggressor. If he wasn’t, there couldn’t be any attack which had commenced or was imminent upon the accused persons. When the brawl started, the first accused ambushed the deceased and tripped him to the ground before sitting on him and attempting to strangle him. Both him and the second accused were not in any sort of danger. To make matters worse, the assault took place at the deceased’s residence. The second accused joined in the assault. It continued outside the homestead. The deceased was under siege in his own homestead. When he wielded the axe as the two accused advanced towards him, we were advised that the accused simply retreated for about a hundred metres and returned. He had the right to chase out the constant threat that both accused kept subjecting him to. The deceased therefore remained under attack. In his attempt to deflect that attack, his sons attacked him for one final moment. On both the occasions they attacked him, they fell him to the ground and pinned him down. At the same time, they assaulted him indiscriminately. As stated earlier, the deceased had injuries all over his body. The second accused was unscathed whilst the first accused had no injuries to show save for his bald assertion that he suffered minor bruises. It only buttresses the evidence that the accused persons were the aggressors.

### **The intention**

[32] There are three forms of intention in our law which can be broken down as:- a. intention; b. knowledge; and c. realisation of risk or possibility. Any three of those suffices as intention to commit a crime. In this case, the accused persons may not have had direct intention to kill the deceased but their behaviour was fraught with the realisation of a real risk or possibility that what they were doing could result in the deceased being fatally injured. When you trip an old man who was possibly somewhat drunk and he lands on a hard surface with his head you must realise that serious injury

may ensue. As if that was not enough that violence was repeated. In addition, there were blows to his head and an attempt to strangle him.

[33] We do not accept the accused persons' contention that the deceased may have been injured when he fell in the morning following the assault. We hold so because the evidence showed that he had been seriously injured the previous evening. When he was rescued by Kaphas and Tsugirirai, the deceased could not walk on his own. They aided him. In the kitchen hut where they put him, Kaphas said the deceased drifted into delusions, speaking strangely and incoherently. He also advised Kaphas that the accused had injured him. His left hand appeared immobile. Those were signs of serious if not mortal injuries.

[34] Even so, when he fell in the morning, Kaphas said he had fallen on his side. He did not hit his head on the ground. The first accused wanted us to believe that it was when the deceased sustained the injuries which killed him.

[35] The injuries which the pathologist noted on the deceased were not consistent with injuries sustained from a fall resulting from a passing out. He observed that the deceased had:- a right temple abrasion; both shoulders had abrasions; both elbows had multiple abrasions; the back trunk also had abrasions. In addition, he had a contusion in the left parietal region; the same region was haemorrhaging; there was a big oedema in the brain; biparietal occipital subarachnoid haemorrhage; he also noted that the deceased was discharging whitish liquid from inside the thorax cavity. In the end he concluded that what caused the death was severe brain oedema, left parietal contusion and head trauma. There can be no doubt therefore that it was the assault which caused the injuries that killed the deceased and not the fall from the time he passed out.

### **Disposition**

[36] In the end, we are inclined to reject the accused persons' defences as not only false but palpably so. There is no possibility of such defences sticking. If anything, they support the evidence which tends to show the accused is guilty. We are therefore satisfied that the two accused attacked the deceased and inflicted the injuries which caused his death. They both did so with the realisation that there was a real risk or possibility that death may result. Accordingly, we are satisfied that the prosecution managed to prove beyond reasonable doubt that both the accused are guilty of murder. The court therefore directs that both accused be and are hereby found guilty of murder

in terms of s 47(1) of the Code as charged.

**MUTEVEDZI J:**.....

*National Prosecuting Authority, State's legal practitioners*  
*Ngwerume Attorneys at Law, first accused's legal practitioners*  
*Nyahuma's Law Golden Stars Chambers, second accused's legal practitioners*