THE STATE
versus
ASHTON TADIWANASHE MANDAZA
and
KUDAKWASHE MACHINGAUTA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 20 JUNE 2024

Assessors: *Mr Mpofu*
Mr Chakuvinga

Criminal Trial - sentencing judgment

K. Chigwedere, for the state
M.S. Musemburi, for the first accused
S. Masike, for the second accused

MUTEVEDZI J: This murder appears to us to have been driven by numerous factors, notably the unmitigated zeal of youth; intoxication; the allure of prostitution and rank stupidity. The two offenders Ashton Tadiwanahse Mandaza (Ashton) and Kudakwashe Machingauta (Kuda) are barely men. At the time the crime was committed, Ashton had just turned nineteen whilst Kuda was still a seventeen-year-old minor. They are now twenty-one and nineteen years old respectively. Initially, they were jointly charged with an older man. It turned out however that the more mature man had not participated in the commission of the crime at all. We acquitted him at the end of the trial.

[1] The argument which resulted in the death of Onisimo Mavhungire stemmed from a misunderstanding which the deceased had with a commercial sex worker at some beerhall in Chivhu. Ashton intervened. The insinuations are that young as he is, he also intended to hire the services of the same woman. She was a lot older than him. That the young man wanted to have sexual intercourse with someone approximating his mother's age demonstrates the depth of love or more accurately, the bravery and possibly the depravity that today's generation has. He and Kuda had been drinking. Most probably, they gathered Dutch-courage from the drink. The deceased was also

inebriated. The woman at the centre of the dispute though was not. She had been outside the beerhall, like a predator stealthily stalking her prey. It turned out to be a nightmarish night. The two offenders killed the deceased. At their trial they both pleaded not guilty but we threw out their defences and convicted them.

[2] In mitigation of sentence, counsel for Ashton submitted that he is a self-employed builder. Ashton is not married. He stays with his peasant parents in the rural areas of Chivhu. He is the eldest child in the family. They and their other children all look up to him as the breadwinner for the family. This is his first legal transgression.

[3] Further counsel urged the court to consider the sequence of events in the commission of the offence. What is admitted or at least what the evidence proved is that Ashton intervened to protect the woman at the centre of the dispute from abuse by the deceased. Whether he wanted a favour in return for that protection or it was for some other ulterior motive is not material. What is critical is that the deceased was also engaged in the abuse of a woman which Ashton intended to stop. The deceased, so the argument went therefore also contributed to his own death and that must be considered as mitigatory. Ashton and Kuda did not premeditate the commission of the offence. We agree. All the factors outlined are important considerations to take into account when sentencing not only Ashton but his co-offender as well.

[4] In another argument, counsel motivated the court not to forget that the offence was committed whilst both Ashton and Kuda on one hand and the deceased on the other were drunk. We couldn't forget it. In fact, it was one of the first things that occurred to the court as stated in the opening paragraphs. In terms of s 221 (a) and (b) of the Criminal Law (Codification and Reform) Act [Chapter 9;23] (the Code) drunkenness or intoxication in circumstances where an accused properly formulated the requisite intention shall not be a defence to such crime but must be taken as mitigating sentence. In relation to the deceased's drunkenness, we have already said it led to his disorderly conduct which contributed to his death.

[5] In addition, it was also submitted that Ashton is contrite and remorseful. He regrets the senseless loss of life and the unbearable effects of the death on the deceased's family. To that effect his family, at his instigation, is in the process of arranging to approach the deceased's family for deliberations with a view to paying compensation in terms of the African customs and culture. He also personally carries his cross in this whole saga

in that the murder has brought stigma not only upon him but his whole family in the community he lived in and possibly beyond.

[6] The youthfulness of the offenders is another factor which must preoccupy the court at this stage. They were both juveniles at the material time. Kuda still is a juvenile even at this sentencing stage.

[7] In relation to Kuda, his counsel in addition to all the factors discussed regarding Ashton which equally apply to him submitted that there is virtually no possibility of him re-offending considering that he confessed to the commission of the offence at the time he was arrested. It illustrates that he immediately regretted his actions. That lowers his moral blameworthiness. Further counsel asked the court to consider that Kuda and his colleague have already been punished in that they have been in pre-trial detention since May 2022, a period of over two years. He rounded by praying for a wholly suspended prison term.

Aggravation

[8] In aggravation Mrs *Chigwedere* for the state conceded that the fact that the deceased was involved in a dispute with Nyarai Muvandi instigated the argument between him and the offenders. She equally admitted the youthfulness of both Ashton and Kuda and that all parties involved were somewhat drunk on that night. She however argued that the question of the offenders' youthfulness cannot save them because of the seriousness of the crime they committed. Her further view was that the crime is aggravated by the fact that the offenders took the deceased's cellphone at the time they killed him. Added to the callous manner in which they killed the deceased, resulting in him suffering multiple injuries the murder would easily gravitate into the realm of those committed in aggravating circumstances.

The Law

[9] The law relating to the sentencing of offenders in murder cases is now fairly straightforward. The reality is that the crime of murder carries a minimum mandatory penalty of twenty years imprisonment unless the court makes a finding that the crime was not committed in aggravating circumstances. In other words, the new sentencing practice requires a court after conviction, to determine whether or not the murder was committed in aggravating circumstances. If it was the court is bound to impose one of the three punishments set by the law. As already said the least of those penalties is a prison term of not less than twenty years. The median is imprisonment for life whilst

the ultimate is the sentence of death. The court's discretion therefore only relates to the choice it makes on which amongst the three penalties it can impose.

[10] Where however the court finds that the murder was an ordinary one, if there ever exists an ordinary murder, its hands are unshackled and its full sentencing discretion is restored. The starting point therefore is to determine whether or not a murder was convicted in aggravating circumstances.

[11] In this case, the prosecutor's point is that the offenders took the deceased's phone after killing him. She does not say the robbed him of the cellphone. She also argued that the brutality of the killing amounts to aggravated circumstances.

[12] Section 47 (2) and (3) list what a court must consider as aggravating circumstances in the following terms:

> "Murder:
>
> (1) …
> (2) In determining an appropriate sentence to be imposed upon a person convicted of murder, and without limitation on any other factors or circumstances which a court may take into account, a court shall regard it as an aggravating circumstance if—
> (a) the murder was committed by the accused in the course of, or in connection with, or as the result of, the commission of any one or more of the following crimes, or of any act constituting an essential element of any such crime (whether or not the accused was also charged with or convicted of such crime)—
> (i) an act of insurgency, banditry, sabotage or terrorism; or
> (ii) the rape or other sexual assault of the victim; or
> (iii) kidnapping or illegal detention, robbery, hijacking, piracy or escaping from lawful custody; or
> (iv) unlawful entry into a dwelling house, or malicious damage to property if the property in question was a dwelling house and the damage was effected by the use of fire or explosives; or
> (b) the murder was one of two or more murders committed by the accused during the same episode; or was one of a series of two or more murders committed by the accused over any period of time; or
> (c) the murder was preceded or accompanied by physical torture or mutilation inflicted by the accused on the victim; or
> (d) the victim was murdered in a public place or in an aircraft, public passenger transport vehicle or vessel, railway car or other public conveyance by the use of means (such as fire, explosives or the indiscriminate firing of a weapon) that caused or involved a substantial risk of serious injury to bystanders.
> (3) A court may also, in the absence of other circumstances of a mitigating nature, or together with other circumstances of an aggravating nature, regard as an aggravating circumstance the fact that—
> (a) the murder was premeditated; or

> (b) the murder victim was a police officer or prison officer, a minor, or was pregnant, or was of or over the age of seventy years, or was physically disabled."

[13] Admittedly, a court is granted the latitude to find more aggravating circumstances outside the list provided in the above provisions.

[14] Looked at critically, the prosecutor's arguments are not convincing. First there was no robbery in this case. The offenders may have either taken the phone or picked it after the assault. There is no evidence that the assault was perpetrated to force the deceased into handing over his phone to the offenders or to induce some form of submission. The evidence which the court admitted was that they assaulted him indiscriminately for his involvement and disagreement with the coveted woman. Our view is therefore that the taking of the deceased's phone was coincidental or even an afterthought by the offenders. After assaulting the deceased outside and behind the beerhall, the offenders are said to have gone back into the bar. It was only after a while that they went back to the scene and returned with the phone. If anything, the taking was therefore more of a theft than a robbery. It therefore does not qualify as an aggravating circumstance.

[15] On the question of brutality, murder is invariably a brutal act. If the sheer lack of compassion associated with murder were to be taken as a factor aggravating the killing, then almost every murder would qualify as having been committed in aggravating circumstances. For cold-heartedness to qualify as an aggravating circumstance, the law requires that the murder must have been preceded by torture or mutilation of the victim by the offender. In the case of *S v Rondodzani and Anor* HH 500/22 this court held that:

> "Clearly… for an allegation of torture to be sustained, there is a requirement that the pain and suffering must perpetrated by a public official. There must be evidence of intense pain and suffering from the prohibited act.... the purpose of the torture must be to obtain information, confession or mere punishment of the victim."

The violence perpetrated in this case does not satisfy those requirements.

[16] We also looked outside the list in subsections (2) and (3) of s 47 for anything else which may have served to aggravate this murder but found none. Our conclusion therefore is that it was not a murder committed in aggravating circumstances.

[17] Once that determination is made, we are freed to impose any sentence outside the framework of the mandatory penalties. We have already singled out in detail, the

factors which we said mitigate the two offenders' moral blameworthiness. They are numerous and there is no reason to repeat them here serve to state that the offenders were and are still young; they were drunk; there was some measure of contributory negligence on the part of the deceased. The court takes full cognisance of that mitigation. Yet it is not possible for the offenders to escape imprisonment given the severity of the crime they committed. The sentencing guidelines equally speak to that. Youthfulness is a big factor in mitigation but can only serve so far. We will however, because of those factors ensure that the offenders go to prison for the minimum possible period from which we are also obliged to deduct the two years that they have already been in prison. It is punishment on its own. There is no basis for the court to treat the two offenders differently. At the material time the law considered both of them as juveniles. Neither of them can claim to have been influenced by the other.

[18] Against all the above, each offender is sentenced to **10 years imprisonment**.

MUTEVEDZI J:……..

National Prosecuting Authority, state's legal practitioners
M S Musemburi Legal Practitioners, first accused's legal practitioners
Maja and Associate, second accused's legal practitioners