

THE STATE
versus
ROBERT MAKUVAZA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 16, 27 February, 3 & 17 March 2023

Mr E Mbavarira, for the state
Ms C Chuma, for the accused

Criminal Trial

MAWADZE J: The main issue in this matter is how the accused allegedly assaulted the now deceased leading to the now deceased's death.

The accused is facing the charge of murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] [the Criminal Law Code].

The charge is that on 12 June 2022 at Makuvaza village Chief Gutu in Gutu, Masvingo the 57-year-old accused assaulted the 26-year-old deceased with open hands, a switch and a shovel causing his death.

The accused is the village head of Makuvaza Village in Gutu. The now deceased stayed in the neighbouring Munyonga village in Gutu. The accused and the now deceased knew each other very well and regarded each other as uncle and nephew respectively.

On 12 June 2022 there was traditional beer for sale at one Johannes Hambike's homestead under the accused's jurisdiction in Makuvaza Village, Chief Gutu, in Gutu. Both accused and the now deceased were among the beer patrons and were apparently both drunk. The accused had arrived earlier at about 330pm at the beer drink and the now deceased only arrived around 5pm. This tragic event happened between 1830hrs and 1900hrs.

The state alleges that it is the accused who attacked the now deceased alleging that the now deceased had stolen some chicken previously at mai Nyasha's homestead. It is said the accused was apparently flexing his muscles as a village head. The state alleges that whilst inside a kitchen hut the accused suddenly charged towards the now deceased and held him by the collar resulting in both of them falling down. It is said Johannes Hambike quickly intervened and separated them.

The now deceased is said to have fled from the kitchen hut with accused in hot pursuit. The accused is said to have thrown a glowing piece of firewood hitting the now deceased on the head. The accused is said to have further assaulted the now deceased with a switch all over his body. The now deceased is said to have managed to escape but accused again caught up with him and further assaulted him with fists and a shovel all over the body inflicting very serious injuries. The now deceased was taken to Gutu Mission hospital where he was initially treated and later transferred to Masvingo Provincial hospital where he allegedly succumbed to the injuries on 16 February 2022.

In support of its cases the state led evidence from Johannes Hambike, Robson Madyavanhu, Takawira Masundire, Dr Godfrey Zimbwa and sgt Carthbert Chikati. The accused gave evidence and called one Tungamirai Mujeru a fellow villager as a defence witness.

A total of five exhibits were produced by consent. These are,

Exhibit 1: is a post mortem report by Dr Godfrey Zimbwa.

Exhibit 2 is accused's confirmed warned and cautioned statement

Exhibit 3 (a) is a shovel and Exhibit 3 (b) is a burnt piece of firewood

Exhibit 4 is a certificate of weight of the shovel, the piece of firewood and the switch

Exhibit 5 is the switch.

The shovel is 80cm long and weighs 1,4kg. The burnt piece of firewood weighs 950g. The switch is 30cm long and weigh 250g. This is as per exhibit 4.

The accused's defence is difficult to appreciate to say the least. Factually the accused disputes the manner it is alleged he assaulted the now deceased. Legally it is unclear whether the accused is alleging defence of a person which is self defence or he is raising the then common law defence of the "thin skull rule" or he is disputing that the assault he perpetrated on the now deceased is the proximate cause of his death of the now deceased's cause of death. The accused's defence is a dog's breakfast to say the least.

This is compounded by the various versions emerging from the accused's defence outline, his confirmed warned cautioned statement, his evidence in court and the evidence of his defence witness.

In his defence outline the accused said in his capacity as the village head he told Johannes Hambike to dismiss all beer patrons as it was late. He said the now deceased without any provocation just charged towards him and kicked him in the groin after which he, the now deceased punched him three times. He said the now deceased was shouting that accused was spreading rumours that he, the now deceased stole some chickens. The accused said the beer patrons restrained the now deceased. However he said the now deceased would not relent but instead threatened to kill the accused. The accused said in a bid to frighten the now deceased the accused took a piece of burning firewood after realising that despite being 26 years old the now deceased was of heavier body built and also drunk.

In the same defence outline the accused said the now deceased left but came back after 30 minutes now wielding a switch which he used to assault accused. The accused said he disarmed the now deceased of the switch and ordered the now deceased to leave. Instead accused said he was tripped to the ground by the now deceased and kicked by the now deceased as accused tried to fight back. The accused said the now deceased picked a shovel exhibit 3 (a) but accused dispossessed him of that shovel which accused used to hit the now deceased twice once on the buttocks as accused was aware the now deceased had just had an abdominal surgery two weeks before. At that stage he said the now deceased left but later cried out that he, the now deceased was injured. The accused said he proceeded to report the assault perpetrated on him at ZRP Gutu that night but the now deceased was ferried to Gutu Mission hospital. Instead the accused said he was detained as an accused and later told of the now deceased's death.

In his confirmed warned and cautioned statement presumably given when events were still fresh in his mind the accused gave a somewhat different version. He said the now deceased first hit the accused in the face and not the groin as he now says. In that statement he said he only hit the now deceased twice with a shovel on the buttocks and mentioned nothing of the said abdominal surgery. Most critically in that statement the accused never said he was attacked by the accused in any manner but that accused simply threatened to attack him for spreading rumours that the now

deceased stole chickens. This is in conflict with a very elaborate account in his defence outline on how the now deceased attacked him.

In his evidence in court accused now said the deceased first threatened to kill him and picked some bricks. The accused even went further to say he was injured on his forehead and palms as deceased attacked him at various stages with booted feet in the groin, with fists and switch.

When the accused was pressed by *Mr Mbavarira* for the state to explain how he assaulted the now deceased he said he only delivered two blows with fists and further two blows with a shovel on the now deceased's buttocks.

The accused was at pains to explain the cause of the now deceased's death. The accused seemed to say the now deceased died from the previous abdominal surgery done in May 2022 and not from any injuries inflicted by the accused. In fact the accused seems to put into issue not only the eye witnesses evidence but also the observations and injuries noted by Dr Zimbwa contained in exhibit 1 the post mortem report.

The accused's witness one Tungamirai Mujeru was of no value to accused's cause. Contrary the accused's evidence he said the now deceased showed him in May 2022 injuries on the now deceased's penis and not the abdomen as accused said thus defeating the very purpose accused had called him.

Sgt Cathbert Chikati contrary to the accused's evidence said despite rushing first to the police to report the accused had no visible injuries at all. Contrary to the accused's evidence he said Gutu Mission hospital staff denied carrying out any abdominal surgery on the now deceased but circumcised him on 7 January 2022.

Dr Zimbwa was clear on the injuries he observed on the now deceased as per exhibit 1. He observed the following injuries;

- “1. *Extensive facial and scalp bruising*
2. *Abdominal Distension*
3. *on opening the abdomen rupture of small (intestines) with faecal leakage.”*

The cause of death is stated as peritonitis caused by the ruptured bowel caused by blunt abdominal trauma.

In his evidence Dr Zimbwa said the now deceased had bruises covering the whole skin of the head. He said the now deceased had extensive rupture, bruising and bleeding of the small

bowels which is perforation of the small bowels. As a result faecal material leaked from the perforated bowels causing swelling or inflammation of the abdomen. The faecal leakage and acid were infectious and this caused what is called peritonitis, a fatal condition. Dr Zimbwa said the ruptured bowels was caused by blunt trauma which could be inflicted with booted feet or a shovel. He said the now deceased had no evidence at all of abdominal surgery as alleged by the accused.

Given the accused's unclear and contradictory accounts the only narrow issue is how the now deceased sustained the fatal injuries.

Johannes Hambike denied that the now deceased was the aggressor. Instead he said it is the accused who was the aggressor. He said the accused first alleged that the now deceased stole chickens and proceeded to hit the now deceased in the kitchen hut with a fist after which both held each other and fell down. Johannes Hambike separated them and the now deceased fled. He said the accused chased after the now deceased and picked a piece of firewood exhibit 3 (b) and hit the now deceased at the back of the head. He said the accused continued to chase after the now deceased and he did not witness what then happened. He said it is the accused who came back saying he, the accused, had injured the now deceased. Johannes Hambike then went to check on the now deceased and found him lying helplessly on his back. He and others lifted him up and took him to Gutu Mission hospital. He denied that the now deceased threatened to kill the accused.

Johannes gave his evidence well. Both accused and the now deceased are his nephews. He was sober and limited himself to what he saw. We find no reason for him to mislead the court.

Robson Madyavanhu (Robson) a 19 year old boy and Takawira Masundire a 13 year old boy (Takawira) are eye witnesses.

Robson said when he heard commotion at Johannes Hambike's homestead a neighbour he rushed to check. He saw accused hitting the now deceased with the piece of firewood exhibit 3 (b). As the now deceased stopped to protest the accused picked a switch, forced the now deceased down and assaulted the now deceased on the back and abdomen with a switch as the now deceased lay down. When the switch broke the accused used fists to hit the now deceased on the head, cheeks and chest. He said the accused briefly left but when the now deceased got up accused turned back and picked a shovel exhibit 3 (a) which accused used to hit the now deceased on the back. Robson said he tried to stop the assault and the now deceased fled but tripped and fell. He said the accused still armed with shovel proceeded to hit the now deceased using both sides of the shovel blade on

the abdomen at the same time kicking the now with booted feet. He said accused was shouting that the now deceased would die as he stole chickens but the now deceased denied the allegations.

Robson said when the now deceased was helpless, with his shirt torn and bleeding from the back the accused left him.

Takawira said he came to the scene after Robson and found accused assaulting the now deceased who was lying down with a switch all over the body. He said the now deceased managed to flee but the now deceased fell down. The accused then hit the now deceased with a shovel and kicked him with booted feet or gumboots saying he would kill the now deceased for stealing chickens. The accused stopped the assault on his own.

Both Robson and Takawira are related to the accused. They materially corroborated each other on how the accused assaulted the now deceased and the weapons accused. They both said the now deceased at all material times was helpless, and lying down as he never fought back. They both have no interest in this matter let alone to falsely incriminate accused. Their evidence dove tails with the injuries sustained by the now deceased and as observed by Dr Zimbwa. We accept their evidence and dis miss the accused's incomprehensible version as false.

It is the accused who fatally assaulted the now deceased. The accused was constantly the aggressor. The now deceased unsuccessfully tried to flee. The now deceased never fought back.

The only benefit we may give the accused is that he may not have intended to cause death. However, it is clear that the accused was negligent in the manner he assaulted the now deceased. This is a borderline case between murder with constructive intent and culpable homicide. The accused will get the benefit of this finding.

VERDICT: Guilty of contravening section 49 Criminal Law Codification and Reform Act [*Chapter 9:23*]: Culpable Homicide.

MAWADZE J

National Prosecuting Authority, for the state

Chuma, Gurajena & Partners, pro deo counsel for the accused