

THE STATE
versus
SHELTER CHIKUKUTU

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 2, 6 & 17 November 2023

Assessors 1. Mr Nish
2. Mr Mutomba

Criminal Trial

B. E Mathose, for the State

C. Mutema, for the accused

MAWADZE J: The vexing questions in this matter is whether the alleged assault alluded to the accused against the now deceased happened and that if it did happen whether there is a causal link between that assault and the now deceased's death.

The accused is a female aged 49 years. The now deceased Naison Chikukutu was aged 64 years.

The charge is that on 1 May 2021 the accused caused the death of her husband the now deceased by knocking his head against the wall and pulling his penis.

The now deceased was in a polygamous marriage. At one point he had three wives. The first and senior wife Violet Bandame would reside in Marinda village, Chief Chiwara in Gutu. She

would occasionally visit her husband the now deceased in Beitbridge where he was employed as a foreman to beg for material support and school fees for her children. The now deceased stayed with his other two wives in Beitbridge in a single room. After the now deceased lost employment, the other wife left and he remained with the accused as a second wife. They relocated to Harare.

The now deceased and the accused had been married for 24 years. They would occasionally visit their rural home in Marinda village, Chief Chiwara, Gutu where accused had built a house at her late in laws. The accused had two children with the now deceased age 22 years and 13 years. The first wife Violet Bandame had her separate homestead nearby in the same village. Apparently the now deceased had solemnised a civil marriage [which is monogamous] with his second wife the accused secretly.

The first wife Violet Bandame is 70 years old. She alleges the now deceased infected her with HIV and she has been on ARV drugs for a very long time. The accused also has HIV. She has been on ARV drugs for 5 years. As per the accused the now deceased was too on ARV drugs for 5 years although he was not properly taking those drugs which became the bone of contention between accused and the now deceased.

About a year before the death of the now deceased he decided to trace his steps back from Harare leaving the accused there to his first wife Violet Bandame in Marinda village, Chief Chiwara, Gutu. However, on 26 April 2021 the accused his second wife followed the accused.

The state alleges that on 1 May 2021 the accused proceeded to Violet Bandame residence where the now deceased was. It is alleged a misunderstanding arose between accused and the now deceased inside the kitchen hut of Violet Bandame the first wife in the presence of Violet Bandame and her then 7-year grandson Atipaishe Chikukutu.

The state alleges that the accused held the now deceased by the neck and bashed his head against the wall causing him to fall down. It is alleged the accused proceeded to pull the now deceased's penis until he fell unconscious.

It is common cause the now deceased was ferried to Ndanga hospital in Zaka. He was immediately transferred to Masvingo General Hospital after which he was moved to Sally Mugabe hospital in Harare where he died 8 days later on 8 May 2021.

It is not an issue that no police report had been made until the now deceased died and was buried. As per the testimony of the investigating officer Assistant Inspector Muriwira Mudzingwa

the police only got involved in this matter after they received an anonymous letter about a year later in March 2022 in which it was alleged the accused had assaulted the now deceased in the manner already alleged. He was then tasked to investigate the matter. The investigating officer recorded statements from witnesses and later arrested accused. He also retrieved medical records from Ndanga hospital, Masvingo General Hospital and Sally Mugabe Hospital.

The accused's evidence has been consistent from her defence outline, evidence in chief and in her cross examination. She denied assaulting the now deceased as alleged or in any manner. In fact, she attributed the death of the now deceased chronic headache which would cause the now deceased to collapse even while herding cattle and also the erratic manner in which the now deceased took his ARV drugs.

The accused questioned as to why the first wife Violet Bandame failed to make a police report of an assault if ever it had happened and only to allege so a year later. The accused said she was shocked to be arrested a year later on 24 June 2022 on allegations of murder. It is the accused's contention that her current tribulations are a result of the inherent bad blood which existed in this polygamous marriage as the first wife Violet Bandame felt the accused was an intruder into her marriage to the now deceased causing Violet Bandame to be rejected and dumped.

The accused urged this court to disregard the evidence of the young boy Violet Bandame's grandson Anotipaishe Chikukutu, who allegedly witnessed the said assault of the now deceased by the accused. The accused said it is unfortunate that the young boy was influenced and put up by Violet Bandame in a bid to crucify the accused and link her to this murder charge.

During the course of the trial 4 exhibits were produced and three of them by the state. They are as follows;

Exhibit 1: - It is the now deceased's certificate of death. It shows the now deceased's cause of death as spontaneous intracerebral bleeding. Indeed, it does not explain the cause of this spontaneous intracerebral bleeding.

Exhibit 2: - These are hospital medical notes uplifted by the police from the various hospitals where the now deceased was admitted. They contain the various notes apparently authored by nurses and doctors and the alleged history of the patient as allegedly narrated to the hospital staff by the now deceased's wife [who is said should be the accused]. The state seeks to rely on the history which says that the now deceased suddenly fell on his own or collapsed and hit

his back of the head [occipital] against a concrete slab. The state then seeks to infer that the accused misled the medical staff in a bid to conceal the assault she perpetrated on the now deceased. The said Exhibit 2 also contains details of the treatment given to the now deceased and it is in incomprehensible medical jargon. The challenge with Exhibit 2 is that it is not in affidavit form. Secondly the authors of those notes were not called to testify. No other expert was called to explain those notes. No probative value can be placed on such hear- say evidence.

Exhibit 3: - is a police signal message on Form 110. Simply it explains how the police got information leading to investigations in this matter. This fact is not in issue. The only problem are the dates in that message vis-à-vis the investigating officer's evidence.

Exhibit 4: - This is Kenaan Charles's statement to the police. It was produced by the defence counsel. The purpose is to show or prove that contrary to Kenaan Charles's evidence in court he never mentioned in that statement that the alleged assault of the now deceased was disclosed to medical staff at Ndanga hospital by anyone. Indeed, that statement does not contain such information. Kenaan Charles blames the police for the omission although he conceded to have signed it despite the said omission.

The state led evidence from the now deceased's first wife VIOLET BANDAME, the now deceased's grandson ANOTIPAISHE CHIKUKUTU, the now deceased's neighbour KENAAN CHARLES and the investigating officer Assistant inspector MURWIRA MUDZINGWA.

The defence led evidence from the accused only.

We turn to that evidence: -

VIOLET BANDAME, (Violet)

Violet gave an overview of her troubled marriage to the now deceased. She portrayed him as an uncaring womaniser who eventually ruined her life by infecting her with the HIV virus. As a result, she had long stopped being intimate with the now deceased well before he decided to come back home to her until his death.

Violet was very bitter that the now deceased even got money paid as lobola for their daughter and he squandered it allegedly with the accused. She portrayed the accused as gold digger who could not even build a marital home but would stay at their in laws' homestead. This was later dismissed as false even by the investigating officer.

Violet denied that the now deceased was of ill health. She professed ignorance of his HIV status or that he was on ARV drugs. She grudgingly said she just saw him taking drugs which she did not know but only know once and that the now deceased was simply malnourished due to the neglect by the accused. She said the now deceased only complained of headache once on the day he was later assaulted by the accused. However, even Kenaan Charles concede that the now deceased was visibly of very poor health.

Turning to the alleged assault Violet had this to say;

Violet said when the accused followed the now deceased to the rural home, she realised the two had outstanding issues. She advised the now deceased to go where accused was at their late in law's residence to resolve these issues which he did and came back to Violet's residence.

On 1May 2021 around 0700hrs she said the accused came to her kitchen hut inquiring about the now deceased's health. Violet called the now deceased. The accused then asked the now deceased as to why he was not taking medication. As a result, a misunderstanding erupted. The now deceased got up and tried to grab the accused's legs. He failed. The accused and the now deceased tussled. Violet said she separated them. Suddenly the accused held the now deceased by the neck and hit his head against the wall, causing him to fall down. She said accused grabbed his penis and pulled it. The now deceased fell unconscious.

Violet said the accused suggested they take the now deceased to the bedroom. Violet refused and ordered accused to go and report to the village head. The accused obliged. A motor vehicle came and ferried the now deceased to Ndanga hospital in Zaka.

Violet said she reported to the village head what the accused had done. However, the village head was not called as a witness. Violet said she also reported to the doctor who attended to the now deceased at Ndanga hospital and to the nurses. No such medical staff members were called. She said the now deceased was transferred to Masvingo General Hospital and then to Sally Mugabe hospital where he died. Violet remained at home. The now deceased was buried and police later came.

To be fair to Violet and her advanced age she can best be described as a drama queen. She would needlessly cry when confronted with difficult questions like why failed to report the said assault to the police. The simple question she completely failed to answer is why she could not disclose the assault to the police which she says led to the now deceased's death? Why would she

protect her nemesis the accused whom she hated with passion? Why would anyone take seriously her emotional outbursts and crying in court when for a year she failed to report accused's heinous conduct which took away the life of the father of her children. Violet's conduct is inexplicable and abnormal. In fact, were it not for an anonymous letter the police would have never known what Violet said the accused did!! Why would the death of her husband 8 days later not jostle and prick her conscience?

The lingering question is whether one can take her as a credible witness when all is said and done?

ANOTIPASHE CHIKUKUTU (Anotipaishe)

He is a grandson of Violet and the now deceased. He stayed with the now deceased and Violet. Anotipaishe said he does not like the accused at all. He could not give the reason for that despite that accused was also married to the now deceased.

Anotipaishe is 7 years old and is in grade 2. His evidence was just brief. He said Violet sent her to call the now deceased after the accused's arrival where the now deceased was cutting poles. He said accused and the now deceased then fought. He explained that they pushed each other. The deceased's head was bashed against the wall and his genitals pulled by the accused as the two fought. Violet then restrained the two.

The court should indeed be alive to the inherent dangers associated with the evidence of young children. They are impressionable and easily influenced especially in a toxic environment like in this case.

Anotipaishe says accused and the now deceased fought and explained that to mean holding, pushing and shoving each other. This version differs from Violet's description. Whilst Violet said she intervened before accused had bashed the now deceased against the wall and pulled his penis, Anotipaishe said Violet only intervened after all this had happened. There is therefore lack of material corroboration between Violet and the young child on the finer details of the assault.

KENAAN CHARLES (Charles)

The evidence of Charles is peripheral. He does not know how the now deceased became unconscious other than what he said he was told. When he arrived with his vehicle to ferry the now deceased to Ndanga hospital the now deceased was unconscious and could not talk. The now deceased's nephew Francis Mhike and the village head later arrived.

Charles was given two versions as to what had befallen the now deceased. As per Exhibit 4 paragraph 3 Violet said the now deceased just complained of a headache after which he collapsed. Later after accused had gone to collect the now deceased's identity card Violet changed and said accused had bashed now deceased's head against the wall and pulled his penis.

At Ndanga hospital Charles said the two versions were repeated with the later version only being said by Violet after the nurses had threatened not to attend to the now deceased and Francis Mhike had intervened.

Now assuming accused had acted in the manner alleged why did Violet lie to Charles who had come to help? Why would Violet only reveal the truth in the absence of the accused. If she was scared of the accused, why would she not say so in her evidence? In any case why would she be scared in the presence of Charles, the village head and Francis Mhike? If not, why was she lying and hiding the truth especially when the now deceased had no visible head injuries? Would it be safe to rely on Violet's evidence on the alleged assault?

ASSISTANT INSPECTOR MURWIRWA MUDZINGWA (Assistant Inspector Mudzingwa)

Assistant Inspector Mudzingwa said the delay in reporting this matter for a year hampered police investigations. He said vital evidence could have been lost. The police could not exhumate the deceased's body. As a result, no post mortem was done. The cause of the deceased's death became problematic

Assistant Inspector Mudzingwa said the medical cards he retrieved did not support the assault narrative as regards the now deceased's medical history. The accused was implicated by Violet. The accused vehemently denied the assault and the medical cards said the now deceased had collapsed. Violet confessed to him that she had no intention of reporting the assault.

ANALYSIS AND FINDINGS MADE

Violet and Anotipaishe are the only witnesses to the assault. As already said, they do not corroborate each other on the finer details of the assault. Anotipaishe is a young child whose evidence should be approached with caution in the circumstances. The danger of false incrimination remains real in *casu*.

On the other hand, Volet cannot be said to be a credible witness. Besides her questionable demeanour, her conduct remains unexplained. It is unsafe to rely on her evidence. She has a motive to lie against the accused, especially due to the acrimonious polygamous marriage.

Given such evidence one cannot make a finding that the accused assaulted the now deceased in the manner alleged. At most a scuffle may have ensued. Anything else becomes conjecture.

As correctly stated by *Mr Mathose* for the state for a charge of murder to be sustained both the *actus reus* and the *mens rea* should be present see *State v Mungwanda* 2002 (1) ZLR 574.

In the circumstances the act of assault has not even been proved.

Further, even assuming such an assault happened there is no causal link between the said assault by the accused and the now deceased's death. Again, as conceded by *Mr Mathose* for the state the spontaneous cerebral bleeding could have been triggered by a number of reasons which included but not limited to the now deceased collapsing on his own, or being bashed against the wall as alleged or high blood pressure, or vascular malformation or just his advanced age underpinned by other underlying causes or renal failure, or use of some coagulant drugs or aneurysm etc.

There is no logical, objective and reasonable basis for this court to choose one cause from all the others.

In the circumstances a charge of murder is simply a pie in the sky. Equally so both the permissible verdicts of culpable homicide and even assault are not sustainable on the basis of the evidence available.

The state has not proved its case beyond reasonable doubt either on the main charge or any permissible verdict. The accused should be accorded the benefit of the doubt.

VERDICT: - NOT GUILTY AND ACQUITTED

National Prosecuting Authority, counsel for the state

Ruvengo, Maboke & Company, pro deo counsel for the accused