

THE STATE

Versus

TASHINGA MUUNGANI

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 7 November 2023, 25 January, 8&23 February 2024

Assessors

1. Mr Gweru
2. Mrs Chademana

### **Criminal Trial**

*E. Mbavarira*, for the state.  
*Ms I Moyo*, for the accused.

### **Criminal Trial**

MAWADZE J: The 32 year old accused from Muungani Village, Chief Gutu, Masvingo is facing a charge of murder as defined in Section 47 of the Criminal Law [Codification and Reform Act (*Chapter 9:23*).

The accused is said to have unlawfully and intentionally killed his 56 year old paternal grandfather Pianos Muungani whom he was residing at the same homestead between 25 to 28

October 2021. It is said he assaulted him with a sharp object several times on the head causing his death.

The state alleges that the motive for the murder was a long standing grudge accused harboured as the accused was always demanding answers from the now deceased as to who was bewitching the accused.

It is alleged that because of this dispute and between 25 to 28 October 2021 the accused attacked the now deceased in the manner alleged killing him at their homestead where they stayed as being just the two of them. It is said thereafter the accused dumped the now deceased's body in a disused well at their homestead.

The state alleges that the accused on 28 October 2021 in a bid to hide his role in this heinous crime notified fellow relatives of his alleged discovery of the now deceased's body in the disused well. The police attended the scene, retrieved the body and later arrested the accused after investigations. Doctor Zimbwa who conducted the post mortem concluded that death was due to head injury.

The accused throughout the trial vehemently denied the state's allegations that he caused the now deceased's death. The accused refuted the allegations that he assaulted the now deceased in any manner as alleged. The accused denied existence of any long outstanding dispute mired in witchcraft between him and the now deceased. In fact the accused said in 2017, 4 years before the now deceased's death, the now deceased came home drunk poised for a fight attacking the accused. The accused said he hit back and broke the now deceased's leg resulting in the accused's arrest and appearing at Gutu Magistrates Court. The accused said after being granted bail he fled to South Africa only to return after 2 years in 2019. The accused said the now deceased took him to Gutu police where he withdrew the charge against the accused. Thereafter the accused said he lived harmoniously with the now deceased until his death in 2021.

The accused said the now deceased, his grandfather was in the habit of leaving home for days drinking beer only to return later. As a result the accused said he did not panic when accused was not at home from 25 to 28 October 2021 when he discovered the body.

The accused said on 28 October 2021 he was passing by the disused well. He smelt some foul smell. As a result of curiosity he peeped into the well. He discovered the now deceased's body and alerted fellow villagers and relatives. Later he was surprised to be arrested.

A total of 3 exhibits were produced by consent.

They are Exhibit 1 the post mortem report,

Exhibit 2 the medical Affidavit by Doctor Zimbwa and

Exhibit 3 accused's confirmed warned and cautioned statement.

Doctor Godfrey Zimbwa gave viva voice evidence, further explaining both Exhibit 1 the post mortem report and Exhibit 2 his medical affidavit. His observation on the injuries the now deceased had was as follows;

- i) A deep laceration  $\pm 2$ cm in front of the right ear or pre auricular area.
- ii) Skull deep laceration 1cm behind the right ear or retri auricular area right side.
- iii) Skull deep laceration  $\pm 3$ cm above the right ear or right parietal area.
- iv) Two skull deep lacerations  $\pm 3$ cm at the back of the head or occipital area.

One can therefore conclude that the injuries on the now deceased were concentrated mainly around the right ear and the back of the head. The cause of the death which is not in issue is the head injury.

The accused's confirmed warned and cautioned statement merely summarises his evidence in denying this charge of murder.

What is important to note in this case is that the issues before the court are not easy to resolve. Firstly there is or was no eye witness to the alleged fatal assault perpetrated by the accused on the now deceased.

Secondly there is no eye witness to the dumping of the now deceased in the disused well

Thirdly the state case is solely based on a circumstantial rather than direct evidence. Thus this court has to resolve the following material issues.

- i) Did the accused assault the now deceased fatally and dumped his body in the disused well?
- ii) Are the injuries on the now deceased causing his death only attributable to an assault?
- iii) Was it possible that some other person may have fatally assaulted the now deceased other than the accused and dumped his body in the disused well?

- iv) It is not possible that the now deceased sustained these fatal head injuries when he accidentally fell into this disused well?

This judgment will therefore grapple with these issues. There are both factual and legal issues to be resolved in this matter.

The evidence placed before this court was adduced from 5 state witnesses being *ROPAFADZO CHIROVE, MARTIN MUUNGANI, SGT EDWARD MUYAMBO, D/CST GARIKAI MAVHURAMA* and *DR GODFREY ZIMBWA*.

We turn to that evidence.

**Ropafadzo Chirove**

(Ropafadzo)

Nothing turns on the evidence of Ropafadzo. The 68 year old Ropafadzo ordinarily resides in Mufaratwira Village Headman Makore Chief Gutu. Both the accused and the now deceased were her uncles. She had visited her sick relative in accused and deceased's village. On 28 October 2021 accused came to her asking for a box of matches in the morning. The accused again returned to her homestead that morning shouting as follows;

*“niece, niece grandfather fell into the well”*

Ropafadzo said he advised accused to alert other relatives and villagers which the accused did. It is therefore clear that her evidence does not resolve the questions before us save to confirm that she was the first person to be alerted by the accused about the body of the deceased being in the disused well.

**Martin Muungani (Martin)**

The 76 year old Martin is the village head of Muungani Village, Chief Gutu in Gutu. He is related to both accused and the now deceased.

He confirmed that accused and the now deceased were the only two people staying at their homestead in his village.

Firstly he confirmed the accused's story that in 2017 the accused assaulted the now deceased and broke his leg. He was not privy to the cause of the dispute then in 2017. He said the matter was reported to the police. The accused was arrested, arraigned before Gutu Magistrates Court and granted bail pending trial. The accused then fled to South Africa only to return some 2

years later. He too confirmed that accused and the now deceased apparently reconciled as the assault case was not pursued and the two continued to reside amicably together.

Secondly he confirmed that on 28 October 2021 accused came to him to report that he, the accused, had discovered the now deceased's body in the disused well at accused and deceased's homestead. He said the accused postulated that the now deceased may have fallen in the disused well while looking for goats, thus ruling out foul play.

Police were alerted. He went to the disused well and made the following observations;

- i) The now deceased's body was inside the disused well leaning against the walls of the well dressed in shorts, T shirt and stockings.
- ii) When the police retrieved the body the observed cuts on the deceased's head which he did not closely examine.
- iii) He went into the now deceased's bedroom hut with the police and saw the following;
  - a) The cement floor was well mopped or cleaned.
  - b) The mattress had blood stains underneath only visible upon turning it
  - c) There were no blood stains on the floor
  - d) There were blood stains on deceased's blankets.

Martin said the opening of the well was big enough for a person to fall in. The well had no water and the now deceased was in a sitting position at the bottom of the well leaning on the walls.

The material evidence of Martin relates firstly to the position of the now deceased in the disused well and secondly the suspicion of foul play in view of the blood stains found in the now deceased's bedroom. If this is true then it would suggest that the now deceased was assaulted in his bedroom hut, possibly fatally and then dumped in a sitting position in the disused well to mask or hide the foul play.

Now in this evidence corroborated by the police detail Sgt Muyambo who attended the scene?

**Sgt Edward Muyambo (Sgt Muyambo)**

Sgt Muyambo attended the scene, retrieved the now deceased's body from the disused well, examined the now deceased's bedroom and arrested the accused.

Sgt Muyambo made the following material observations.

- i) The now deceased's body was in a disused well about 6m deep and  $\pm$  200m from the deceased's homestead.
- ii) The deceased body was exuding a foul smell and had cuts on the head.
- iii) Inside the now deceased's bedroom hut he observed blood stains on the floor, mattress, pillow and hoe handle which he all took as exhibits [ but none was produced in court]
- iv) Inside the disused well the now deceased's body's position was that it was lying on its back at the bottom of the well with the legs lifted upwards.
- v) The reason he arrested the accused was that the accused was the only person staying with the now deceased and his failure to report the now deceased as a missing person for 3 days. He however confirmed that accused told him that the now deceased would disappear for days before returning home.
- vi) Lastly he said Dr Zimbwa told him that a sharp object inflicted the injuries on the deceased's head.

Our analysis of Sgt Muyambo's evidence is that he was not a truthful witness on some material issues and did not corroborate Martin's evidence. We say so because;

- a) Sgt Muyambo gave a different version of how the now deceased's body was positioned in the well from that of Martin. He said the now deceased was lying on his back on the bottom of the well with legs lifted upwards. Martin on the other hand said the now deceased was in a sitting position at the bottom of the well leaning against the walls of the well.
- b) Martin said there were no blood stains on the well mopped cement floor of the deceased's bedroom but Sgt Muyambo said there were blood stains on the floor.
- c) Sgt Muyambo saw blood stains at numerous places which Martin did not see, that is on the floor, hoe handle, pillow, and blood stains from the bedroom hut to the kitchen.

It is not an exaggeration that Sgt Muyambo was a poor witness. As an attending detail it was probably advisable for him to record in his note book the critical observations he made rather than to rely on his mere memory which seemed to fail him. He even lied that it is Martin who first discovered the now deceased's body in the disused well after detecting a foul smell. This is clearly false. It is accused who did so. He also lied that Dr Zimbwa told him that the cuts on the deceased's head were inflicted by a sharp object. Dr Zimbwa refuted this. Instead he said the cuts or lacerations were irregular or had an irregular pattern which suggests that the blunt trauma caused the tears, cuts or lacerations and not a sharp or smooth edged instrument or object. The cuts did not have smooth edges. In fact Dr Zimbwa said it was possible that these head injuries could have been caused by falling into the disused well if the well had rough walls or edges, or had stones inside. In fact Dr Zimbwa said such stones or rough edges were consistent with the injuries on the now deceased's head.

As an attending detail Sgt Muyambo did a shoddy job. He did not even examine the inside of this disused well or its bottom. This was critical in order to establish if foul play was excluded because deceased could have fallen into that well or was dumped into the well after being killed or assaulted. A discerning eye of a police officer was clearly missing from the attending detail.

Now did the investigating officer D/Cst Garikai Mavhurama attend to these issues and provide any corroborating evidence.

D/Cst Mavhurama took over the matter after the accused's arrest. He then visited the scene and made the following material observations;

- i) There were splashes of blood on the walls of the now deceased's bedroom hut. Now this complicates the state case. Neither Martin nor Sgt Muyambo saw these splashes of blood on the walls inside the now deceased's bedroom hut.
- ii) He said just like Martin that the cement floor of the now deceased's bedroom had been mopped or cleaned. Surprisingly he was still able to see blood stains on the same floor which blood stains Martin did not observe.
- iii) He observed blood stains on the mattress where the now deceased puts his head. This is again new evidence.

- iv) He could not produce the blood stained items as exhibits like the mattress, hoe handle, pillow etc. In fact he only referred to the mattress and hoe handle having been the only exhibits. None of the two was sent for forensic examination to authenticate the said blood stains.
- v) D/Cst Mavhurama said he gathered evidence that accused, after the discovery of the now deceased's body in the disused well had suggested to fellow villagers present that they should not bother to retrieve the body but to simply bury it in that well. What an exaggeration by an investigating officer. Ropafadzo never said that. Martin never said that. Accused understandably dismissed it as false.
- vi) Contrary to the allegation by the state that the dispute between accused and the now deceased giving the possible motive for accused's alleged conduct was mired in witchcraft, D/Cst Mavhurama said accused had said it was because the now deceased had squandered the lobola paid for accused's sister and that the now deceased was chasing accused from his homestead saying accused should go and stay at his underdeveloped late father's stand. Again this is new evidence. Needless to say accused refuted all this as the fertile imagination of D/cst Mavhurama.
- vii) Lastly D/cst Mavhurama was in- explicably at pains to explain why accused was charged of this offence. He attributed it to the blood stains on the hoe handle, which hoe handle was never produced, let alone sent for forensic examination. He also said it was because accused disappeared to go and herd cattle after the discovery of the now deceased's body, whatever that means or imply. Again the evidence of D/Cst Mavhurama besides being unconvincing is not corroborative of the evidence of both that of Martin and Sgt Muyambo. It does not answer the questions or speak to the issues I initially posed as factual disputes to be resolved.

### **The Law**

The Law on circumstantial evidence is settled in criminal matter. The long enduring case of *R v Blom* 1939 AD 188 at 202-3 has stood the test of time. In that case Watermayer JA refers

to two important principles or rules of logic which govern the use of circumstantial evidence in a criminal matter. These are;

- a) That the inference sought to be drawn must be consistent with all proved facts and
- b) That the proved facts should be such that they exclude every reasonable inference from them save or except the one to be drawn. If they do not exclude other reasonable inference then there must be a doubt whether the inference sought to be drawn is correct.

Thus put differently, circumstantial evidence can only be used in a criminal matter to draw an inference if such an inference sought to be drawn is the only reasonable one derived from the proved facts.

Indeed it is competent for the court to return a verdict of guilty in a criminal matter solely on circumstantial evidence. All the court has to be satisfied is that the circumstantial evidence preclude every reasonable inferences of the innocence of the accused. See *S v Shonhiwa* 1987 (1) ZLR 215; *S v Vhera* 2003 (1) ZLR 668 at 680 C

Lastly it is important to note that circumstantial evidence in a criminal matter must always be narrowly examined. See *S v Marange* 1991 (1) ZLR 244 (S) at 249.

Now what are the facts proved in this matter? They are as follows;

- a) That the accused was the only person staying with the now deceased at their homestead.
- b) That in 2017, 4 years before the now deceased's death the accused assaulted the now deceased, broke his leg, was arrested and fled to South Africa.
- c) That 2 years later probably in 2019 the accused returned from South Africa, continued to stay with the now deceased and no further acrimony or conflict between the two was reported or observed.
- d) That the now deceased disappeared on 25 October 2021 and his body was found in a disused well at his homestead 4 days later on 28 October 2021.
- e) That it is the accused who first discovered or reported the discovery of the deceased's body to Ropafadzo and Martin.
- f) That the now deceased died of head injuries caused by blunt object.

There is clear dispute as to the other factors and they are not facts proved. For example;

- i) Was now deceased not in the habit of leaving home for days only to return later on.
- ii) In what position was the now deceased's body when it was discovered in the disused well.
- iii) What was the state of the side of the walls of the disused well and its bottom?
- iv) Where exactly if any were blood stains in the now deceased's room and were there blood stains.
- v) Was the deceased fatally assaulted first and then dumped into the disused well.
- vi) What would be the possible motive or cause for the accused to fatally assault the now deceased.
- vii) Is it the accused who assaulted the now deceased's if at all he was assaulted.
- viii) Did the now deceased accidentally fell into the disused well and died or he was fatally assaulted first and dumped into that well...

It is our view that no single reasonable inference can be drawn from all the facts proved pointing to the accused's hand in the demise of the now deceased. There is a serious doubt which lingers in the mind the court. The accused may or may not be the culprit. That doubt should be resolved in accused's favour. The threshold required in a criminal matter has not been met at all. Any other conclusion is simply based on suspicion and conjecture. It is unsafe to found a conviction on the evidence before us.

Accordingly the accused is found not guilty and acquitted.

Verdict: Not Guilty and Acquitted.

*National Prosecuting Authority, Counsel for the state*  
*Mutendi, Mudisi & Shumba. Pro deo counsel for the accused.*