

THE STATE
versus
NDARAMO MUTERO
and
JULIUS MUTERO
and
CHARLES MUTERO

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 14 and 16 February 2023

Criminal Trial

ASSESORS: 1. Mr Mudzinge
2. Mr Magorokosho

Mrs J. Matsikidze, for the state
C. Ndlovu, for the first accused
C. Maunga (Jnr), for the second accused
Mrs Y. Chapata, for the third accused

MUZENDA J: On 3 October 2019 at Munorwei Village, Chief Nyashanu, Buhera, all three accused who are siblings assaulted Kasirai Masawi using a log, catapult and stones all over the body leading to his death. They are now being charged with murder.

All the three accused pleaded not guilty and the matter proceeded to trial. It is important to state that after the closure of the state case, counsel for all three accused tendered pleas of guilty to a lesser charge of culpable homicide. The state rejected the limited pleas and the matter proceeded to the defence case.

The crisp issue for determination by this court is whether all three accused are guilty of murder or culpable homicide?

The decision of the matter hinges heavily on the evidence of the state witnesses. On 3 October 2019 all three accused and deceased were part of villagers who had gathered at Mahumberu homestead for a traditional beer drink. A misunderstanding arose between first accused and one Oneday Mukaka. Deceased attempted to intervene in a bid to stop the scuffle. He was struck with a log on the head, collapsed and lost consciousness. He was further attacked whilst lying in limbo by all accused using various weapons. The accused were then stopped by

Tonderai Mahumberu, the owner of the homestead. Now deceased was revived, left the homestead and went to be attended to at a clinic. He could not improve, he was referred to Mutare Provincial Hospital where he succumbed to the injuries on 9 October 2019.

The state called four witnesses to testify and the rest of the witnesses' evidence was admitted as it appears in Annexure 'A', Summary of the State case. Of all the witnesses, the undisputed evidence cascades crisply to the following:

- (a) Accused 1 had a misunderstanding with Oneday Mukaka over the sale of a jacket.
- (b) Accused 1 was injured by Oneday Mukaka.
- (c) The now deceased resolved to intervene between accused 1 and Oneday Mukaka. He was hit by accused 1 at the back of the head with a log and he collapsed and lost consciousness.
- (d) Accused 2 and 3 joined their brother (accused 1) to assault now deceased.
- (e) All witnesses called by the state speak of use of a log, stones and stone propelled by means of a catapult.
- (f) The certificate of weight produced by the state with the consent of all counsel for the three accused shows weights of stones ranging from 0,380 kilograms to 1,980 kilograms totaling to 5 pieces of stones used. The log used measured 56cm, it is small end with a circumference of 14cm and big end 15.5cm.
- (g) Various bystander tried to restrain all three accused but were aggressively repelled by all the three accused. Some of them got assaulted and were injured, others had to flee from the raging accused. Betias Masawi, deceased's brother was badly injured to the extent of being unconscious and confused and was subsequently located in the nearby hills.
- (h) Sarah Mandiuraya, Chenejrai Mutiba and Tonderai Mahumberu's bulk of damning evidence on how the three accused mercilessly assaulted the now deceased went unchallenged.
- (i) All the witnesses who testified in court had no reason to falsely implicate the three accused.

On the other hand, all the three accused both in their defence outline and evidence in chief distanced themselves from the fatal injuries on now deceased. Accused 1 speaks of deceased being struck with a stone thrown by his elder brother Betias Masawi. He added that he acted in defence of self. Accused 2 states and repeats that Betias Masawi missed accused 1

and his stone fatally injured the now deceased. Accused 2 speaks of a wrestle between accused 1 and Betias Masawi. Accused 2 added that he intervened to stop the fight. He denies assaulting the now deceased. He is the one who advised now deceased and Betias to report the matter to the police. Accused 3 stated that he is the one who grabbed the subject jacket and fled from the scene. He managed to escape and stood far away from the homestead where the melee was taking place. When he later returned he discovered that both accused 1 and now deceased had sustained injuries. He thus denies assaulting the now deceased.

Human relations are the result of a complicated interplay of thought and emotions. People tend to criticize their fellow men's so called blunders, but know that mistakes occur in the mental process of all living people. Yet there are few gifts that one person can give to another as rich as understanding. By using understanding, intelligence and patience you are more likely to bring about change than by constant criticism. We all differ from other people in mentality, training, heredity, environment and conviction. Above all the highest result of education is tolerance. One must accept to be rebuked and reprimanded and be able to control one's temper. The wisely tolerant exercised firmness in opposing what is wrong and detrimental.

This is virtually what the three accused failed to perceive in this matter. The defences given by all the three accused to us are fabricated and spiced up. The reality of what occurred on the day in question is clearer as per state witnesses. The three accused embarked on a relentless and protracted assault on the now deceased and on occasions targeted vulnerable parts of the body, the head, the chest and the abdomen. Officious bystanders tried to intervene but were chased away and assaulted by the three accused. Now deceased had a noble idea of stopping the fight between accused 1 and Oneday Mukaka, such is necessary in human relationships, but what did he and others get in return, a bashing. The attack on deceased was unprovoked and uncalled for, the now deceased paid for the sins of Oneday Mukaka who had managed to escape.

The manner of assault on the now deceased apparently exhibits ruthlessness on the part of the three accused. We are conscious and have taken note of all accused's changes of plea to an offence of culpable homicide but this was not genuine taking into account the structure and content of their defence statements, Annexures B to D. They realised that they were swimming against the current and decided to bargain. Their defences are rejected as untrue. In assaulting now deceased with stones, log and catapult and targeting on the head all three accused ought to have and actually realized in our view that there was a real risk or possibility that their

persisted conduct may cause death and continued to engage in that conduct despite the risk or possibility. Onlookers and fellow villagers tried to intervene but accused attacked them. The matter borders on actual intent as per the utterance of accused 2 but we will give all three accused the benefit of doubt on the aspect of actual intention and find them guilty of murder with legal intent in contravention of s 47(1)(b) of the Criminal Law Code.

Sentence

In arriving at an appropriate sentence the court will take into account submissions made by all parties in mitigation and in aggravation. All three accused are sibling brothers and first offenders. They experienced pre-trial incarceration for a period in excess of a year. They are all responsible heads of their families. They are not sophisticated and had partaken some alcohol. They paid restitution to now deceased's family and all this will be considered in deciding on sentence. Compensating deceased's family goes far in trying to mitigate the loss of deceased to the family in many ways. All accused on one occasion tendered a plea of guilty to culpable homicide showing a little bit of remorse although it came too late in the proceedings.

In aggravation, a young life was lost over trivial issues. Now deceased was a peacemaker but lost his life in the process. The nature of injuries shown on the postmortem report show that the injuries were serious and he suffered extensively till his death. People must learn to accommodate and tolerate others moreso the peacemakers not to repay such a noble deed by severely beating the helper. A custodial sentence is unavoidable in this case.

Accordingly you are sentenced as follows:

12 years imprisonment

National Prosecuting Authority, state's legal practitioners.

Gonese and Ndlovu, first accused's legal practitioners.

Maunga Maanda and Associates, second accused's legal practitioners

Henning Lock, third accused's legal practitioners