

**THE STATE**

**Versus**

**EDMORE NCUBE**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr E. Shumba & Mr A. B. Mpofo

GWERU CIRCUIT COURT 1 FEBRUARY 2023

**Criminal Trial**

*M. Ndlovu* for the state

*Mrs O. T. Maputsenyika* for the accused

**MAKONESE J:** The accused appears in this court facing one count of murder in contravention of section 47 (1) of the Criminal Law Codification and Reform Act (Chapter 9:23). The accused pleads not guilty to the charge. He tenders a plea of guilty with respect to the lesser charge of culpable homicide. The state accepts the limited plea.

In a statement of agreed facts the state and defence outline the events surrounding the commission of this offence. On the 7<sup>th</sup> of April 2021 and at around 17:00 hours the accused person was in the company of the deceased, Mercedes Sibelo and Never Sibelo coming from Ndani Business Centre, Gokwe, where they had gone to sell their farm produce. The four were using an ox-drawn cart. They decided to unyoke two oxen so that the cart would be drawn by two oxen instead of four. During the process of unyoking the oxen one got loose and escaped into a nearby bush. Mercedes and Never ran after the ox leaving the deceased and accused behind with the cart and the remaining three oxen.

A misunderstanding arose between the deceased and the accused. The deceased wanted to drive the cart home leaving Mercedes and Never behind. The accused insisted that they should wait for Mercedes and Never to return. The deceased advanced towards the accused wielding an axe and slapped the accused once on the face with an open hand. A scuffle ensued between the accused and the deceased. The accused dispossessed the deceased of the axe he was wielding. Accused struck the deceased once on the left thigh. The deceased bled profusely and fell down crying. The deceased died as a result of injuries sustained in the attack.

The remains of the deceased were conveyed to United Bulawayo Hospitals for the post mortem examination. A forensic pathologist Dr Juana Rodriguez Gregori concluded that the cause of death was:

- (a) Hypovolemic shock
- (b) Laceration of the femoral artery

The accused signed a warned and cautioned statement on the 8<sup>th</sup> of April 2021 wherein he admitted having struck the deceased with an axe.

The weapon that was used in the assault is an axe with a wooden handle. The length of the handle is 0.75m. It weighs 1.042kg. The length of the axe head is 15cm.

The accused accepts the evidence of the state witnesses as contained in the summary of the state case. The accused denies having the requisite intention to kill in the form of *dolus directus* or *dolus eventualis*. The accused acknowledges that through his conduct he was negligent in causing the death of the deceased. The accused accepts that he mistakenly wounded the deceased.

From the evidence placed before the court we are indeed satisfied that the accused is not guilty of the crime of murder. Accused is accordingly found guilty of culpable homicide.

### **Sentence**

In sentencing the accused, the court must take into account the personal circumstances of the accused, the weighty mitigating features of the case as well as the interests of justice. The sentence that must be imposed must be fair to the offender. The sentence must not be retributive and must rehabilitate the accused. The accused was aged 40 years at the time of the commission of the offence. The deceased was aged 28 years. The accused and deceased were brothers. The court takes into consideration the following mitigatory factors;

- (a) The accused pleaded guilty to the lesser offence of culpable homicide
- (b) The accused is a first offender
- (c) The accused has shown remorse and contrition
- (d) The accused is a family man with the usual responsibilities
- (e) The accused has been on bail pending trial and has routinely attended remands
- (f) The accused has presented himself before this court to receive his punishment

- (g) The accused gave material assistance at the funeral of his brother (deceased).
- (h) The accused has admitted his guilt and has thus assisted in the administration of justice
- (i) Accused spent 1 month in custody before he was granted bail.

Sentencing involves the delicate balancing of accused's personal interests and those of the interests of justice. Justice must be served by the imposition of a fair sentence. A rational approach to sentencing must be adopted. The court must remain alive to the need to impose a sentence that fits the crime and the offender. A sentence that is unduly harsh is not appropriate. The sentence must not be too lenient so as to fall below societal expectations.

In the circumstances of this matter, I consider that the mitigatory factors far outweigh the aggravating circumstances. However, a non-custodial sentence would not be appropriate in this case. The accused has been convicted of a serious offence. A life was needlessly lost. The sanctity of human life cannot be over emphasized. The deceased was the initial aggressor. He armed himself with an axe and confronted the accused. He slapped the accused on the face. The two wrestled for the axe. The accused succeeded in dispossessing the deceased of the axe and struck him once on the thigh causing a laceration of the femoral artery. The accused acted recklessly and negligently caused the death of his brother.

Accordingly, and for these reasons, the following is deemed to be an appropriate sentence:

“Accused is sentenced to 4 years imprisonment of which 2 years is suspended for 5 years on condition accused is not within that period convicted and sentenced to an offence involving violence and for which he is sentenced to imprisonment without the option of a fine.

Effective sentence 2 years imprisonment.”