

THE STATE

Versus

ROBSON MULEYA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi
HWANGE 8 MARCH 2022

Criminal trial

Mrs M. Cheda, for the State
G. Musengi, for the accused

DUBE-BANDA J: The accused appears before this court on a charge of murder as defined in section 47 of the Criminal law [Codification and Reform] Act Chapter 9:23. It being alleged that on the 18th June 2021, accused unlawfully caused the death of John Mudenda (deceased) by striking him on the head several times and stamping on his chest several times with booted feet and striking him with an open hand on the cheek intending to kill him or realising that there is a real risk or possibility that his conduct may cause the death of deceased and continued to engage in that conduct despite the risk or possibility.

The accused pleaded guilty to a lesser crime of culpable homicide. The State accepted the limited plea of guilty to culpable homicide. State counsel tendered into the record of proceedings a statement of agreed facts. The statement is before court and marked Annexure A, and it reads as follows:

The state and the defence are agreed that the following issues are common cause being that:

1. The accused was aged 63 years at the time of the commission of the offence and he resides at his own homestead, Mabone Village, Chief Saba, Binga.
2. The deceased was aged 72 years at the time he met his death. He used to reside at Violet Khumalo's homestead, Mabone Village, Chief Saba, Binga.
3. The accused and the deceased were brothers.

4. On the 18th of June 2021, the accused and the deceased were at a soccer tournament at Kamalundu grounds, Kamalundu Area, Chief Saba, Binga. They were also partaking in beer drinking.
5. At around 0100 hours, the accused and the deceased had a misunderstanding after the accused was struck on the head with a brick by an unidentified person. The accused suspected that the person could be the deceased.
6. The accused kicked the deceased with a booted foot once on the head and the deceased fell to the ground.
7. The accused further kicked the deceased on the head several times and stamped on him several times on the head.
8. The accused was restrained from further assaulting the deceased by Innocent Munsaka and Tryphine Mumpande.
9. The deceased bled from the nose and lay on the ground unconscious.
10. On the following morning, at around 0630 hours, the accused and the deceased went back to the grounds and continued with the altercation.
11. The accused assaulted the deceased once on the cheek with an open hand and the deceased fell down and lost consciousness.
12. The deceased was referred to Binga hospital for treatment. The deceased remained unconscious and was discharged from Binga hospital on the 24th of June 2021 when the family failed to raise funds to take him to Mpilo hospital where he had been referred to.
13. The deceased died at home on the 28th of June 2021.
14. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.

The State tendered into evidence the post mortem report. It is before court and marked Exhibit 1. The post mortem report lists the cause of death as epidural hematoma and assault. According to the post mortem report under marks of violence it is stated that deceased suffered excoriations on the face, left shoulder and left temporal region. The internal examination showed the scalp suffered haemorrhage infiltrate in left temporal region, and the brain suffered extensive epidural hematoma in all right hemisphere.

The facts of this case show that the accused the accused kicked the deceased with a booted foot once on the head and the deceased fell to the ground. The accused further kicked the deceased on the head several times and stamped on him several times on the head. The deceased bled from the nose and lay on the ground unconscious. This caused deceased to suffer the injuries that caused his death. The facts show that the injuries sustained by the deceased were caused by the accused. The post mortem report shows that the injuries inflicted by the accused caused the death of the deceased.

The facts show that accused believed that deceased struck him with a brick. He was therefore under an unlawful attack. The attack had commenced. The action taken to avert the attack was unnecessary. Accused deployed excessive and disproportionate force. At the time he attacked deceased, deceased was not armed.

It was objectively foreseeable or within the range of ordinary human experience that accused's actions would lead to the death of the deceased. It therefore means that the accused acted negligently by assaulting the deceased in the manner he did. A reasonable person placed in a similar situation would have avoided acting in the manner the accused did. Accused negligently failed to realise that death may result from his conduct; or realising that death may result from his conduct and negligently failed to guard against that possibility.

In the circumstances of this case, we are satisfied that the State's concession has been properly made, it accords with the facts of this case and the law. It cannot be said that the accused is guilty of the crime of murder.

In the result, the accused is accordingly found not guilty of murder and found guilty of a lesser crime of culpable homicide in terms of section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

Sentence

The accused has been convicted of the crime of culpable homicide. This Court must now decide what sentence is appropriate for the offence for which he has been found guilty. To arrive at the appropriate sentence to be imposed, this Court will look at his personal

circumstances, take into account the nature of the offence he has been convicted of, and factor in the interests of society.

We factor into the equation the personal circumstances of the accused which are as follows: he is 63 years old, married with three grown up children. He is the sole provider of his family and also takes care and provides for his grandchildren. He is a substance farmer, and also does part time jobs in the village to help vend for his family. He has no assets of value and has no savings. Sold his only cow to raise \$150.00 to help deceased seek medical assistance.

We also take into account that he is a first offender and he has been in custody for approximately eight months before trial. He pleaded guilty to the crime of culpable homicide. We factor into the equation that there was some measure of intoxication. We further take into account that the stigma of having caused the death of his brother would haunt him during his entire lifetime.

On the other side of the pendulum we factor into the equation that the accused has been convicted of a serious offence. A life was ended. It is incumbent on this court to emphasize the sanctity of human life. Society frowns at the taking of another human being's life. The courts must send a loud and clear message that the killing of a fellow human being will not be tolerated. We note that the accused used unacceptable force on a 72 year old man. He kicked the deceased with a booted foot once on the head and the deceased fell to the ground. The accused further kicked the deceased on the head several times and stamped on him several times on the head. The deceased bled from the nose and lay on the ground unconscious. This caused deceased to suffer the injuries that caused his death. He inflicted serious injuries as depicted in the post mortem report. Accused's moral blameworthiness is high.

Taking into account the facts of this case, a non-custodial term or community service will trivialize an otherwise serious case. We are of the view that the following sentence will meet the justice of this case, the accused is sentenced to 3 years imprisonment of which of which 1 year imprisonment is suspended for 5 years on condition the accused does not within that period commit an offence of which an assault or physical violence on the person of another is an element and for which upon conviction he is sentenced to a term of imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Muviringi And Associates, accused's legal practitioners