

**THE STATE**

**Versus**

**KHULEKANI NDLOVU**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr T.E Ndlovu and Mr S.L Bazwi

HWANGE 10 MARCH 2022

**Criminal trial**

*Mrs M. Cheda*, for the State

*Ms C. Manyeza*, 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 14<sup>th</sup> January 2021, caused the death of Ephraim Ndlovu (deceased) by stabbing him with an okapi knife once on the left side of the chest, 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 and defence counsel tendered into the record of proceedings a statement of agreed facts. The statement is 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 22 years at the time of the commission of the offence and he resides at Xolisani Ndlovu's homestead, Nyamazana Area, Tsholotsho.
2. The deceased was 26 years at the time he met his death. He used to reside at Albert Ndlovu's homestead, Nyamazana Area, Tsholotsho.
3. On the 14<sup>th</sup> January 2021, and at around 1930 hours, the deceased together with his cousin Hazel Moyo set out to confront the accused over why the accused had earlier

on during the day assaulted Hazel Moyo with a switch all over the body. Hazel Moyo was armed with a knob Kerrie.

4. They caught up with the accused along a foot path at Nyamazana Line, Tsholotsho. The deceased then grabbed the accused by the collar and demanded to know why accused had assaulted Hazel Moyo.
5. Hazel Moto then struck the accused once on the shoulder with a knob Kerrie he was carrying.
6. The accused removed an okapi knife from his pocket and stabbed the deceased once on the chest and fled from the scene.
7. The deceased bled profusely, collapsed on the ground and died on the spot.
8. 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 acute anemic; cardiac and pulmonary laceration; and stab wound. According to the post mortem report the deceased suffered the following injuries: incised wound of 1.5 cm length, located at the 3<sup>rd</sup> costal arch, left part, penetrating in thorax cavity. The internal examination shows that the deceased suffered a fracture of 3<sup>rd</sup> costal arch.

The State tendered into evidence the Okapi knife used to stab the deceased. It has the following measurements: weight 51gammes; length of blade 7.5cm; with of blade 1.8cm; length of handle 9.7cm; width of handle 1.7cm. The knife is Exhibit 2.

The facts of this case show that the deceased together with Hazel Moyo set out to confront the accused and the latter was armed with a knob Kerrie. They caught up with the accused. The deceased then grabbed the accused by the collar and demanded to know why he had assaulted Hazel Moyo. Hazel Moyo then struck the accused once on the shoulder with a knob Kerrie he was carrying. The accused removed an okapi knife from his pocket and stabbed the deceased once on the chest and fled from the scene. The deceased bled profusely, collapsed on the ground and died on the spot.

Accused was under an unlawful attack. The attack had commenced. He was struck with a knobkerrie on the shoulder. He answered this attack by stabbing deceased on the chest with

an okapi knife. He used excessive and disproportionate force in averting the attack. He stabbed deceased with a lethal weapon on the chest, a very delicate part of the body. He used severe force that his stabbing caused a laceration of the upper lobe of the lungs, cardiac and pulmonary laceration.

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. It was objectively foreseeable or within the range of ordinary human experience that accused's actions would lead to the death of the deceased. Accused used excessive and disproportionate force in averting the attack. It therefore means that the accused acted negligently by stabbing 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 23 years old. He is married with a pregnant wife. He has one minor child. He neither has savings nor assets of value.

We also take into account that he is a first offender and he has been in custody for approximately two weeks before trial. He is a youthful offender. He pleaded guilty to the crime of culpable homicide. We factor into the equation that he was defending himself against the deceased and one Hazel Moyo.

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 factor into the sentencing equation that he used a lethal weapon, i.e. and okapi knife to stab the deceased. He targeted a delicate part of the human body. The post mortem report speaks to the force and serious injuries he inflicted on the deceased. He used excessive force, the knife went so deep that it caused laceration on the upper lobe of the lungs and cardiac and pulmonary laceration. This kind of violence is unacceptable.

Taking into account the facts of this case we are of the view that the following sentence will meet the justice of this case, the accused is sentenced to 6 years imprisonment of which of which 2 years 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*  
*Mhaka Attorneys, accused's legal practitioners*