

THE STATE

Versus

QEDAMANDLA MPALA

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

D. Ncube, 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 26th May 2021, accused unlawfully caused the death of Ernest Ncube (deceased) by striking him a switch several times all over the body and further struck him with the back of an axe once on the back of the back and stamped on his stomach several times with botted feet 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 25 years at the time of the commission of the offence and he resides at Willard Mpala's homestead, Mbembeswana Line, Chief Mabhikwa, Lupane.
2. The deceased was aged 20 years at the time he met his death. He used to reside at Wilson Mlauzi's homestead, Mbembeswana, Siganda, Inyathi.

3. On the 26th May 2021, at around 2000 hours, the accused, deceased and one Thinkwell Ndlovu were on their way to Bubude Business Centre for a drink.
4. Along the way the accused person accused the deceased of having stolen his cellphone the previous day. The deceased however denied the allegations and this angered the accused.
5. The accused took an okapi knife from his pocket and threatened to stab the deceased if he did not return his cellphone. The accused then took a silver rope from his pocket and tied the deceased's hands and legs. He then stripped the deceased causing him to fall to the ground on his back.
6. The accused then trampled on the deceased's stomach and chest with booted feet. The accused then assaulted the deceased with switches all over the body as the deceased lay on the ground.
7. The deceased screamed for help and pleaded with the accused not to further assault him. Thinkwell Ndlovu also tried to restrain the accused.
8. The rope that was used to tie the deceased's legs loosened. The deceased got up and ran away. The accused gave chase and struck the deceased with the back part of the axe once at the back and deceased fell to the ground.
9. Thinkwell Ndlovu then dispossessed the accused of the axe and the knife.
10. The deceased got up and staggered home.
11. On the 27th May 2021, the deceased was taken to Bubude Clinic for treatment where he was referred to Tsholotsho Hospital for further treatment. Deceased however did not go due to financial constraints.
12. The deceased's condition deteriorated and he died the same night at home.
13. 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 traumatic shock and assault. According to the post mortem report the deceased suffered the following injuries: echymosis in left temporal region and right side of the thorax. Under internal examination the report shows that deceased suffered among other injuries, heart had a contused surface and the right lung had lacerations.

The State tendered into evidence the following real exhibits: an axe (Exhibit 2); *mukusu* switch with branches (Exhibit 3); small *mukusu* switch (Exhibit 4); and silk rope (Exhibit 5). These are the weapons that accused used to attack and inflict the injuries on the deceased.

The accused executed a brutal attack on the deceased. He threatened to stab the deceased with an okapi knife. He took a silver rope from his pocket and tied the deceased's hands and legs. He then stripped the deceased causing him to fall to the ground on his back.

Thereafter he trampled on the deceased's stomach and chest with booted feet. The accused then assaulted the deceased with switches all over the body as the deceased lay on the ground. The deceased screamed for help and pleaded with the accused not to further assault him. Thinkwell Ndlovu also tried to restrain the accused. The rope that was used to tie the deceased's legs loosened. The deceased got up and ran away. The accused gave chase and struck the deceased with the back part of the axe once at the back and deceased fell to the ground. 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. It therefore means that the accused acted negligently in 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.

This is a borderline case between murder in terms of section 47(1) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and culpable homicide in terms of section 49 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. We gave accused a benefit of doubt, and it is in this context that we are satisfied that the State's concession has been properly made.

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 26 years old. He is a widow, his wife died after his incarnation. He has three minor children. He has been in custody for ten months pending trial. We also take into account that he is a first offender and he has been in custody for approximately two weeks before trial. He pleaded guilty to the crime of culpable homicide.

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.

This was a brutal assault on the deceased. The facts of this case show that the accused took an okapi knife from his pocket and threatened to stab the deceased if he did not return his cellphone. The accused then took a silver rope from his pocket and tied the deceased's hands and legs. He then stripped the deceased causing him to fall to the ground on his back. The accused trampled on the deceased's stomach and chest with booted feet. He then assaulted him with switches all over the body as the deceased lay on the ground. The deceased screamed for help and pleaded with the accused not to further assault him. Thinkwell Ndlovu also tried to restrain the accused. The rope that was used to tie the deceased's legs loosened. The deceased got up and ran away. The accused gave chase and struck the deceased with the back part of the axe once at the back and deceased fell to the ground. Thinkwell Ndlovu then dispossessed the

accused of the axe and the knife. The deceased got up and staggered home. This is a borderline case between murder in terms of section 47(1) (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and culpable homicide.

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 10 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