

THE STATE

Versus

MAVUKA MOYO

And

JATHO NDEBELE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr J. Sobantu & Mr E. Mashingaidze

BULAWAYO 9 NOVEMBER 2021

Criminal Trial

K. Ndlovu for the state

L. Muleya for 1st accused

H. Shenje for 2nd accused

MAKONESE J: The accused persons appeared in this court facing a charge of murder in contravention of section 47 (1) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The allegations against them are that on the 20th January 2021 at Kweneng Farm, Mphoengs, the accused acting in common purpose, one or both of them struck the deceased Ronny Moyo, several times on the head with an axe. The accused persons later dumped the body of the deceased in a disused well, intending to kill Ronny Moyo or realizing that their conduct may result in the death of the deceased. The accused persons denied the charge and tendered pleas of not guilty.

The state did not adduce direct evidence to prove its case but relied on circumstantial evidence to show that the two accused persons acted in concert to procure the deceased's death. The state led *viva voce* evidence from two witnesses before closing its case.

The state tendered a state outline narrating the circumstances surrounding the death of the deceased. It shall not be necessary to repeat the contents of the evidence which now forms part of the record. The accused persons both filed defence outlines in support of their respective versions of events. A post mortem report compiled by a pathologist Dr Juana Rodriguez Gregori at United Bulawayo Hospitals following an examination of the remains of the deceased was tendered

into the record. The cause of death was undetermined due to the advanced state of decomposition of the body.

The State case

The state opened its case by leading evidence from its main witness **ABIGAIL MOYO**. The witness is a step-daughter of the deceased. Accused 1 is her uncle while accused 2 is a neighbour. The witness testified that the deceased and her mother separated a few years back. The deceased was living on his own at the time he went missing. The witness would visit the deceased from time to time. The witness did not reside very far from deceased's homestead. On 23 January 2021 the witness attended her aunt's burial at their village. Whilst there she observed that the deceased was not in attendance. This was of concern to her. She asked accused 1 when he had last seen the deceased. Accused 1 indicated that he had last seen the deceased on a Wednesday. The witness then proceeded to deceased's place of residence to check on the deceased. She was in the company of accused 1 and the village head, Frank Ndlovu. Upon arrival at deceased's home they discovered that his bedroom hut and kitchen were locked from outside. After forcing their entry into the house they were shocked to find that the bedroom had been wiped clean and there was no property inside. Accused 1 remarked that deceased could have gone out of the country or had left to live with another woman. The witness was surprised by accused 1's remarks. With the deceased's whereabouts still unknown, and on the 26th January 2021 the witness proceeded to Mphoengs Police Station and filed a missing person report. On 31st January 2021, the witness and other villagers organized a search party to look for the deceased. The deceased's body was found and retrieved from a disused well on 31st January 2021. The body was in an advanced state of decomposition. The body was pulled out of the well with the assistance of the police sub-aqua unit. The disused well is located at Kweneng Farm. The body was taken for a post mortem examination. The body was returned to the village for burial on 4th February 2021. On 5th February 2021 the witness received information from the village to the effect that the deceased's property was in the possession of the accused persons. The police were alerted. Investigations revealed that accused 2 was in possession of 2 of the deceased's goats. The goats were found in accused 2's pen. The goats bore ear tags with accused 1's name. The witness testified that when accused 2 was confronted by the police he stated that he had bought the goats from the deceased sometime in December 2020. The police proceeded to search accused 1's place of residence. They recovered the goats belonging to the deceased. All the goats were positively identified by the witness as those of the deceased. Under cross-examination, the witness indicated

that deceased had bought one goat from one MaNdebele and it is this goat that gave birth to the rest of the goats. After recovering the goats from the two accused persons the police took away accused 1 to Plumtree for further interrogation. This witness then indicated that she then called the police and alerted them that accused 2 could be involved in the commission of the alleged offence from credible information gathered from other villagers. The witness was told to bring accused to the police station. On arrival at Plumtree CID offices she gave her statement. The two accused persons were taken in for questioning. On the 6th February 2021, accused 2 led the police and made indications at his homestead, in the presence of this witness. As a result of these indications the police recovered a solar panel which was buried in one of the bedroom huts under a bed in accused 2's residence. Police also recovered 8 zinc sheets which were buried in the garden, one trunk which was buried in a field. Inside the trunk was a solar regulator, speakers and a bicycle frame. The witness identified the property as the property of the deceased.

The witness was subjected to extensive cross-examination by counsel for the accused persons. The witness remained composed and gave consistent responses. She was a credible witness who must be believed.

The state then led evidence from **DETECTIVE CONSTABLE MUDEBE**

This witness narrated that he arrested accused 2 and recovered goats belonging to the deceased. He recovered a solar panel, zinc sheets, a trunk with speakers and bicycle parts. All the recovered items were buried in the ground. This piece of evidence corroborates in material respects the evidence of Abigail Moyo. The witness indicated that on 12th February 2021 accused 2 indicated that he wanted to show the police the rest of the property belonging to the deceased. The witness pointed out that accused 2 stated that he did not want to have problems by keeping property belonging to the deceased. It is observed here that on the second visit to accused 2's homestead the accused showed the police shoes belonging to the deceased, speakers and a cupboard. A foam rubber and bicycle parts belonging to the deceased were also recovered. The police proceeded to accused 1's place and accused pointed out a plastic dish, a metal dish, a battery, trousers and a suit jacket and a small radio belonging to the deceased. The witness was cross-examined extensively by the defence counsel. The witness was asked whether besides the property belonging to the deceased there was anything else linking he accused persons to the alleged murder. The witness answered the question with an emphatic "yes". The witness was asked to explain and revealed

that accused 1 also showed them the axe which had been used in the commission of the offence. Realising that he was on quick sand accused 1's defence counsel sought to retract the question. The court noted and observed that the question had been put to the witness and had been answered without any prompting. The court may therefore not disregard this vital piece of evidence. Further, the indications of the 6th of February 2021 made by accused 2 are evidence of "pointing out". The evidence of such indications as admissible in terms of section 258 (2) of the Criminal Procedure and Evidence Act (Chapter 9:07). All in all, the two state witnesses' accounts showed the background of how the deceased went missing, how his body was found and retrieved from a disused well. The evidence of the two state witnesses was clear and credible as it related to how deceased's properties were linked to the accused persons.

The state sought out obtained admissions in terms of s314 of the Criminal Procedure and Evidence Act to the effect that the following property belonging to the deceased was recovered from accused 1's residence on the 6th of February 2021, namely; 1 x wheelbarrow, 1 bicycle carrier, 2 x bicycle wheels, 5 zinc sheets, 7 wooden poles and four goats. The defence also made formal admission relating to property found in possession of accused 2 on the 6th February 2021, namely, 1 solar panel, 1 bed base, 8 zinc sheets and 2 radio speakers. This property was positively identified by Abigail Moyo to be property belonging to the deceased. The overall picture is that after deceased went missing and his body was retrieved from a well, almost his entire property, including a dog and goats was in the possession of the accused persons.

Defence case

Accused 1 elected to give evidence under oath. Essentially accused testified that all the property found in his possession which belonged to the accused was acquired from deceased during his lifetime. Accused 1 indicated that he contracted the deceased to construct a kraal and goat pen in exchange for payment in the form of 2 speakers and an amplifier. Accused stated that he also gave deceased a solar panel as payment for services to be rendered at a future date. This contract was supposedly entered into in December 2019. In April 2020 accused 1 states that he noted that the kraal and goat pen was still not constituted. Accused 1 states that he went to South Africa and when he returned in August 2020 he noticed that the kraal and goat pen had not been created. Around 17th December 2020 accused 1 decided to terminate the contract. Accused 1 engaged accused 2 to take over the contract. Accused 1 alleges that he repossessed the speakers, amplifier and solar panel from the deceased. What

became clear is that instead of the property originally forming the contract between accused 1 and deceased, all the property of the deceased was shared between accused 1 and accused 2. Accused's explanation is that deceased had given him extra items to make up for the used up property. Accused's version is not comprehensible and does not conform to common logic and common sense. Deceased would not surrender all his property to accused 1 for a simple kraal and goat pen. Accused 1 claimed that the goats were his and deceased had been looking after them before he collected him. It cannot be mere coincidence that accused 1 collects all the goats, giving two of the goats to accused 2 soon after the disappearance of the deceased. Accused 1 insisted that there was no witness to his transaction with the deceased. No one except him and the deceased knew about the arrangement. In a rural setting this is hardly possible. The court takes judicial notice of the communal lifestyle in the rural areas. It is improbable that not one single living soul knew about the contract between accused 1 and the deceased. I found accused 1 to be an evasive witness whose story did not simply add up.

Accused 2 gave evidence in his defence. He testified that he acquired the 2 goats from accused 1 as payment for the construction of the kraal and goat pen. Accused 2 explained that he concealed the various items in different locations because he wanted to hide the property from his wife. Accused 2 intended to give the items to his second wife (small house). What boggles the mind is why the other panels were hidden in the ground under a bed in the homestead. Why would accused 2 go to such great lengths to hide the property? The zinc sheets were also buried in the ground. Accused 2 tried to explain his evidence by suggesting that after the rains fell, soil collected and covered the zinc sheets. The evidence of the policeman that the zinc sheets had been buried in the garden was not challenged. The court is not induced to believe that the zinc sheets were covered by soil after the rains fell. The zinc sheets were hidden because they had been unlawfully acquired from the deceased after he had been murdered. Accused 2 informed the police details that he did not wish to keep property belonging to a dead person. A second visit was undertaken to accused 2's homestead on the 12th February 2021 when he pointed out deceased that evidence remained unchallenged.

The law on circumstantial evidence

The leading authority on circumstantial evidence is *R v Blom* 1939 AD 188.

The court in that case at page 202 – 203 pointed out that in convicting an accused on the basis of circumstantial evidence, two cardinal rules of logic have to be observed and adhered to. These are:

- (a) the inference sought to be drawn must be consistent with all the proved facts.
- (b) the proved facts must be such that they exclude every possible inference of the accused's innocence save the one sought to be drawn.

The facts were proved and are common cause.

1. On the 23rd January 2021 Abigail Moyo and others went to check for the deceased. Abigail was in the company of accused 1 and Frank Ndlovu.
2. The deceased was not at his homestead. All the doors were locked from outside.
3. When Abigail and others gained entry into deceased's were they discovered that the room was empty and deceased's property had been stolen or missing.
4. Deceased's goats, zinc sheets were also missing.
5. On 26th January 2021 Abigail filed a missing person report at Mphoengs Police Station.
6. On 31st January 2021 deceased's body was found in a state of decomposition. The body was retrieved from a disused well in Kweneng Farm, Mphoengs.
7. On 5th February 2021, 4 goats were recovered from accused 1's homestead. On the same day, 2 more goats were recovered from accused 2's place of residence. The 2 goats found in accused 2's possession had accused 1's ear tags.
8. The goats were positively identified by Abigail Moyo as goats belonging to the deceased.
9. Accused 1 and 2 were taken by the police to CID Plumtree for questioning.
10. On the 6th February 2021 accused 1 and 2 made indications at their homesteads.
11. As a result of indications various items of property all belonging to the deceased were found with accused 1 and 2. All the items recovered from accused 2's homestead were hidden and buried in the ground, save for the goats.

12. The police proceeded to accused 1's homestead where they recovered property belonging to the deceased.
13. At the instance of accused 2 the police returned to the accused's homesteads on 12th February 2021 and more property belonging to the deceased was recovered.

Accused persons' explanation of their possession of deceased's property

In *S v Kuiper* 2000 (1) ZLR 113 (SC), the Supreme Court held that:

“... no onus rests on the accused to convince the court if the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that it is beyond any reasonable doubt false.” (emphasis added)

Accused 1's version is that all the property belonging to the deceased found in his possession was lawfully acquired. It makes no sense that deceased would have cancelled a contract and then surrender his entire property to accused 1. The assertion that deceased did not own any goats and that accused 1 had left the recovered goats with the deceased for safe-keeping, only came up when counsel for accused 1 cross-examined Abigail Moyo. This issue was never made in the defence outline. This was a clear after thought. We reject this version as false. Accused 1 gave the impression that he acquired deceased's property before his disappearance. Surely there should have been a witness to confirm these transactions. It cannot be that soon after the disappearance and discovery of deceased's body, literally all property belonging to the deceased is found with accused 1 and accused 2. Once it became known that deceased was a missing person the accused persons did not disclose that they in fact were in possession of deceased's property. This aspect is vital and significant because when accused 1 first opened deceased's empty bedroom his response was to suggest that maybe the deceased left the country or went to live with another woman. This crucial evidence was not challenged. The court is entitled to accept it as a correct version of the events as they transpired. Accused persons' explanation of their possession of deceased's property and the purported agreement between accused 1 and deceased is vague and full of inconsistency. The property was not kept in the open but was hidden. Accused persons' explanations cannot be believed. At the time the villagers were busy searching for the deceased, the accused persons had property belonging to the deceased in their possession. At that time before the body of the deceased was discovered none of the accused persons disclosed that

they had already acquired his goats and a dog. The accused's explanations are false beyond reasonable doubt. The only reasonable inference in the circumstances is that the two accused persons attacked the deceased and threw his body into the well at Kweneng Farm. The motive of the commission of the crime was robbery. The accused persons shared the property amongst themselves. If the deceased's body had not been recovered, accused 1's theory that possibly the deceased had left the country would have been difficult to prove. In order to explain the missing property accused 1 sought to convince Abigail Moyo that possibly deceased went to leave elsewhere with another woman. All these suggestions were meant to distract the villagers from looking for deceased. Over time, deceased would remain a missing person.

Intention

It is clear that accused persons committed the offence and disposed of the body in a well to destroy any evidence that deceased had actually been killed. In *S v Mugwada* 2002 (1) ZLR 574 (S) the court held at page 581D – E as follows

“On the basis of the above authorities, it follows that for a trial court to return a verdict of murder with actual intent it must be satisfied beyond reasonable doubt that:-

- (a) either the accused desired to bring about the death of his victim and succeed in completing his purpose; or
- (b) while pursuing another objective, he foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.

On the facts of the present case accused 1 is a brother to the deceased.

Accused 2 hails from the same village. The attack on the deceased was carefully planned and executed. There was premeditation and the attack did not occur at the spur of the moment.

We are satisfied that the state proved its case beyond reasonable doubt. It is not a requirement of our law that the state should prove the case against the accused persons beyond any shadow of doubt.

In the circumstances, the accused persons are found guilty of murder with actual intent.

Sentence

The accused persons are mature adults who had been convicted of a very serious offence. They both are family men with the usual family responsibilities. Accused 1 is a brother to the deceased. Accused 2 was deceased's neighbor. In assessing an appropriate sentence the court takes into account the fact that accused persons are first offenders. This is their first brush with the law. Accused persons co-operated with the police leading to the recovery of various items belonging to the deceased. Accused persons are relatively unsophisticated persons with a low level of education. What is aggravating in this matter is that the offence was committed with the sole purpose of acquiring the property of the deceased. In that regard that was a murder intended to rob the deceased of his property. The accused persons carefully planned and executed the murder. The body of the deceased was dumped into a deep disused well. The accused persons went to great lengths to conceal the crime and to cover their tracks. Accused persons committed the offence with inherent wickedness. The accused persons showed no remorse or contrition. Accused persons did not apologise to the victim's family. The accused persons have defended themselves to the bitter end and gave patently false defences. The murder was committed in aggravating circumstances in that there was premeditation and the murder was in furtherance of a robbery.

This court has taken into account the personal interests of the accused persons and the circumstances of the case. This is a peculiar and chilling case where a brother murdered his own brother and then take over all of the deceased's property to make it his own.

The court finds the following to be an appropriate sentence:

“Accused persons are each sentenced to 25 years imprisonment.”

National Prosecuting Authority, state's legal practitioners

Moyo & Nyoni Legal Practitioners, accused 1's legal practitioners

Shenje & Company Legal Practitioners, accused 2's legal practitioners