

**THE STATE**

**Versus**

**MORGAN NSINGO**

IN THE HIGH COURT OF ZIMBABWE  
KABASA J with Assessors Mrs C. J. Baye & Mrs L. Sithole  
GWERU 25 & 26 JANUARY 2022

**Criminal Trial**

*M. Shumba* for the state

*K. Mambara* for the accused

**KABASA J:** The accused appeared before us on a charge of murder to which he pleaded not guilty. In denying the charge he proffered explanations which made it difficult to understand whether he was denying the charge because he disputed the location where the offence occurred or because he knew nothing about the offence. The court entered a plea of not guilty and *Mr Mambara* could not confirm that the plea was in accordance with his instructions primarily because the accused kept changing statements. This however did not change the plea of not guilty.

On 2<sup>nd</sup> May 2017, the accused, who was 32 years old at the relevant time was at Makomo Bottle Store, Bvute Business Centre in Mberengwa where he was drinking beer. The deceased, Bloodwell Musiiwa who was aged 28 was at the same bottle store also drinking beer but in different company. Accused allegedly spilt deceased's sister's soft drink and a misunderstanding ensued between the accused and the deceased. Accused became violent and picked up fights with several people. He eventually left going to his homestead.

The following morning on 3<sup>rd</sup> May 2017 the accused went to the deceased's homestead and after confronting the deceased over the events of the previous

night, drew out an Okapi knife with which he stabbed the deceased once on the chest. The deceased was ferried to hospital but was pronounced dead on admission.

In denying the charge, the accused explained that he was drinking beer at this business Centre when some patrons there demanded money from him. When he refused to give in to the demands, one Tunga head butted him, he retaliated and other patrons joined in assaulting him. He fled to his home and later that same day at around 7:30 am he was arrested by members of the neighbourhood watch committee.

To prove its case, the state produced a confirmed warned and cautioned statement, a post mortem report and the Okapi knife which was allegedly used to stab the deceased. The warned and cautioned statement was admitted into evidence in terms of section 256 (2) of the Criminal Procedure and Evidence Act, Chapter 9:07. The accused sought to challenge the production of this confirmed statement on the basis that no confirmation proceedings were ever conducted, the statement was given under duress, the person who is said to have made the statement was identified as someone else not him and the statement was not witnessed.

Section 256 (2) of the Criminal Procedure & Evidence Act, Chapter 9:07, provides that:

“A confession or statement confirmed in terms of subsection (3) of section one hundred and thirteen shall be received in evidence before any court upon its mere production by the prosecutor without further proof.”

The statement was therefore received in evidence and the onus fell on the accused to prove that such statement was not given freely and voluntarily.

As regards the other issues, they were factual issues which therefore stood to be resolved as any other factual issues arising from the trial.

The warned and cautioned statement was detailed and in it the accused stated the following:

“I do admit to the charge of murdering Bloodwell Musiiwa. I was in a bottle store drinking beer. While drinking, I spilled Colleter Hove’s beer when I was dancing to some music. A certain man who was in the bottle store named Tunga came and head butted me on the mouth. I became angry and began to assault him, it was then I was hit by Bloodwell Musiiwa with a stone on the head. Suddenly a certain man named Zenzo came and held me by my feet and I fell down. He got on top of me, I overpowered him and got on top of him and drew out a knife and began to stab him with it. People ran away from the bottle store and started striking me with catapults while I remained at the bottle store. I then left and went home. When I got home, I did not stay long, I then left and went to my brother’s homestead named Givemore Mugaviri where I found him already asleep and had to sleep in the kitchen. The following morning, I woke up and went to Bloodwell Musiiwa’s homestead, upon arrival I knocked at his bedroom hut and he came out. I asked him why he had assaulted me the previous night and a misunderstanding ensued and I stabbed him with a knife once on the chest and went to my homestead. That is all.”

The stabbing was confirmed by Doctor Pesanai who examined the deceased’s body a day after his death and concluded that the cause of death was:

1. Haemorrhage shock
2. Bilateral haemothorax
3. Perforated heart
4. Stab wound in assault

The knife used to stab the deceased’s blade measured 10cm, length of the handle 14 cm, widest part of the blade 2cm and weight of the knife 0,057kg.

Evidence was led from six witnesses, the first of whom was Inzwiraishe Hove. The deceased was his brother's son. On 2 May 2007 in the evening, he was with the deceased at Bvute Business Centre when a misunderstanding arose between the deceased and accused after the accused had spilt deceased's sister's soft drink. His attempts to find out what the problem was later earned him a beating from the accused. He did not retaliate and later went home without the deceased as he could not locate him. The deceased later came home, ate and retired to bed. The following morning he was awakened by the deceased who told him that he was dying as he had been stabbed by the accused. The deceased subsequently fell and the witness observed the accused walking away and he had a knife in his hands. He looked for transport to ferry the deceased to hospital but he was pronounced dead on arrival.

This witness' bedroom was about 8m from the deceased's. He did not hear anything until the deceased came to awaken him, bleeding profusely from the left side of the chest and vomiting.

Whilst this witness' evidence did not flow with ease due to his failure to respond to questions as asked, we got the impression that this was not because he did not know what he was talking about but just failure to comprehend issues and confine himself to what he was being asked. It was more of him not being sharp rather than untruthful.

He was candid in his admission that he did not witness the stabbing but only observed the accused walking away. The suggestion that his wife ought to have also been a witness if this story was a true reflection of what happened was a futile attempt at trying to discredit this witness.

Had he been bent on embellishing his evidence, he could easily have said he heard commotion coming from the deceased's bedroom, rushed there and

witnessed the stabbing. It would not have taken much for him to say so had he been bent on nailing the accused.

We found him to be a credible witness whose evidence was materially corroborated by Colleter and Munoreveyi. Colleter was the one whose soft drink was spilt by the accused and deceased was her brother. She was at the business Centre primarily to charge her phone. She bought a drink and the accused took it from her and spilt it. He also pushed her and one Tunga tried to intervene to no avail. One Zenzo also tried to reason with the accused but the accused turned on him, he hit Zenzo and stabbed him with a knife. The witness decided to go home.

The following morning, the 3<sup>rd</sup> May 2017 she was in a bedroom which she was sharing with one Moreblessing when she heard the accused shouting “Moreblessing tell MaSiziba to start crying as I have killed their dog.” She knew the accused’s voice and identified it as such. The first witness then phoned her thereafter asking her to go to the roadside as Bloodwell was dead. She went there and stood by the vehicle which was ferrying the deceased to hospital but she was not able to talk to him.

Colleter’s evidence was short and to the point. She gave the impression of someone who was merely relating what she knew to have happened. She did not seek to exaggerate her evidence and candidly admitted not having witnessed the attack on the deceased.

Her evidence tallied with the first witness’ narration. This being so because the first witness observed the accused walking away after the deceased had been mortally wounded. Colleter heard the accused shouting that he had killed “their dog” and shortly thereafter she received a telephone call from the first witness

informing her of what had befallen the deceased, her brother. She was the one accused referred to as “maSiziba.”

The unfolding of the events cannot possibly be a creation but the logical flow of the events as related by these witnesses speaks to the fact that this is how the events unfolded.

It could not have been a coincidence that the deceased collapsed after telling Inzwiraishe that he had been stabbed by the accused and Colleter then heard accused confirming such stabbing. Inzwiraishe then asked Colleter to come to the roadside and she goes there and confirms that her brother had indeed been stabbed and was unable to talk.

No amount of careful rehearsing would bring about such a logical flow of events. The events flowed because they did occur as described by the witnesses.

Munorevei Matare was at his homestead which was about 300m from the deceased’s when he also heard the accused shouting the following words: “Go and call Makomo so he can come and ferry Bloodwell as I have finished with him.” Makomo is this witnesses’ brother and it was his vehicle that eventually ferried the deceased to hospital. When he heard these words he came out of his house and saw the accused and talked to him. It was daylight so he was able to see the accused, a person he has known from childhood. After confirming with the accused as to what he meant, this witness proceeded to the deceased’s home where he found him bleeding profusely from the left side of the chest and vomiting. He was unable to talk and could only open his mouth without saying anything whilst rolling on the ground. The witness also went to the hospital but the deceased did not make it as he succumbed to his injury.

It was suggested to this witness that he was not able to see the accused and identify him but he explained that his homestead is fenced by wire not tree branches so he could see without any difficulty.

He too only confined himself to what he personally heard and witnessed and did not seek to embellish his evidence.

His narration of events dove-tailed with the narration by the other 2 witnesses in a manner which was demonstrative of the fact that this was not rehearsed evidence.

We were satisfied all 3 witnesses were credible witnesses whose evidence could be safely relied on.

Tungamirai's evidence was only relevant in showing what had transpired at the business Centre between accused and Colleter. He also confirmed that accused was not assaulted. On the contrary it was the accused who appeared to be picking fights with people at the business Centre.

We found him to be a credible witness who did not seek to talk about the fatal stabbing as he knew nothing about it.

Maybe Sibanda was one of the members of the neighbourhood watch committee who arrested the accused after a report of the deceased's death was made to him. The accused is his uncle's son and when he went to arrest him he asked for the knife which had been used in the assault and the accused produced an Okapi knife from his pocket. He identified that Okapi knife which had been produced as exhibit 3 and also indicated the blood like stain on either side of the blade. He observed these blood stains on the day he recovered the knife from the accused.

Sibanda only recovered the murder weapon and also took the accused to the scene. The suggestion that the accused produced the knife after this witness and one Nkosilathi threatened him appeared to be a question which was asked just so as to try and find something to discredit the witness. The attempt did not succeed in discrediting the witness but rather reflected badly on the accused as it became clear that he was bent on just denying even the obvious.

Even if he was threatened, would a threat cause one to produce that which they did not possess? Certainly not.

Whilst there was no scientific evidence to show that the blood on that knife was deceased's, the accused's belated attempts to attribute the blood to the de-horning of cattle spoke volumes as to his credibility or lack thereof.

When one considers the flow of evidence, from the stabbing, the deceased's report to Inzwiraishe which in itself was a dying declaration as he believed he was dying and did subsequently die, Inzwiraishe's observations as accused walked away with a knife in his hands, the accused's words which he uttered as he walked away directed first to Moreblessing and then to Munoreveyi and the eventual recovery of the knife that same morning, it became clear that the blood on that knife could not have been from an animal unless one is to take the accused's words that he had killed "their dog" as equating the deceased to an animal, which would then mean that, that was the "animal" as per accused's words, whose blood was on that knife.

The last witness was Nkululeko Ncube whose ineptitude makes one wonder whether members of the Police Intelligence Unit should investigate crimes and compile dockets. He recorded the accused's warned and cautioned statement and forgot to get the one who witnessed the recording to sign. He also typed over an earlier statement and forgot to ensure he deleted the name thereon

and type the accused's. His ineptitude is just that, ineptitude, and not that he did not do what he said he did.

The warned and cautioned statement speaks to the incident involving the accused and he signed that statement. The witness also signed it. There is therefore no doubt that this statement was from the accused and not the person whose name appeared at the end of the statement. One only has to read the statement to see that it was indeed a blunder when this last sentence was left without deleting Lester's name:-

“I certify that the above statement was freely made by Lester Simbayinako Moyo who was in his sound and sober senses, it was read to him and he signed it.”

The one who signed was the accused and the name which appears below that signature is his. The preamble talks about the accused and refers to the murder of the deceased. The particulars of where the offence occurred relate to the matter involving the accused.

The contents of the statement itself relate to the events which happened between the accused and the deceased and the incident which occurred at the bottle store at Bvute. This incident did not relate to Lester Moyo and so it was clear the witness did not pay attention to detail as he ought to have.

The accused sought to make an issue out of these clear errors and wanted to capitalize on them. He sought to suggest that he was forced to sign the statement. Why would he be forced to sign such a detailed statement? And why say he was forced to sign? Does it mean he gave the statement but did not want to sign it? If he was forced to give the statement, why was he including such detail? Why not just say I stabbed the deceased and stop there? The details in

that statement could only have come from him and it would make no sense for the police to force him to give details which appeared to justify his actions.

He also sought to suggest that no confirmation proceedings were conducted. The witness took him to Zvishavane Magistrates' Court for the confirmation proceedings and the accused acknowledged that he was indeed taken to Zvishavane.

The confirming magistrate could have been called but the state's decision not to call the magistrate is understandable.

The accused's suggestion that someone just stamped and signed the statement but not a magistrate is so far-fetched so much that it became clear that he was bent on just saying anything and everything, whether it made sense or not was the least of his worries. His story was difficult to follow and he preferred to answer questions by posing his own questions.

Granted the accused need not convince the court as to the truthfulness of his story for he has no onus to prove his innocence. He has no onus to prove anything. In *R v Difford* 1937 AD 370 the court put it thus: -

“Accused need not convince the court as to the truthfulness of his story, whatever explanation he gives no matter how improbable it may be, the court cannot dismiss it unless it has been shown to be not only improbable but beyond doubt false.”

The accused sought to disown a warned and cautioned statement whose detail could only have come from him. He even mentioned his brother where he said he went to sleep on the night of the 2<sup>nd</sup> May 2017. The police did not know him prior to his arrest, how then would they have known of the brother, including his name?

He also related events of the 2<sup>nd</sup> May 2017 and took no issue with the fact that the deceased was stabbed on 3 May 2017, a day after the events of the 2<sup>nd</sup> May 2017 which occurred at the business Centre.

However, when he testified in his defence and under cross-examination he sought to suggest that he was at the business Centre on the 3<sup>rd</sup> May 2017, early hours of that day, suggesting that the stabbing was on that same day. If this is so how come he clearly stated that it was the following day when deceased was stabbed and he said this in a statement which was recorded just a day after the incident. The events were still fresh in his mind then and so he was recalling the dates with no difficulty. Years later he now seeks to confuse everyone by giving a different version.

He would have the court believe that he was the victim as people wanted to take his money and that 2 people were attacking him but failed to take the money because their strategy failed. What strategy when he gave the impression that he was under heavy attack and at one point he was felled to the ground. If all these people were out to get his money would they have not done so with relative ease?

He also sought to pretend that he did not know the deceased's homestead. It was clear he was thinking on his feet and realized that if he accepted knowing where deceased stayed it would then be said he therefore had no difficulty following up on him the following morning and heading straight to his (deceased's) bedroom.

He is not expected to give reasons as to why state witnesses would lie against him but when he started giving reasons which had not been put to the witness it became clear that he was making up a story with each question that was posed.

He initially said Colleter was once married to his uncle and so he knew her but later said she did not know his voice. Asked why that was so yet she was married to his uncle and so must have known him well, he then said that was before he moved to that area and when he moved there, they had already separated.

A reading of his responses under cross-examination shows a man who has very little respect for the truth.

His story cannot be looked at in isolation. The evidence led against him could not be wished away.

Granted no-one witnessed the stabbing. We are however alive to the 2 cardinal rules of logic as enunciated by WATERMEYER JA in *R v Blom* 1939 AD 188 that:

- “1. The inference sought to be drawn must be consistent with all the proved facts; and
2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.”

The deceased was stabbed in the morning of 3 May 2017 and managed to speak a few words, that is, he was dying and who had inflicted that mortal wound. The accused is seen walking away holding a knife. He is heard shouting words to the effect that his sister should start crying. A knife is later recovered from him and it is blood stained.

What other conclusion can be reached except that he is the one who stabbed the deceased inflicting the injury from which he died a few hours later.

We were therefore satisfied that it was the accused who stabbed the deceased and caused his death.

In *State v Jealous Joansi* HH-217-16 KUDYA J cited *S v Mugwanda* 2002 (1) ZLR 574 (S), a judgment by CHIDYAUSIKYU CJ in which the Chief Justice set out the test for determining the *mens rea* of an accused in murder cases.

“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 succeeded in completing his purpose or
- (b) while pursuing another objective foresees the death of his victim as a substantially certain result of that activity and proceeds regardless.

On the other hand, a verdict of murder with constructive intent requires the foreseeability to be possible (as opposed to being substantially certain, making this a question of degree more than anything else).”

What was the accused’s intention *in casu*? He armed himself with a knife, walked to the deceased’s home which we were told is about 3km away, plunged an Okapi knife into his chest with enough force to pierce the heart and shortly therefore announces that he was “finished with him” and his sister should start crying.

The chest is a delicate part of the body and as described by state counsel, the engine of the body. It houses organs which, if severed or pierced lead to certain death. The accused chose to stab the chest and pierced the heart. He knew what he was doing and his remarks thereafter is evidence of this fact. When one pronounces such and his conduct is indicative of the desire to bring about the result as announced, what else can be said except that he desired to bring about the death of the deceased and accomplished that objective.

It matters not that he stabbed the deceased once. It is how and where he stabbed that matters. That one vicious stab wound was meant to achieve what he had set out to do. An intention to kill can therefore be correctly inferred from the accused’s conduct. (*S v Mayor Magusvi* HB-265-20).

We are therefore satisfied that the state has proved its case beyond a reasonable doubt and the accused is accordingly found guilty of murder as defined in s47 (1) (a) of the Criminal Law Code, Chapter 9:23.

### **Sentence**

You are a 37 year old first offender. The offence was committed in 2017, it has taken almost 5 years to finalise it.

I do not think you are so hard hearted such that it can be said you suffered no anxiety over this period. You are married with 2 minor children and your family is dependent on you.

Your family paid the funeral expenses for the deceased's funeral and also paid 10 herd of cattle, 7 sheep and 2 goats. That shows a measure of contrition and remorse and should be taken as mitigatory.

I have no reason to disbelieve that such compensation was paid, so I will accept that it was paid. It will therefore work in your favour (*S v Hahlekiye* HH-260-17).

The murder was pre-meditated and this qualifies it to be a murder committed in aggravating circumstances as envisaged in s47 (3) (a) of the Criminal Law Code. That said however, it is correct as counsel submitted, that the court still has a wide discretion when it comes to sentence, either the death penalty, life imprisonment or imprisonment of not less than 20 years.

Sentencing ought not to be approached with a vengeful attitude (*S v Ndlovu* HB-46-96). The punishment should still be rationally arrived at, a humane approach to sentence has nothing to do with maudlin sympathy for the accused but a recognition that arriving at a fair punishment allows the court to temper justice with mercy (*S v Rabie* 1975 (4) SA 885 (A)).

That said, it is aggravating that you were bent on shirking any and all responsibility for your actions. You bragged about your conduct soon after you had stabbed the deceased.

You walked all the way from your home, armed with a knife and were so determined to achieve your purpose that you threw all caution to the wind and your conscience took a back seat.

The deceased died a painful death and he was only 28 years old. Whilst the case is not the typical artisanal miners' notorious unruly behavior where machetes and axes are used with reckless abandon, the point still is as an artisanal miner your conduct was typically the behavior of this group of people who seem to have very little regard for the sanctity of life.

The courts have time without number underscored the need to respect the sanctity of life and where a life is needlessly lost the punishment must be exemplary.

You deserve a long term of imprisonment so as to send a clear message that this behavior is abhorred and artisanal miners of like mind should be suitably warned. (*S v Ezekiel & 4 Others* HB-294-17).

You are accordingly sentenced to 30 years imprisonment.

*National Prosecuting Authority*, state's legal practitioners  
*Mavhiringidze & Mashanyare*, accused's legal practitioners