

**THE STATE**

**Versus**

**DARLINGTON MUTANDI**

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J with Assessors Mr Ndlovu and Mr 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 8<sup>th</sup> August 2021, accused unlawfully caused the death of Netto Dube (deceased) by trampling upon his stomach three times with the heel of his bare foot 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 41 years at the time of the commission of the offence and he resides at own homestead, Hubani line, Chief Gampu, Tsholotsho.
2. The deceased was aged 34 years at the time he met his death. He used to reside at Tandiwe Dube's homestead, Nanda line, Chief Gampu, Tsholotsho.
3. On the 23<sup>rd</sup> May 2021, the accused and the deceased were part of the people who had attended a traditional healer's ceremony at Senzeni Moyo's homestead, Nanda line, Tsholotsho.
4. People gathered at the ceremony were partaking of some home brewed beer.

5. The deceased and the accused started insulting each other. One Fanti Nkomo then took the deceased away from the accused and led him out of the homestead.
6. The deceased however continued to insult the accused using vulgar words saying “your mother’s clitoris” and “your anus”. This infuriated the accused who charged towards the deceased and they started fighting. Fanti Nkomo tried to restrain them but he failed.
7. The accused consequently tripped the deceased causing him to fall down facing upwards.
8. The accused trampled on the deceased’s stomach 2 times with the heel of his bare foot. Fanti Nkomo restrained the accused from further assaulting the deceased and the accused left the scene.
9. The deceased who was laying on the ground stood up, staggered and fell to the ground.
10. The deceased died on the 24<sup>th</sup> of May 2021 at his homestead.
11. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death

The State tendered into evidence a copy of the post mortem report. It is before court and marked Exhibit 1. The post mortem report lists the cause of death as peritonitis, small bowel perforation and blunt force trauma to the abdomen. According to the report the deceased was assaulted in the abdomen and died the following day. Under marks of violence report says deceased was vomiting from the nose and mouth. The internal examination showed the small bowels were perforated.

The facts of this case show that the accused tripped the deceased causing him to fall down facing upwards. He then trampled on the deceased’s stomach two times with the heel of his bare foot. The deceased who was laying on the ground stood up, staggered and fell to the ground. Accused used disproportionate force in assaulting the deceased. The deceased had fallen on the ground lying facing upwards. Accused used severe force in trampling on his stomach. The force was so severe that he damaged his bowels. This caused him 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 accused and deceased had a fight. The accused was under an unlawful attack. He deployed disproportionate and excessive force in the circumstances. 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 42 years old, and he was 41 years when he committed this offence. He is married with two minor children. He has no assets of value and has no savings.

We also take into account that he is a first offender and he has been in custody for approximately nine months before trial. He pleaded guilty to the crime of culpable homicide. We factor into the equation that there was some measure of provocation and intoxication. He contributed the funeral expenses of the deceased. He did not use a weapon. His home was destroyed after the commission of this offence.

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 the accused used disproportionate force, he trampled on the deceased's stomach with much force that he damaged the internal organs. He inflicted serious injuries as depicted in the post mortem report. Accused's moral blameworthiness is high.

In the circumstances only a custodial sentence will meet the justice of this case. Community service will trivialise this offence. Death of a human being in the hands of another is a serious matter. The sentence must speak to such seriousness.

In the circumstances the accused is sentenced as follows: 3 years imprisonment 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  
*Muvhiringi & Associates*, accused's legal practitioners