

THE STATE
versus
JULIET MATONGO

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 9 MARCH, 2020

Criminal Trial – Sentence

Assessors

1. Mr Mutomba
2. Mrs Chademana

E. Mbavarira, for the state
M. Mureri, for the accused

MAWADZE J: After hearing both counsel's addresses in mitigation and aggravation one is clearly reminded of the old adage that despite being blind justice should always be tampered with mercy. No matter the circumstances the court should not lose its conscience or moral compass.

The circumstances of this case are mired in the inherent conflicts which always exist in polygamous marriages. Generally it is the women in such relationships who are always in conflict and at times with disastrous if not tragic consequences.

The 33 year old accused entered into a customary law union with her husband in 2006. Four minor children were born out of the union aged 12 years, 9 years, 6 years and 2 years. The first three children are in Grade 6, Grade 3 and Grade 0 respectively.

The accused's husband married a second wife the then 21 year old deceased in 2019 and the marriage was blessed with a one year old child.

Although the accused was initially facing a charge of murder as defined in s 47(1) of the Criminal Law (Codification and Reform Act) [*Cap 9:23*] (*hereinafter the Criminal Code Cap 9:23*) she was subsequently convicted on her own plea of guilty of contravention section 49 of the Criminal Code *Cap 9:23* which relates to culpable homicide on the basis of a statement of agreed facts.

In brief the agreed facts are that on 31 July 2019 the accused and the now deceased had a misunderstanding over the reason why the now deceased had entered the accused's house without her authority. When their husband came home at about 1800 hrs he tried to resolve this dispute which had occurred in the afternoon. The now deceased was reprimanded about her conduct but she did not accept the reprimand. Instead she turned against the accused.

The now deceased grabbed the accused and assaulted her with a burning log. She went further to take the lid of a three legged aluminium pot (bhodho) and struck the accused at the back of her neck. The accused's 11 year old child who witnessed this unfortunate violence tried to restrain the now deceased unsuccessfully.

The accused retaliated by picking a cooking stick and assaulted the now deceased once on the head. The cooking stick was produced in court as Exhibit "2" and as per Exhibit "3" the Certificate of weight its weight is 0,23 kg. Its length is 51 cm. The diameter on its head is 5 cm, the middle part is 3,5 cm and handle is 2 cm. The now deceased fell on to the floor and started to breath heavily. Moments later she died.

As per Exhibit "1" the post mortem report the doctor observed the following injuries;

- *swollen left peri – auricular region*
- *bleeding from the nose*
- *subdural hematoma on the left*
- *skull fracture tempero – parietal region" (sic)*

The cause of death is said to be subdural hematoma arising from the head injury.

There is no doubt that the accused has been convicted of a very serious offence. The offence of culpable homicide arising from violent conduct invariably attracts a fairly lengthy prison term even for female first offenders. This is so because the court always upholds the sanctity of human life. While the gender prospective cannot be ignored, that alone would not dissuade the courts from descending heavily on those who resort to violence causing loss of life.

The accused being the senior wife and older should have acted with restraint. After the accused's 12 year old boy had sensibly intervened there was no need for the accused to retaliate. Further, the dispute between the accused and the now deceased despite being mired in the tribulations of polygamy was a minor one. Due to the accused's negligent conduct a young life has been lost leaving a 1 year old child.

A proper assessment of all factors on this case however shows that the mitigatory factors far outweigh the aggravating factors.

As already said the accused has 4 minor children. In addition to that the now deceased's 1 year old child has also been left in her custody. The accused is unemployed without savings or assets. To add salt to injury soon after the now deceased's death her husband abandoned her at the matrimonial home and his whereabouts are unknown. The accused now has the inenviable burden of looking after five minor children with virtually no means at all. As was said in mitigation both her in laws are deceased and she cannot outsource this onerous task to anyone. Considering her means even if she is given an option of a fine she will simply end up in prison. Further, given her family responsibilities she is virtually unable to multi task and meaningfully perform any community service work. Indeed the accused's personal circumstances cry out for mercy.

It is mitigatory that family assets were used to pay compensation to the now deceased's family. Both counsel submitted that payment of 9 cattle and RTGs15 000 was made to the now deceased's family including also a plough and scotch cart!! In addition to that the accused and her husband provided all the food consumed at the funeral. While this may never atone the loss of life it nonetheless is some form of punishment especially for a family of little means like that of the accused.

The weapon used by the accused cannot be described as a dangerous weapon despite the fact that the single blow she delivered was directed at the head. We did see the cooking stick in court and all things equal it may not cause such serious injuries. It is still possible that the now deceased was not fatally injured as a result of the direct blow of the cooking stick but that she may have hit hard on the ground when she fell. The degree of the accused's negligence is therefore moderate in the circumstances.

From the agreed facts the now deceased was the aggressor. Other than been the cause of the unfortunate misunderstanding the now deceased was again the first to attack the accused. To

that extent she was the author of her demise. She was not only younger in terms of age to the accused but was the junior wife. Culturally she should have shown the accused some respect.

It is our considered view that the accused should be spared of an effective custodial sentence. As already said other forms of punishment like payment of a fine or community service are inappropriate in view of the accused's personal circumstances. At the end of the day a wholly suspended prison term would meet the justice of the case.

In the result, the accused is sentenced as follows;-

“3 years imprisonment wholly suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence upon the person of another for which she is sentenced to a term of imprisonment without the option of a fine.”

*National Prosecuting Authority, counsel for the State
Matutu & Mureri, pro deo counsel for the accused*