

THE STATE  
versus  
SIMBARASHE MACHONA  
and  
JOHN MACHONA

HIGH COURT OF ZIMBABWE  
MAWADZE J.  
MASVINGO, 8<sup>TH</sup> February, 2022

**Criminal Trial: - Sentence**

**Assessors**

1. Mrs Chademana
2. Mr Nish

*E. Mbavarira* for the State  
*K. Mabvuure* for the accused 1  
*Ms I Moyo* for accused 2

MAWADZE J: Both accused 1 and accused 2 are father and son respectively. They were arraigned for murder as defined in s 47(i) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. However they were convicted of the permissible verdict of contravening section s 49 of the Criminal Law (Codification and Reform) Act [*Cap 9:23*]. This was on the basis of a statement of agreed facts.

I am indebted and grateful to the well-researched and detailed submissions by both counsel for the accused persons in mitigation and state counsel in aggravation. This court cannot be less wiser after such meaningful submissions.

The facts giving rise to this charge can be summarized as follows;

Accused 1 who is the father of accused 2 was 47 years at the material time. Accused 2 was and is a juvenile. He was born on 15 February, 2004. At the material time he was 16 years old. They are both residents of Village 7, Madzudzu, Chief Chitanga in Mwenezi.

The now deceased was 20 years old at the material time. The now deceased had a history of mental illness and would generally move from one place to another.

On the night of 30 January, 2020 the now deceased arrived at the accused persons homestead. He broke into the kitchen and took a small pot of sadza. The now deceased disappeared into the bush. The following morning the accused persons discovered the break in at their homestead. They also realized that a small pot of sadza was missing. Accused 1 and accused 2 followed some shoe prints which led to the now deceased who was found fast asleep in the bush.

The now deceased was taken to the accused persons homestead where instant punishment was meted out. The accused persons were joined by one Timothy and Mthokhozisi Mpofu who are at large. All the 4 persons took turns to assault the now deceased with mopani tree switches all over the body. Upon being released the now deceased collapsed and died.

During the night accused 1 used a scotch cart to ferry the now deceased's body to a hill near Munhundishe Primary School where accused 1 dumped it. The decomposing body of the now deceased was only discovered on 1 February, 2020. The accused persons were only arrested in March 2020.

The post mortem examination by Dr Godfrey Zimbwa could not establish the cause of death as the now deceased's body had decomposed.

There is no doubt that accused persons are facing a very serious offence involving loss of life.

The right to life is a non-derogatory right in the Constitution. It is clear from the agreed facts that a life was needlessly lost. What is saddening is that the now deceased paid the ultimate price over a small pot containing some left over of sadza.

One would have expected that the accused persons especially accused 1 being an adult person would take the now deceased to the police. Instead the accused persons decided to take the law into their own hands. They acted as the complainant, the police and the jury as it were in their own case.

It is difficult to appreciate that the accused persons failed to realise that the now deceased was even of unsound mind. They were pre-occupied with inflicting punishment regardless of any other factors.

The assault itself was perpetrated by four people and qualifies as a gang assault. The force used should have been severe as the now deceased died the very day of the assault. The accused persons should have inflicted very serious injuries. The findings in the post mortem report cannot distract from this fact. The now deceased was clearly defenseless and at the mercy of the accused persons. It is clear that the accused persons were reckless and did not care about the consequences of their conduct. The moral blameworthiness of accused 1 is even higher on condition of his age and conduct after deceased's death. Accused 1 dumped the now deceased's body near a hill in the bush to conceal the crime he and others had committed. Accused 1 was oblivious as to what would happen to the now deceased's body. He literally left it to decompose in the bush which it did. Indeed the deceased's body could well have been devoured by wild animals. Accused 1 cared less as long as he saved his skin. It never occurred to accused 1 that the now deceased despite dying such a painful death deserved to be accorded at least a decent burial in line with our morality or "*Ubuntu*".

The arrest of the accused persons is wholly attributed to the police who unraveled this case after almost three months. Without such industry from the police this case could have died a natural death.

The degree of negligence in this case is very high. The moral blameworthiness of accused persons especially accused 1 is even higher.

Having said all this there are mitigating factors.

Some of the mitigating factors are common to both accused persons but some are peculiar to each accused. These mitigating factors are so material to the extent that the accused persons cannot be treated the same in sentencing them.

In relation to the common mitigating factors they are both first offenders. To that extent they deserve some measure of leniency.

Both accused persons pleaded guilty to the charge. Infact upon their arrest they co-operated with the police and they admitted to have fatally assaulted the now deceased. In light of the indeterminate cause of death they could have raised flimsy defenses or shifted the blame to their

two accomplices at large. Despite being out on bail they attended court religiously and were prepared to face the consequences of their conduct.

As rural and unsophisticated persons they may well have labored under the wrong belief that they were entitled to chastise a thief as it were. Clearly they had no intention to kill but are punished for their negligence.

As things stand both accused persons will forever live with the stigma that they have the now deceased blood on their hands.

On the other hand the age difference between them is a material factor.

Accused 1 is an adult man. He is a father to four minor children. His wife and children are dependent on him. His incarceration would obviously adversely affect this family.

Accused 2 was a juvenile at the time of the commission of the offence and is still a juvenile. This denotes immaturity and failure to appreciate the consequences of his conduct. In sentencing juvenile offenders the court should always be alive to the sentiments I expressed in the case of *S v Ncube* 2011 (1) ZLR 608 (H). The probation officer as Exhibit 3 clearly shows that accused 2 should be treated as a special category offender. As a child his best interest are paramount and should not be condemned or treated like an adult.

Accused 2 was in Form 2 at the material time but stopped attending school as a result of his arrest in this case. The court should not further damage accused 2's future.

It may well be that accused 2 acted under the influence of elderly persons especially accused 1 his father. The element of mob psychology is more pronounced in an impressionable mind like that of accused 2. To that extent therefore accused 2 should not and cannot be treated the same as accused 1 an adult person.

In the result each accused is sentenced as follows;

*“Accused 1 Simbarashe Machona :- 6 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused 1 does not commit within that period any offence involving the use of violence upon the person of another and or any offence involving negligently causing the death of another through violent conduct for which accused is sentenced to a term of imprisonment without the option of a fine.*

*Effective sentence for accused 1:- 4 years imprisonment.*

*Accused 2 John Machona:- 3 years imprisonment wholly suspended for 5 years on condition accused 2 does not commit within that period any offence involving the use of violence upon the person of another for which accused 2 is sentence to a term of imprisonment without the option of a fine”.*

*National Prosecuting Authority, counsel for the state  
Chihambakwe Law Chambers, pro deo counsel for accused 1  
Mutendi, Mudisi and Shumba, pro deo counsel for accused 2*