

THE STATE
versus
ZADZISAI KUODZA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 28 October 2021, 21 January, 22 February & 18 March, 2022

Mr E. Mbavarira, for the state
T Nyoka with O. Mafa for the accused

Assessors

1. Mr Mutomba
2. Mrs Chademana

Criminal Trial

MAWADZE J: To try and establish the truth in this matter is like looking for a needle in a haystack. It is a difficult exercise to say the least.

This judgment incorporates another judgment in this same matter which is HMA 15/22. This was a ruling on the application for discharge of the accused at the close of the prosecution case made in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Cap 9:07*]. The application was unsuccessful. The accused was put on her defence. In that vein therefore it may not be necessary to regurgitate evidence led by the state in much detail as this as well outlined in HMA 15/22.

The 50 year old was arraigned for murder as defined in section 47(i) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 1 April, 2019 and in Mamvura Village, Chief Munyikwa, Gutu, Masvingo the accused unlawfully and intentionally caused the death of Simbarashe Matombo then aged 46 years by assaulting him several times with a blunt object all over the body.

Most of the events preceding the now deceased's death are not in issue.

The accused was in a love triangle. She was in love with two local men being the now deceased Simbarashe Matombo aged 46 years and residing in Matombo village, Chief Munyikwa, Gutu and Ephias Chiwara aged 49 years residing in Mutsaka Village, Chief Munyikwa, Gutu. Infact Ephias Chiwara who testified indicated that he was aware that the now deceased was in love with the accused. He further said that at some point he was actually assaulted by the now deceased over his love affair with the accused. It is not clear as to whether the now deceased was also aware that accused was also in love with Ephias Chiwara.

The accused was staying alone at her homestead in Mamvura Village, Chief Munyikwa, Gutu. Her homestead comprises of a kitchen hut, a round hut and three roomed flat. These two men would interchangeably visit her at her homestead. The state implies that it is this love triangle which culminated in the tragic events leading to the now deceased's death.

The accused denies having a hand in the deceased's death. The thrust of her defence is that she does not know the circumstances of the now deceased's death.

The state led evidence from the accused's other boyfriend Ephias Chiwara; the accused's daughter in law 41 year old Shuwai Gapare who was also accused's neighbour; the accused's young brother Bonface Kuwodza and the Investigating Officer D/Sgt Tinashe Innocent Davis Nyamayaro.

The evidence of deceased's young brother Sylvester Matombo, Cst Namatai DinHIRA and Dr Godfrey Zimbwa was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The accused gave evidence and did not call any witnesses or produced any exhibits.

A total of 3 exhibits were produced by consent. These are;

Exhibit 1 the post mortem report, exhibit 2 the accused's confirmed warned and cautioned statement and Exhibit 3(b), (c), (d), (g) and (f) being the photographs of the deceased's body after his demise.

Nothing turns on the accused's confirmed warned and cautioned statement. In that statement the accused simply stuck to her story as per her defence outline Annexure (B) save for some inconsequential details.

The cause of the now deceased's death is not in issue. The deceased's young brother Sylvester Matombo confirms that the now deceased was in good health prior to his death on 1 April 2019 with no injuries. This is corroborated by the accused herself who spent the better part of that fateful day with the now deceased and was the last person to have been seen in the now deceased's company on that fateful night.

However when the deceased's body was discovered the following morning in some rapoko filed near accused's homestead there was clear evidence of severe injuries. The signs of violence on the deceased body can be seen on the photographs exhibit 3. D/Sgt Nyamayaro who attended the scene and examined the now deceased's body observed the following injuries;

- (i) Swollen left eye
- (ii) A cut at back of the now deceased's head
- (iii) Bleeding from the nose and mouth

Dr Zimbwa who examined the remains of the deceased and authored the post mortem report exhibit 1 made the following observations;

- “1. *Facial and neck bruising*
2. *Bilateral peri orbital haematoma*
3. *Bruising and haematoma on frontal area*
4. *Loose neck, moves with crepitus*
5. *Bruising both upper limbs”*

Dr Zimbwa concluded that the cause of the now deceased's death was head injury and cervical spine fracture.

The finding is therefore made that the now deceased did not die of natural causes. Physical harm was inflicted on his person hence the evidence of a violent death, possible from such an assault.

The only concern is that Dr Zimbwa was not called to give *viva voce* evidence. His evidence would have probably shed light on what possible caused the injuries he outlined in the post mortem report exhibit 1 and the fatal injuries. This was necessary in light of the allegations

by the state that accused fatally assaulted the now deceased several times all over the body with a blunt object. Why is it being said only a blunt object was used and is it consistent with the injuries Dr Zimbwa observed. This was even more critical when one considers that the state insinuated as per the evidence of Ephias Chiwara and accused's daughter in law Shuwai Gapare that the accused at some point quarrelled with the now deceased whilst wielding an axe and was heard shouting saying in Shona "*ndokutema*" [I will strike or cut you]. Lastly Dr Zimbwa may have been able to explain if it was possible that accused on her own, being a female, could have inflicted such injuries on the now deceased more so as accused herself did not sustain any injuries. Thus without the benefit of *viva voce* evidence of Dr Zimbwa the court is left to second guess on how deceased sustained those injuries and the possible weapon(s) used.

The problem with the state's case is that there was no eye witness as to how the now deceased was fatally assaulted on 1 April, 2019. The state therefore relies on circumstantial evidence.

It is not denied that the accused spent the better part of that day with the now deceased. Her testimony is uncontroverted. In brief it is as follows;

The accused said on that day 1 April, 2019 there was a market some 2 km from her homestead. Accused decided to go to the market in the morning. Before she left the now deceased arrived at her homestead en route to the same market. The accused said the now deceased wanted to buy roofing sheets. They left for the market together and arrived at the market around 0900 hrs. After buying some items [the now deceased brought roofing sheets] they drank beer together. Later in the day the now deceased proposed to go and leave his roofing sheets at accused's homestead. The accused objected telling the now deceased that his home was closer to the market compared to the accused's homestead. The now deceased however stealthily went and left the roofing sheets at accused's homestead. Thus when the accused left the market and got home around 1600 hrs she found the now deceased at her homestead. The now deceased had put the roofing sheets in her yard. The accused had also removed his pair of shoes and cap saying they were now wet [one assumes it was raining].

The accused said at around 1700 hrs the now deceased left her homestead saying he was going to look for a boy to assist him to ferry the roofing sheets to now deceased's homestead. The accused said either by design or mere oversight the now deceased also left his wet shoes and cap

at her homestead. Meanwhile after the now deceased left the accused said he other boyfriend Ephias Chiwara arrived around 1800 hrs. The accused said she started to cook food for supper and Ephias was hiding in one of her rooms lest the accused's brothers could see him. The accused said around 1900 hrs the now deceased came back but without the said boy and by then accused was cooking outside. The accused said the now deceased was now singing a different tune demanding to spend the night with the accused at accused's homestead. Since the accused's other boyfriend was present Ephias Chiwara the accused refused to accept the now deceased's request.

The accused said this was the cause of the argument accused had that night with the now deceased. The accused said the now deceased only left her homestead when he heard the voices of the accused's brothers approaching from the market. By then Ephias Chiwara was still hiding in one of her rooms from the now deceased and probably also from accused's brothers. The accused said Ephias Chiwara could therefore not see what was happening outside accused's house.

The accused said when his brothers arrived she reported to them the problem she was having with the now deceased and that the brothers should chase away the now deceased. The accused said her brother Bonface then picked an axe threatening to harm whoever was present. In the process the accused's brother entered accused's room and Ephias Chiwara bolted out wearing his underpants only to come back after accused's brothers had left.

The accused denied that she fought the now deceased or threatened to strike him. The accused said she simply went into her house leaving the now deceased outside as he was insisting to spend the night with her.

The accused stuck to this story in her defence outline, in her evidence in chief and under cross examination. The only notable omission is that in her statement the accused did not disclose the quarrel she had with the now deceased who insisted to spend the night with her. There is nothing one can read about accused's demeanour. She remained calm throughout her evidence and fully answered all questions put to her.

The burden to prove the commission of a criminal offence rests with the state. The threshold of proof is beyond reasonable doubt. Now did the state discharge this evidential onus and proved beyond reasonable doubt that it is the accused who fatally attacked the now deceased?

We turn to the evidence of the state witnesses in order to answer this question.

Shuwai Gapare (Shuwai)

All Shuwai the accused's daughter in law said is that she heard accused and the now deceased quarrelling on the night in question at accused's homestead. She said she just heard accused saying in Shona "*ndokutema*" [I will strike at you]. The issues of a quarrel is not disputed by the accused. It is the said words which accused disputed. What is amazing about Shuwai's evidence is that she could not explain any other words uttered by either the accused or the now deceased other than the said words. She could not tell what the dispute was all about. Why would she fail to grasp what was happening. Shuwai's evidence is not convincing at all.

Bonface Kuodza (Bonface)

Bonface the accused's young brother said as he passed accused's homestead he saw accused walking outside her yard with a cell phone light on. However Bonface's evidence is not only interesting but confusing as it is at variance not only with the accused's evidence but with Ephias Chiwara's testimony.

Bonface's was in the company of three other men. He said the accused called him saying some thieves or people were bothering her. He proceeded to the accused's house. For some strange reason he did not seek any further details but proceeded to try and search inside accused's flat. He said before he opened the door Ephias Chiwara bolted out wearing boxers only. Bonface would want this court to believe he did nothing but just left. Why would he not chase after Ephias Chiwara? Why would he not interrogate the accused? That evidence is incredible to say the least. The accused's version is more probable.

Ephias Chiwara (Ephias)

The evidence of Ephias was not only difficult to follow or understand. Why do we say so?

- (i) Ephias could not explain a simple issue of where, how and what time he met the accused that day. The accused was very clear on this.
- (ii) Ephias prevaricated as to what he was doing when the now deceased arrived at accused's homestead. He said accused was cooking, then said they were drinking beer with the accused and then said he was scared and was hiding from the now deceased who once previously assaulted him. Again accused was clear that Ephias was hiding.

- (iii) Ephias was unable to explain the number of times the now deceased visited the accused's homestead that night. Surely he was present and why would he find such a simple issue burdensome. He could not even explain the purpose of the said visit(s).
- (iv) Ephias's version of how accused and the now deceased allegedly fought was difficult to follow. He said they used hands. He changed and said the accused had an axe shouting saying, "*ndokutema*" [I will strike at you]. He then said they pushed each other into the fields. His other version is that he was hiding and did not see what happened between accused and the now deceased.
- (v) Ephias's evidence is unclear as to what was happening when Bonface came to accused's homestead. He corroborated accused that accused reported to Bonface that the now deceased was harassing her. He said Bonface then searched accused's house but does not say where the now deceased was by then. Ephias does not explain why he decided to flee naked and worse still have the courage to come back and spent the night with the accused without fearing the return of either Bonface or the now deceased.

In our assessment Ephias was a terrible witness who was not keen to tell the court the truth at all. Is it possible that he would just watch as the accused his girlfriend was being harassed and assaulted by the now deceased? If he was seated inside the house as accused and the now deceased quarrelled why did Bonface suddenly find him naked? After hiding from his nemesis the now deceased and fleeing from accused's brothers why would he come back and have the courage to spent the night peacefully with the accused without fear of the possible return of either the accused's brothers or the now deceased. In short Ephias is not worthy believing at all!

D/Sgt Nyamayaro

As the investigating officer D/Sgt Nyamayaro should have not taken issues at face value but with a discerning mind. It should have been clear to him that Ephias Chiwara was a suspect whom he should at least have jointly charged with the accused. There was no capital to be gained at all by making Ephias Chiwara a state witness. Further he should have further interrogated the role of accused's brothers especially Bonface. Did he honestly believe the accused a female would single handedly fatally injure the now deceased and possibly remove the now deceased's body

from her homestead to where it was found? Did he establish exactly where the now deceased was exactly when he died? Was it at accused's homestead or some point in the fields or where the body was finally found? The bottom line is that this was a poorly investigated case more so as he had evidence of a love triangle.

The celebrated case of *S v Bloom* 1939 AD 188 outlines the principles of logic in the applicability of circumstantial evidence. The cardinal rule is that circumstantial evidence can only be properly applied in a criminal matter to draw a correct inference pointing at an accused's guilt if such an inference sought to be drawn is the only reasonable one to be derived from the proved facts. See also *S v Shonhiwa* 1987 (1) ZLR 215 (S); *S v Vhera* 2003 (1) ZLR 688 (H).

In casu from the facts proved one cannot draw a single inference pointing to the accused's guilt. Indeed it may be possible that as a result of the quarrel accused fatally assaulted the now deceased. However what did she use and where did the assault took place? It is possible the paramour or rival suitor Ephias Chiwara is an accomplice or he fatally assaulted the now deceased alone. It may well have been accused's brothers including Bonface and others exercising some misplaced patriarchal authority. It may well be just other persons who pounced on the now deceased as he made his way home from accused's place, more so as this was a market day. No single inference can be drawn.

It is our considered view that the state has not discharged its evidential onus. The accused should be accorded the benefit of the doubt.

Accordingly the accused is found not guilty and acquitted.

VERDICT

Not guilty and acquitted.

National Prosecuting Authority, counsel for the state
T. Munyanyi & Associates, *pro deo* counsel for the accused