

THE STATE  
versus  
DENFORD TAFAMBA  
And  
JAMES TAFAMBA

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO, 31 May, 1 June, 11 November 2021.  
9, 10 May, 21 June & 15 July 2022

Assessors: 1. Mr Gweru  
2. Mr Nish

*Ms M. Mutumhe*, for the state  
*Ms P N Magaiza*, for accused 1  
*Ms G T Ndava*, for accused 2

### **Criminal Trial**

MAWADZE J: Both accused persons are facing a charge of murder as defined in section 47 (1) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]. The charge is that on 22 April 2020 at Tafamba homestead, Mutomani village, Chief Gudo in Chiredzi each of the accused or both of them unlawfully and intentionally caused the death of John Mutomani by assaulting him with fists, stones and a wooden bench on the head several times.

Both the accused and the now deceased are closely related. What caused the tragic mayhem in this matter is centred on the dispute relating to the leadership of their village or village headmanship.

Accused 1 Denford who was then aged 35 years is a secondary school teacher and a son of Accused 2 James. Accused 2 James was then aged 68 years old.

Accused 1 Denford resides in Mapindami village, Chief Gudo Chiredzi and Accused 2 James resides in Mutomami village, Chief Gudo, Chiredzi.

The now deceased John Mutomani was aged 48 years and is a young brother to Accused 2 James.

At the material time Accused 2 James was the village head or acting village head of Mutomami village. On 22 April 2020 other family members including the now deceased, Simon Mutomani, Fresh Mutomani, Svongwai Murehwa and others drove to Accused 2 James's homestead and Accused 1 Denford was already at Accused 2 James his father's homestead.

A meeting was convened at Accused 2 James's homestead to discuss the rightful person to assume the village headmanship of Mutomami village in which both the now deceased John Mutomani and Accused 2 James Mutomani laid claim to.

During the discussion the dispute was not resolved. Accused 1 Denford decided to telephone Chief Gudo which the now deceased did not take kindly to. The now deceased told accused Denford not to telephone Chief Gudo or even mention the now deceased's name. The now deceased tried to take Accused 1 Denford's mobile handset but Accused 1 Denford would not budge. This is the genesis of the subsequent physical confrontation which ensued and is in dispute as to how it unfolded leading to fatal injury inflicted on the now deceased.

The state alleges that it is Accused 1 Denford who first struck the now deceased with a fist causing the now deceased to fall down. The state alleges Accused 1 Denford then picked stones which were in abundance at this rocky place and hit the now deceased who was lying on the ground. The state alleges that Accused 2 James joined in the fracas by picking a wooden bench and struck the now deceased on the head inflicting a serious injury. The state alleges that Simon Mutomani and Svongwai Murehwa then intervened and rescued the injured now deceased who was immediately taken to the local clinic and a report made at the local police base. The now deceased was then referred by the police to Chiredzi general hospital where he was sutured with 7 stitches on the head. The police proceeded to the scene of the alleged crime at Accused 2 James's homestead and recovered the wooden bench allegedly used to assault the now deceased on the head. Apparently the now deceased was not admitted at Chiredzi general hospital. However it is alleged that his condition deteriorated and upon revisiting the same hospital on 27 April 2020 he was referred to Harare for specialist treatment where he was admitted on the same day 27 April

2020 but died the following day on 28 April 2020. An autopsy report by a pathologist Dr Tsungai Jabangwe indicated his cause of death as;

- “1. *Septicaemia*
2. *severe acute inflammation of the scalp*
3. *scalp laceration secondary to blunt force head injury*
4. *Hypertensive heart disease*”

Both Accused 1 Denford and Accused 2 James vehemently disputed the version alleged by the state.

Accused 1 Denford said on the day in question he had visited his father Accused 2 James when the now deceased in the company of about 15 people including state witnesses Fresh Mutomani, Simon Mutomani, Svondwai Murehwa arrived at Accused 2 James’s homestead early in the morning unannounced using a vehicle. He said the now deceased who was aggressive pronounced that he had come to claim the village headmanship which post was being held by Accused 2 James. The local councillor Alfred Mazombwe was also present. Accused 1 Denford said naturally Accused 2 James refused to surrender the village headmanship and a dispute erupted.

Accused 1 Denford said in good faith he decided to appeal to a higher authority being Chief Gudo whom he contacted telephonically. However Accused 1 Denford said this incensed the now deceased who became the aggressor and accused 1 Denford said he was attacked in the following manner.

Accused 1 Denford said the now deceased hit him with a fist causing him to fall down and continued to assault him as he lay helplessly on the ground. Accused 1 Denford said the now deceased’s colleagues Fresh Mutomani, Simon Mutomani and Svondwai Murehwa joined in and also attacked him until he fractured his right hand and fell unconscious. Accused 1 Denford said when he gained consciousness, he proceeded to the local Muteyo base to file a report but he was told the now deceased and his colleagues had beaten him to it as they had already made a report against Accused 1 Denford and his father Accused 2 James. As a result, Accused 1 Denford said the police turned a deaf ear not only to his report but continued to be biased against him in all their investigations. Accused1 Denford said all the police did was to refer him to Chiredzi general hospital where his fractured hand was put in a plaster. Accused 1 Denford completely denies playing any part in the alleged assault of the now deceased. In fact he said he was unconscious at the time the now deceased was injured. He said other independent witnesses like the local

councillor would have been proper witnesses to what happened and not the now deceased's partners in crime. This is the same version 1 Denford gave in his confirmed warned and cautioned statement exhibit 5 save for the part that he fell unconscious at some stage. Accused 1 Denford also maintained this version of events in his evidence in chief.

When Ms Mutumhe cross examined him Accused 1 Denford said he decided to call Chief Gudo telephonically to ensure a peaceful resolution of the dispute which had ensued. He nonetheless admitted that he preferred his father Accused 2 James to remain the village head.

In order to buttress his case Accused 1 Denford called his young brother Taurai Tafamba who was also present as a defence witness. Taurai Tafamba gave a similar account to that of Accused 1 Denford save for his new evidence that Accused 2 James was also assaulted by Fresh Mutomani. Again, he conceded that it was natural for him to fight in the corner of his elder brother Accused 1 Denford as it were but insisted that he was truthful.

Accused 2 James who was the incumbent village head (acting or substantive) gave a similar account of how the events unfolded as narrated by his son Accused 1 Denford upto the point he says the now deceased started to assault Accused 1 Denford.

Accused 2 James raises the defence of a third party being his son Accused 1 Denford. He said when he realised that the now deceased, Fresh Mutomani, Simon Mutomani, Ngonidzashe Mutomani were viciously assaulting his defenceless and helpless son Accused 1 Denford with fists and booted feet as he lay on the ground he decided to intervene to save Accused 1 Denford's life. Accused 2 James said he did this by picking a wooden bench which he just threw towards the attackers of his son Accused 1 Denford which bench fortuitously hit the now deceased on the head. Accused 2 James said he believed the injury he inflicted was not serious let alone fatal but nonetheless conceded that it is that blow which caused the injury on the now deceased's head. Again, Accused 2 James gave a similar version in his confirmed warned and cautioned statement exhibit 6.

In his evidence Accused 2 James said the attackers of his son Accused 1 Denford did not even relent even after he had thrown the wooden bench at them. He said it took the intervention of Accused 2 James's wife who came with a machet and assaulted some of the assailant to stop the

brutal attack of Accused 1 his son who lay unconscious and was only resuscitated when water was poured on him and had sustained a broken arm.

Under cross examination by *Ms Mutumhe* for the state Accused 2 James grudgingly accepted that the head injury he inflicted on the now deceased caused the now deceased to bleed and that it is the cause of his death. Accused 2 James did not call any witness.

The state in buttressing its case relied on the testimony of Simon Mutomani, Fresh Mutomani and Svondwai Murehwa. The evidence of constable Dion Mukandu and inspector Atwell Ngara simply relates to police investigations. Similarly, the evidence of Dr Adraph Dube [which was admitted in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]] and Dr Tsungai Victor Jabangwe a senior pathologist relate to the injuries the now deceased sustained and the cause of death respectively.

A total of 9 exhibits were produced [7 by the state and two by Accused 1 Denford]. We proceed to comment on the probative value of these exhibits [not in sequence however].

We have already referred to exhibit 5 and exhibit 6 which are Accused 1 Denford and Accused 2 James's confirmed warned and cautioned statements respectively.

Exhibit 1 is the wooden bench Accused 2 used to strike the now deceased on the head. It weighs 1,54kg as per its certificate of weight exhibit 2. Indeed if moderate to severe force is used to strike a person with such a weapon on the head fatal injury can be inflicted.

Exhibit 8 and Exhibit 9 relate to Accused 1 Denford being his medical card and medical report respectively.

As per Exhibit 8 the medical card Accused 1 Denford was treated on day in question 22 April 2020 at a local clinic. Accused 1 Denford has a swollen arm assessed as a possible fracture and Accused 1 Denford continued to receive treatment until 3 June 2020. Exhibit 9 is a duplicate medical report as the initial one was lost. It is dated 14 January 2021. The findings by Dr Lavaia Keith at Chiredzi general hospital is that Accused 1 Denford fractured both bones of the right hand due to severe force.

It is therefore a fact that Accused 1 Denford was in all probabilities severely assaulted. We say so because none of the state witnesses gave a credible account of how Accused 1 Denford was severely injured. The state witnesses were present and should have shed light as to how Accused 1 Denford was seriously injured as shown in Exhibit 8 and Exhibit 9.

Exhibit 7 is the medical report compiled by Dr A Dube at Chiredzi on 24 April 2020. It shows that the now deceased on 24 April 2020 sustained a scalp laceration which was sutured [7 stitches] and the head injury was deemed serious as it could result in mental illness. Indeed 3 days later Dr A Dube attended to the now deceased and observed that his condition had deteriorated as his face and neck were now grossly swollen; he could hardly walk [his gait was said to be staggering] and exhibited shortness of breath. This caused Dr A Dube to immediately refer the now deceased to a neurosurgeon in Harare for specialist treatment. It therefore can not be true as Accused 2 James said in his defence outline that he caused a minor head injury as he applied moderate force and that there is no nexus between that head injury and the now deceased's death.

Exhibit 4 is the Pathology Test report which is linked to Exhibit 3 the post mortem report by Dr Javangwe dated 3 May 2020.

Exhibit 3 is fairly detailed and Dr Javangwe gave *viva voce* evidence explaining the Autopsy report. It clearly states that after being assaulted on 22 April 2020 the now deceased was attended at a local clinic with "a head laceration". However after initial treatment [as per exhibit 7] his condition worsened as is detailed in Exhibit 7 [shortness of breath, staggering gait, swollen head, swollen face]. Upon referral to Harare a CT scan was done and it revealed "*extensive circumferential scalp soft tissue haematoma, soft tissue injury left occipital /parietal region with effacement tissue.*"

Dr Javangwe observed "*a left parietal linear laceration, irregular edges 7x0,5cm to 8 'O' clock orientation*" and puss underneath the scalp.

The cause of the now deceased's death is not in issue as belatedly conceded by Accused 2 James. In simple terms it was severe head injury caused by the blow Accused 2 James delivered with Exhibit 1 the wooden bench. Dr Javangwe clearly explained the chain of events leading to the now deceased's death. The doctor said the initial event leading to the fatal injury was blunt force on the head and that further developments like stressful high sugar level and negative effects on the heart were all triggered by this initial injury to the head.

What is important to note is that the fatal injury was to the now deceased's head and it was a single blow. This is inconsistent with the state case that the now deceased was assaulted all over the body with booted feet and stones. If that was the case surely evidence of such an assault would have been observed when he was first attended to on day of assault on 22 April 2020.

The critical question therefore is how the now deceased sustained the fatal injury. This leads us to the testimony of the state's key witnesses Simon Mutomani [Simon], Fresh Mutomani [Fresh], Svondwai Murehwa [Murehwa].

Simon's evidence is that it is Accused 1 Denford who first delivered a fist to the deceased's head causing both Accused 1 Denford and the now deceased to fall. He said Accused 1 Denford then sat on the now deceased's tummy and assaulted him on the head with fist size stones. Simon said he rushed to rescue the now deceased but Accused 2 James's wife came with a machete and struck Simon on right shoulder and finger and also injured Murehwa who had tried to intervene. Thereafter he said Accused 2 James came with a wooden bench Exhibit 1 and hit the now deceased on the side of the head inflicting a serious injury. Simon said Accused 2 did not throw the bench but used it whilst holding the bench.

The challenge with Simon's evidence is that it seems exaggerated and he down played his own role. If Accused 1 Denford had used fist size stones to hit the now deceased on the head surely such injuries would have been observed at the clinic and at Chiredzi general hospital where the now deceased was treated. Further if Simon was as objective witness he would not have denied that Accused 1 Denford was injured.

Fresh Mutomani gave a similar sequence of events to that of Simon. The only material difference is that unlike Simon, Fresh said Accused 2 James first came with the wooden bench and assaulted the now deceased after which Accused 2 James's wife came with a machete which she used to inflict injuries on both Simon and Fresh. This material contradiction was never resolved by the state.

Murehwa gave a complete different sequence of events from that of both Simon and Fresh. He said after Accused 1 Denford first hit the now deceased with a fist, he, Murehwa held Accused 1 Denford and took Accused 1 Denford out of the yard to the gate. Simon and Fresh said after being hit with a fist by Accused 1 Denford the now deceased fell down and Accused 1 Denford sat on top of the now deceased. Murehwa seems to suggest that while Accused 1 Denford was at the gate Accused 2 James then hit the now deceased with the wooden bench. However, Simon and Fresh said all this happened as Accused 1 Denford sat on the tummy of the now deceased. Again Murehwa is the only witness who said Accused 1 Denford only came and sat on top of the now deceased hitting the now deceased with stones after Accused 2 James had struck the now deceased.

with the wooden bench. Murehwa also said he was unaware as to how Accused 1 Denford was injured or that he (Accused 1 Denford) was at all. He said Accused 2 James's wife then came with a machet and struck Murehwa on the hand [we indeed saw a healed scar consistent with that attack].

The impression one gets is that both versions by state witnesses on one hand and the accused persons on the other generated more heat than light as it were. Each side sought to down play its role. The role of the other opposing side was exaggerated. The truth was unfortunately the resultant causality.

In our assessment it is clear that a brawl or mayhem ensued resulting in injuries on both opposing sides. Indeed fists, booted feet, wooden bench and a machet were used. In the midst of all this the court is enjoined to keep the eye on the bail and decide the criminal liability of both accused persons vis-à-vis the now deceased's death.

In our view *Ms Mutumhe* for the state in her closing written submissions rightly and correctly conceded that no criminal liability can be attached to Accused 1 Denford. While he may have thrown a fist or two or engaged in a brawl with the now deceased, what is clear is that the injury on the now deceased's head was inflicted by Accused 2 James to use the wooden bench. Further when Accused 2 James decided to use the wooden bench Exhibit 1 it can not be said he was acting in common purpose with Accused 1 Denford.

The last issue is whether when the Accused 2 James used the wooden bench to fatally injure the now deceased he was acting in defence of his son Accused 1 Denford. The law as regards self defence and the defence of a third party is well settled as per section 253 of the Criminal Code [Chapter 9:23]. In the case of *Collet Baira Manzonza v State HMA 2/16* I discussed this defence at length and its applicability.

What emerges from all the evidence is as follows;

- a) All material state witnesses Simon, Fresh and Murehwa were clear that Accused 2 James used the bench while holding it and not throwing it.
- b) Accused 2 James directed his blow to the now deceased head.
- c) Accused 2 James used severe force
- d) At the time Accused 2 James decided to take the bench his son Accused 1 Denford should have been under unlawful attack which even resulted in a broken hand.

- e) Assuming Accused 2 James threw the bench at the assailants of his son Accused 1 Denford such conduct remains improbable because he could well have hit his own son whom he was trying to rescue. In all probabilities he used the wooden bench while holding it.
- f) The means Accused 2 James used was unreasonable as all the protagonists at most were using fists and booted feet.

Our finding is that Accused 2 James was negligent in the manner he sought to defend his son Accused 1 Denford. It is the blow to the deceased's head which he delivered which is the proximate cause of the deceased's death. The means he used was clearly not reasonable in the circumstances and he was negligent.

We therefore find Accused 2 James guilty of the permissible verdict of Culpable Homicide.

VERDICT:

Accused 1 Denford: Not Guilty and Acquitted

Accused 2 James: Guilty of contravening section 49 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*]: - Culpable Homicide.

SENTENCE:

The sentence only relates to Accused 2 James since Accused 1 Denford has been found not guilty and acquitted.

Accused 2 James now stands convicted of a lesser charge of culpable homicide.

A proper balance of mitigating and aggravating factors should be made in order to arrive at a fair and just sentence.

The offence of culpable homicide arising from violent conduct remains a very serious offence. It entails loss of life which this court has a duty to protect. The sacred nature of human blood can not be over emphasised.

It is saddening to note that offences involving violent conduct leading to loss of life remain prevalent in Masvingo.

My simple exhortation to the to the public is that disputes arising from contestations for power, be they chiefmanship, headmanship or village headmanship should never be violent and

let alone lead to loss of life. Which sane person would want to be in power after shedding innocent or unnecessary blood? Would you enjoy that position and sleep peacefully? There are proper and legal ways to resolve such disputes.

It is saddening that Accused 2 James has decided to resort to crime in the afternoon of his life. It is uncharacteristic for such an old person of 70 years of age to resort to violence. Instead, you should be the foundation or voice of reason. You were expected to counsel those younger to you.

In assaulting the now deceased with a wooden bench on the head you did not only use a lethal weapon but directed it at the head which is a vulnerable part of the body. Fatal injury was inflicted because of severe force.

Your lack of remorse is astonishing given the circumstances of the case and the loss of life. One would have expected you to own up and be able to heal the wounds within your extended family. My hope is that you would pursue reconciliation through the mediation of chief Gudo as was said by your counsel so that you would leave a positive legacy.

The degree of negligence in this case is between moderate and high side.

In mitigation one has to consider that at 70 years of age you are in the sunset of your life. One wonders why you decided to find yourself on the wrong side of the law at such an age.

As a first offender you deserve some measure of leniency.

You are married with 7 children whom we are told are all majors but one is mentally challenged hence is a perpetual minor. The other is in upper sixth and still dependant on you.

It is commendable that you have now surrendered the village headmanship. This is the first step to heal the rift within the extended family.

The fact that you caused the death of your young brother will forever haunt you.

It is accepted that you did not plan to commit this offence. The visit by other family members at your homestead was unannounced. Further, it is accepted that you acted in the manner you did in the bid to protect your son who was under unlawful attack and sustained a broken arm.

You delivered a single *albeit* fatal blow.

The only question one has to answer is whether any useful purpose would be served by sending a 70 year man to prison who would be a burden to prison officers and to the fiscus. The

justice of the case demands that at your advanced age this court should spare you an effective prison sentence.

In the result you are sentence as follows;

*“3 years imprisonment of which is wholly suspended for 5 years on condition the accused does not commit within that period any offence involving the use of violence against another and or negligently causing the death of another through violent conduct and for which the accused is sentenced to a term of imprisonment without the option of a fine.”*

*National Prosecuting Authority, counsel for the state*  
*Pundu & Company, counsel for the accused 1*  
*Magwana & Partners, counsel for the accused 2*