

THE STATE
versus
ADONIA MOYO
And
ELIAS CHIMBUYA

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 23,24 May,4 & 22 July 2022.

Assessors: 1. Mr Nish
2. Mrs Chademana

Mr E. Mbavarira for the state
Mr C. Mutema, for accused 1
Mr O. Mafa, for accused 2

Criminal Trial

MAWADZE J: At the close of the defence cases for accused persons both *Mr Mutema* for accused 1 and *Mr O Mafa* for accused 2 indicated that they had no closing submissions either orally or written to make. Indeed, their stance may be understandable. The case for both accused persons is not an easy one to say the least. It is only *Mr Mbavarira* for the state who filed written closing submissions.

Both accused have been arraigned for murder as defined in section 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The charge is that on 15 July 2021 and at near Mombasa, Dunira Mall 1, Victoria Ranch Township, Masvingo each of the accused or both of them intentionally and unlawfully caused the death of TAFADZWA CHIUMBA by striking him on the head several times and stabbing him with a knife several times all over the body.

Both Accused 1 Adonia aged 27 years and Accused 2 Elias aged 25 years were residents of Masvingo at the material time. Accused 1 Adonia was a vendor cooking sadza for sale at Gomba business centre in Masvingo. Accused 2 Elias was a tout in Masvingo and would also illegally sell dagga. Accused 1 Adonia and Accused 2 Elias are friends.

The now deceased was 35 years old and residing with his family at No. 8518, Victoria Ranch Masvingo. He was in the business of selling snooker tokens at Zambezi bar, Mombasa, Dunira Mall 1, Victoria Ranch in Masvingo.

At around midnight on 15 July 2021 both accused and the now deceased were at Zambezi bar in Victoria Ranch. The now deceased then approached both accused persons intending to buy dagga. Both accused sold the now deceased a twist of dagga for US 50 cents and he gave both accused US \$5.

The state alleges that both accused persons then refused to give the now deceased change in the sum of US \$4.50 resulting in a misunderstanding. It is alleged that both accused decided to leave Zambezi bar and the now deceased followed them demanding his change. It is the state case that both accused persons turned on to the now deceased and assaulted him with bricks on the head several times and stabbed him with a knife several times as he lay down causing his death. The now deceased's body was only discovered the following morning on 16 July 2021. The cause of the now deceased's death is said to be head injury.

Both accused gave their defence outlines which are now part of the record as Annexures "B" and "C" respectively.

Accused 1 Adonia said after selling the twist of dagga for US 50 cents and being paid US \$5 by the now deceased both accused fled without giving the now deceased the change. Accused 1 Adonia said in response the now deceased then teamed up with his colleagues and persued both Accused 1 and Accused 2. Accused 1 Adonia said a fist fight resulted from the opposing camps. Accused 1 Adonia said he was overpowered and Accused 2 Elias in defence of Accused 1 Adonia picked a brick and hit the now deceased. Accused 1 Adonia said he fled from the scene with Accused 2 and is unaware as to what subsequently happened to the now deceased.

Accused 2 Elias gave a similar account to that of Accused 1 Adonia in the defence outline. The only addition he made is that when he saw that his colleague Accused 1 Adonia was under serious attack from the now deceased and his colleagues Accused 2 Elias then picked a brick and

hit the now deceased after which both Accused 1 Adonia and Accused 2 Elias fled. Accused 2 Elias said he too is not aware of what subsequently happened to the now deceased. Accused 2 Elias therefore offers the defence of a third party.

The evidence of 5 state witnesses was admitted in terms of section 314 of the Criminal Procedure and Evidence act [*Chapter 9:07*]. These are Bennegina Mudambirwa, Gilbert Mundingido, Emilia Dzate, D/Ass Inspector Power Gwande and Dr Godfrey Zimbwa. For the completeness of the record, we shall summarise that evidence so admitted.

Emilia Dzate

Emilia Dzate is the 28-year-old wife of the now deceased and was residing at No. 8518, Victoria Ranch Masvingo with the now deceased. She said the now deceased left home for the Zambezi bar on 15 July 2021 at 1200hrs to sell snooker tokens but never came back. The now deceased was in possession of his two mobile cellphones. She only identified the now deceased's body on 16 July 2021. Emilia Dzate said after the arrest of both accused persons, she went to CID offices and identified the STYLO 0179 and KGTEL cellphone handsets belonging to the now deceased and two buddie lines also belonging to the now deceased.

Bennegina Mudambirwa

She is a 53-year-old woman and a councillor for ward 7, Masvingo Rural District Council. She resides at No. 6701 Victoria Ranch Township, Masvingo. On 16 July 2021. She was advised of the discovery of the now deceased's body near a gulley at about 0530hrs and she proceeded to make a report of the nearest local police base.

Constable Gilbert Mundingido

Constable Gilbert Mundingido based at ZRP Chikato, Masvingo was tasked by his officer in charge on 16 July 2021 to guard the now deceased's body in the morning until the arrival of CID details. He proceeded to do so. At the scene he observed that there were a lot of blood-stained bricks, blood on the ground and that the now deceased's head was literally crushed.

D/Ass Inspector Power Gwande

D/Ass Inspector Power Gwande was the head of the CID details who attended the scene of crime. He made similar observations to those of Constable Mundingu. After the arrest of both accused, he recorded their warned and cautioned statements.

Dr Godfrey Zimbwa

Dr Zimbwa carried out the post mortem report on the body of the now deceased on 16 July 2021 and concluded that the cause of death was severe head injury.

The state led *viva voce* evidence from Evermore Mariga, Crispin Maroveke, D/Sgt Sanley Tandi and D/Sgt Takesure Buzu. The accused persons gave evidence and both did not call any witness.

A total of 9 exhibits were produced by consent during the trial. They are as follows;

Exhibit 1 is the post mortem report compiled by Dr Zimbwa. The doctor observed the following injuries;

- "1. Severe crush of the skull with multiple skull fractures and extrusion of brain tissue.
2. Extensive mutilation of penis and scrotum. "

The cause of the now deceased's death which is severe head injury is not in issue.

Exhibit 2 and Exhibit 3 are confirmed warned and cautioned statements for Accused 1 Adonia and Accused 2 Elias respectively. We shall revert to them later in analysing the evidence of both the accused.

Exhibits 4 [being 4.1 to 4.17] are 17 pieces of blood-stained cement bricks. They were recovered at the place where the now deceased's body was. It is clear that they were used to crush the now deceased's head.

Exhibit 5 is the certificate of weight of the 17 pieces of bricks whose combined weight is 15,480kg.

Exhibit 6 [being exhibit 6.1 to 6.6] are pictures of the now deceased's lifeless body taken at the scene. The pictures are frightening to look at. The now deceased's head is virtually crushed. His clothes are visibly soaked in blood. Amazingly both his penis and scrotum are cut exhibiting deep wounds. Lastly there is a visible deep stab wound on his forehead. The brutality exhibited in these pictures is nerve wrecking.

Exhibit 7 are items the police recovered from Accused 1 Adonia. They include a blue blood-stained work suit, brown jacket, the now deceased's KGTEL cellphone handset, the now deceased's buddie sim card and a knife. As per Exhibit 9 the certificate of weight shows the particulars of the knife as 0.070kg and 15cm long.

Exhibit 8 are property items recovered from Accused 2 Elias. They include a green blood-stained shirt, blood-stained black trousers, blood-stained white shirt, STYLO mobile hand set belonging to the now deceased and two Econet and one netone lines belonging to the now deceased.

The evidence from all the state witnesses is largely undisputed. We now revert to that evidence.

Evermore Mariga (Evermore)

Evermore is a 29-year-old vendor. He was well known to both Accused 1 Adonia who cooked sadza at Gomba business centre and Accused 2 Elias a local tout. The now deceased was also known to him as a person who sold snooker tokens at Gwanoz/Zambezi bar. He also knew that Accused 2 Elias sold dagga. Evermore said on 15 July 2021 at about time the bar was to close he witnessed the now deceased buying dagga from Accused 2 Elias. Later on he observed Accused 1 Adonia slapping the now deceased as they were at the exit gate. Thereafter he saw Accused 2 Elias tripping the now deceased uttering the following words;

"mudhara unofira mahara" loosely translated meaning *"old man you would die for nothing"* referring to the now deceased.

Evermore said the now deceased continued to demand his change from the accused persons which he was not given. Evermore said he left both accused still quarrelling with the now deceased.

The evidence of Evermore is not dispute. He explained that he fully appreciated what he observed. He insisted that the now deceased was alone as he was being assaulted by both accused persons.

It is clear that Evermore has no interest in this matter. He has no motive to falsify his testimony. The account he gave shows he indeed appreciated what happened. There is no basis therefore to reject his evidence.

Crispen Maroveke (Crispen)

Crispen is a 65-year-old man who performed night guard duties at Gwanongedza complex. He was well known to Accused 1 Adonia but only knew Accused 2 Elias and the now deceased in connection with this case.

On the night in question Crispen was on duty at Gwanongedza complex when he said both accused persons and the now deceased passed by his guard point. He said the three were having an altercation as the now deceased was demanding his money and mobile phone handsets from both the accused. He said both accused persons were pulling and dragging the hapless now deceased away. He told the three to move away and not to engage in violence at his work station. He only learnt of the now deceased's demise the next morning. No useful questions were put to Crispen in cross-examination. He was indeed sober and on duty. This means he clearly observed what was happening between both accused and the now deceased.

The evidence of both Evermore and Crispen dispels the allegation by both accused persons in their defence outlines that the now deceased was in the company of other persons. Both were clear that the misunderstanding or altercation involved only both accused on one side and the now deceased on the other side.

D/Sgt Stanley Tandi

D/Sgt Stanley Tandi attended the scene of crime. His evidence dovetails with the photographs exhibit 6 as regards the injuries he observed on the now deceased. He also observed the pieces of blood-stained bricks exhibit 4 at the scene. Lastly, he said both accused persons gave their statements to the police freely and voluntarily. Again, his evidence was not challenged in any material way by both accused persons.

D/Sgt Takesure Buzu (D/Sgt Buzu)

D/Sgt Buzu's evidence relates to how both accused were arrested and the items recovered from both of them.

D/Sgt Buzu said on 17 July 2021 he and other details got information that Accused 1 Adonia had had an altercation with the now deceased on the night the now deceased died. As a result, he arrested Accused 1 Adonia on 17 July 2021 and Accused 1 Adonia implicated accused 2 Elias whom they also arrested. He said he recovered a knife from

Accused 1 Adonia together with other property exhibit 7. What is of significance is that Accused 1 Adonia was in possession of the now deceased's KGTEL cellphone and sim cards. Accused 2 Elias was also in possession of the now deceased's STYLO cellphone handset. These mobile phone handsets were identified by the now deceased's wife Emelia Dzate. Further Accused 2 Elias was in possession of blood-stained clothes part of exhibit 8.

The evidence of D/Sgt Buzu is uncontroverted.

We now turn to both accused persons' cases.

It is foolhardy in view of all this evidence for both accused persons to state in their defence outlines that they are unaware as to what happened to the now deceased or caused his death.

Both accused persons indeed sold dagga to the now deceased on the night in question. In their respective defence outlines they both said they fled without giving the now deceased the change of US \$4.50. The question is why would they behave in that manner if they had no ill motive. The attempt by both accused to belatedly allege that they offered the now deceased his change in bond notes or promised to pay the US \$4.50 the next day can not possibly be true. It is not the version they gave in their defence outlines; but is clearly new evidence and some after thought.

Again, it can not possibly be true that the now deceased attacked both accused persons with the help of some unknown persons. Evermore and Crispen were clear that there were no such persons. If the now deceased was being dragged away by both accused as Crispen said he possibly could not have engaged in a fist fight with both accused. Instead, all he said is that the now deceased was heard demanding his mobile phone handset and money. The evidence of both the accused that they fought the now deceased and that Accused 2 Elias acted in defence of a colleague is clearly false.

Both accused persons are further implicated in the demise of the now deceased by their blood-stained clothes found in their possession. How did both of them get their attire blood stained? Again, it is no use to belatedly refute ownership of those clothes. Where would the police get blood-stained clothes. If Accused 2 Elias had just thrown one brick at the now deceased how did Accused 1 Adonia and Accused 2 Elias get their clothes blood stained?

Both accused persons have not been consistent at all in their evidence. Their confirmed warned and cautioned statements which they dismally failed to disown at the eleventh hour tell a different story not only from their evidence in chief and in cross examination but from their own defence outlines. All in all, each accused gave three versions of what happened between them and the now deceased.

Accused 1 Adonia in exhibit 2 his confirmed warned and cautioned statement bared it all. He said he and Accused 2 Elias hit now deceased with fists causing the now deceased to flee but when the now deceased fell down they struck him with bricks as he helplessly lay down. In fact, Accused 1 Adonia said they decided "*to finish off*" the now deceased. He however alleges that he gave his knife to Accused 2 Elias who proceeded to cut the now deceased's throat and pierced his chest. Accused 1 Adonia in that statement made it clear that they left the now deceased dead and took away his mobile handsets. It is important to note that in that statement Accused 1 Adonia claims ownership of the knife later recovered by the police and all items found in his possession by the police. There is no mention of the defence of a 3rd party.

Accused 2 Elias in his warned and cautioned statement tries to shift the blame to Accused 1 Adonia. However, in that statement Accused 2 Elias said he himself struck the now deceased several times with bricks and was given a knife by Accused 1 Adonia which he used to stab now deceased on the throat. Accused 2 Elias said it is Accused 1 Adonia who forcefully took the now deceased's cellphones which they shared one a piece. In that statement Accused 2 Elias said indeed his attire was blood stained and he surrendered those items to the police upon his arrest. It is untruthful for Accused 2 Elias to later on say in his evidence that police planted those clothes on him.

While both accused persons may have been drunk there is nothing to suggest they were not in control of their mental faculties. They clearly appreciated and understood the wrongfulness of their conduct hence their many versions of what transpired which are false.

The intention of the accused persons is clear. They acted in common concert and decided to "*finish off*" the now deceased as per their own words. They proceeded to literally crush his head to pulp and stabbed him several times. Both accused acted with actual intent. Their evidence is dismissed as false.

VERDICT

Both Accused: - Guilty of murder with actual intent in terms of section 47 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

SENTENCE

There is very little one may say in favour of the accused persons. In this matter their personal circumstances clearly recede into the background and principles of retribution and deterrence are uppermost.

It is cases of this nature which bring to the fore the debate of retaining or abolishing the death penalty. Indeed, no reasonable court enjoys sitting in judgement and sentence of a case of this nature

This court had to search high and low in order to try and understand what motivated both of you to commit this crime in the manner you did. The disrespect of human life, the pervasive cruelty, the want on brutality and inhuman conduct is beyond this court's general experience.

The now deceased's crime as it were is difficult to appreciate. Indeed, he purchased dagga from you in breach of the law. He nonetheless paid you for the unlawful transaction. If you did not want to give him the change why would you not just flee or at least threaten him.

It is difficult to imagine that one could have his head crushed to pulp and his genitalia mutilated over a dispute of US \$5 or US \$ 4.50. As already said the pictures of the now deceased's mutilated body Exhibit 6 paint a ghastly sight which is nerve wrecking.

This court may repeat the exhortation that maybe the scourge of drug abuse by our young people needs to be urgently addressed by all stakeholders. I believe the accused persons could have been on some drugs. A normal human being can not behave in the manner the accused persons did.

The now deceased died a painful death. I wonder how both accused managed to sleep peacefully after committing such a heinous crime in such a callous manner.

The court has taken on board your personal circumstances which however pale into insignificance. Both of you are middle aged. Accused 1 Adonia is still single Accused 2 Elias is married with one child. Both of you are first offenders.

Both of the accused have been in custody for a year.

Besides these personal circumstances I find nothing materially mitigatory.

Both accused stand convicted of murder with actual intent. In terms of section 47(2) (c) of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*] this was murder committed in aggravating circumstances. The minimum sentence to be imposed is 20 years imprisonment.

I have agonised over imposing the death penalty. I did bend backwards on account of your respective ages and the probability that you were voluntarily intoxicated either by consumption of alcohol or dagga or both.

In the result each one of you is sentenced as follows;

"Each accused is sentenced to imprisonment for life. "

*National Prosecuting Authority, counsel for the state
Ruvengo Maboke & Company, pro deo counsel for the accused 1
Mutendi, Mudisi & Shumba, pro deo counsel for the accused 2*