

THE STATE  
versus  
CHAKANETSA KAMBARAMI

HIGH COURT OF ZIMBABWE  
MAWADZE J  
MASVINGO 13, 14, JULY, 17, 21, SEPTEMBER, 1, 5 & 30 OCTOBER, 2020

**Assessors**

1. Mr Nish
2. Mr Mutomba

**Criminal Trial**

*B.E. Mathose*, for the State  
Accused in person  
*O. Mafa*, keeping brief

MAWADZE J: Before the commencement of this trial the accused raised all manner of issues which ultimately delayed the start of this trial. A brief discussion of those issues raised by the accused is necessary in order to appreciate why the accused ultimately opted to conduct his defence in person without either counsel of choice or *pro deo* counsel.

Firstly, the accused sought the recusal of the prosecutor assigned to this matter *Mr Chikwati*. The accused alleged he was well known to *Mr Chikwati* as they allegedly grew up together and that *Mr Chikwati* had an interest in this matter. *Mr Chikwati* denied all these allegations but nonetheless recused himself simply to ensure progress in the matter and to avoid unnecessary interlocutory hearings.

Thereafter the accused made an application that the venue of the trial be changed from Masvingo town to some other place preferably Harare. The reason the accused gave was that he would not get a fair trial in Masvingo as the public in Masvingo was baying for his blood and would improperly influence this court. We found no objective basis for this assertion or belief hence we dismissed it as frivolous.

The accused then indicated that he did not want to be represented by the *pro deo* counsel *Mr O Mafa* or any other *pro deo* counsel in Masvingo as is provided for in s 70(1)(e) of the Constitution. Instead the accused indicated that he preferred to engage counsel of choice as is provided for in s 70(1) (d) of the Constitution. We postponed the matter twice to allow the accused to engage counsel of choice from Harare as per his request. The accused had said all legal practitioners in Masvingo were terrified to represent him.

After these postponements it became clear to us that the accused either had no means to engage counsel of choice or the appetite to engage such counsel of choice. We therefore directed the Registrar to appoint *pro deo* counsel for the accused. As a result *Mr O. Mafa* of Mutendi, Shumba and Mudisi was duly appointed timeously before the trial date.

On the trial date *Mr O. Mafa* and state counsel approached us in Chambers and indicated that the accused had flatly refused to co-operate with him in any manner and was unwilling to give him any instructions.

We proceeded to convene the court wherein *Mr O. Mafa* repeated the tribulations he suffered at accused's hands. In response the accused said all he wanted was to conduct his defence in person. Our advice to the contrary in view of the serious nature of the matter faced fell on deaf ears. The accused indicated that he was much better equipped to prosecute his own case and saw no value in being represented by counsel.

In the end our respectful view was that this trial could not be held at ransom in perpetuity by the accused. We therefore acceded to his request for him to prosecute his case. However in order to protect the accused's rights and the interest of justice we directed that *Mr O. Mafa* would keep brief throughout the whole trial. We are grateful to *Mr O. Mafa's* professional conduct as he was present throughout the trial despite the raw deal he got from the accused. At some point *Mr O. Mafa* even assisted the accused to appreciate certain legal principles relevant to procedure.

Despite that, even this olive branch being extended to the accused, the accused even insisted to write his own closing address to the court. We now turn to the matter itself.

The accused is facing two counts arising from the same incident on the same day.

In count 1 which relates to murder as defined s 47(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], the charge is that on 2 June 2019 in Sundowners road, Masvingo the accused caused the death of Josiah Rimai by assaulting him with clenched fists and booted feet on the head.

Count 2 relates to theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] in that on the same date and place as in count 1 the accused stole a motor vehicle, a Fun Cargo registration number AEO 2450 which was being driven by the now deceased in count 1 Josiah Rimai.

Most of the facts in this matter are largely common cause in relation to both counts.

The 37 year old accused resides at No. 8081 – 1<sup>st</sup> Street, Glen Norah, Harare.

The now deceased was 36 years old and residing at No. 5652, Musvoti Street, Majange, Masvingo. He was employed by one Samuel Mutusva as a driver of a pirate taxi, Fun Cargo Registration No. AEO 2450 relevant to count 2.

On 1 June, 2019 the accused was in Masvingo with his wife or girlfriend one Caroline Banda. They had come from Harare. The purpose of their visit is not clear but it is not material to the allegations. As per the accused he said he had visited his parents in Masvingo (mother and sisters) but State witnesses said accused told them he had come to Masvingo to attend a musician Ammara Brown's birthday show. What is common cause is that on 1 June, 2019 the accused and his wife or girlfriend [whom we shall simply refer to as wife for easy reference] booked at Backpackers Lodge in town.

On 2 June 2019 at around 0900 hrs the accused and his wife proceeded to Masvingo Polytechnic College bus stop where the boarded the now deceased's pirate taxi ostensibly to go to Great Zimbabwe Monuments near Nemanwa growth point. The now deceased was working with his assistant one Lucky Willard Dube. On their way towards Nemanwa growth point the accused decided to hire the now deceased's pirate taxi for the day and to pay the now deceased whatever fees he would have generated whilst plying the Masvingo – Nemanwa – Mashate route. The now deceased agreed and off loaded other passengers at Mashate after which he remained with his

assistant, the accused, and accused's wife. The accused then offered to buy the now deceased and his assistant beer and spent most of that day drinking and roasting meat at Nemanwa growth point. Later that day they came back to accused's lodgings at Backpackers Lodge where the accused gave himself out as a Good Samaritan and gave the now deceased a pair of trousers (track suit), a pair of tackies and sunglasses. Thereafter all the 4 of them proceeded to Dunira Complex in Mucheke still carousing and accused bought meat which he gave the now deceased's assistant to roast.

It is not in issue that the now deceased's assistant Lucky Willard Dube was left at Dunira Complex when the accused, his wife and the now deceased drove back to Backpackers Lodge.

At Backpackers Lodge the accused briefly left the now deceased and his wife in their room and later came back alleging that the now deceased was proposing love to accused's wife. It is common cause the accused assaulted the now deceased inside that room after which the 3 of them later left in deceased's motor vehicle. Where they went thereafter and what transpired is in dispute.

What is not in dispute is that two days later on 4 June, 2019 the now deceased who was missing was found unconscious along Sundowners road with severe injuries and passed on the same day on admission at Masvingo General Hospital. Meanwhile on the same day 4 June, 2019 the accused was arrested in Beatrice while driving the now deceased's motor vehicle which was reported missing to Harare.

According to the State the accused assaulted the now deceased firstly in the room at Backpackers Lodge with fists and booted feet after which it is said he took the now deceased to a bush near Sundowners Lodge. The State alleges that the assault of the now deceased by accused continued in the bush until the now deceased was left for dead in count 1. The State alleges the accused then took the now deceased's motor vehicle that night only to be arrested in Beatrice en route to Harare in count 2. According to the State the accused was avoiding police road blocks but that his luck ran out when he gave a lift to a police Detective who alerted his colleagues who in turn intercepted the accused at Central Farm, Beatrice.

The accused gave a lengthy defence outline which we shall outline in much detail as he later adopted it as his evidence.

While the accused admitted that he assaulted the now deceased inside accused's room at Backpackers Lodge for allegedly proposing love to his wife the accused insisted that that assault was not fatal and that he did not further assault the now deceased again as alleged. The accused's

basic defence in count 2 is that although he was arrested in possession of the complainant's motor vehicle in Beatrice en route to Harare he believed the motor vehicle belonged to the now deceased whom he wanted to punish for proposing love to his wife and that he had no intention of depriving anyone permanently of that motor vehicle.

In detail the accused said he had visited his mother and sisters in Masvingo in the company of his wife after which he and his wife booked into Backpackers Lodge on 1 June, 2019. The next day 2 June, 2019 he said he and his wife decided to visit Great Zimbabwe Monuments around 0900 hrs and met the now deceased as alleged with his friend Lucky Willard Dube who he subsequently hired as they were pirating with the said motor vehicle. The accused said thereafter the four of them spent the day drinking beer and roasting meat at his expense.

Later the accused confirmed that they returned to his lodgings at Backpackers where he gave the now deceased a track suit and pair of tackies.

The accused said the four of them left for Dunira Complex in Mucheke using the same motor vehicle where they continued drinking and roasting meat. The accused however said it is the now deceased's friend Lucky Willard Dube who disappeared at Dunira Complex.

The accused said he returned to his lodgings at Backpackers Lodge now with his wife and the now deceased after which he decided to leave his wife and accused in the room ostensibly to go and buy food at Chicken Inn. The accused said he came back as he had already suspected that the now deceased was lustful of his wife. Before he entered the room he said his suspicions were confirmed as he heard the now deceased proposing love to his wife. He said this forced him to budge into the room. Accused said he was further angered by the fact that his wife had now changed clothes inside that room which was not an en suite room in the presence of the now deceased.

In anger the accused said he assaulted the now deceased with open hands only and also kicked him until the now deceased admitted proposing love to accused's wife and apologised blaming drunkenness. The accused said he accepted the apology.

Due to the commotion he had caused at Backpackers Lodge the accused said he decided to check out and to find another Lodge. The now deceased suggested Sundowners Lodge some 8 km out of town and drove accused and his wife to that lodge where accused and his wife booked in. They were still drinking beer and decided to return to town.

The accused said to his and wife's utter surprise the now deceased just stopped the motor vehicle a few metres from Sundowners Lodge holding a bottle of whiskey and bolted out of the motor vehicle vanishing into the bush and never to return. The accused said this was probably due to drunkenness coupled with guilty conscience of proposing love to accused's wife. The accused said he and his wife were left in possession of the said motor vehicle and he decided to drive it to town but failed to start it. Thereafter they hitch hiked to town where he met one Thabani Ngwenya who returned him to Sundowners Lodge and jump started the now deceased's motor vehicle.

The accused said it is Thabani Ngwenya who drove the now deceased's motor vehicle to Backpackers Lodge where the accused and his wife formally checked out and collected their belongings after which they drove back to Sundowners Lodge where he had now booked in and retired to bed.

The next day on 3 June, 2019 the accused said since he had the now deceased's particulars he tried to no avail to call the now deceased on his mobile number as he wanted to return the motor vehicle. The accused said he also had Thabani Ngwenya's telephone number and he telephoned Thabani Ngwenya who came to Sundowner's Lodge where accused explained to Thabani Ngwenya about the now deceased's weird conduct the previous night.

The accused said the following day on 4 June, 2019 he still failed to locate the now deceased hence he and his wife left Masvingo for Harare while he was driving the now deceased's motor vehicle. The accused said he decided to take with him the now deceased's motor vehicle in order to fix the now deceased for his conduct of proposing love to his wife on 2 June, 2019 and that since the now deceased had the accused's details the now deceased was to suffer the inconvenience of following accused to Harare in order to collect the motor vehicle.

The accused said on his way to Harare he indeed gave Detective Sergeant Allen Tafirei a lift near Beatrice who thought the accused was a smuggler and caused his arrest at a road block. Accused denied that he avoided any police road blocks previously.

Upon his arrest the accused said he and his wife were taken to Masvingo from Beatrice by Masvingo CID details who tortured both of them. The accused said the CID details forced him to confess to the offense in count 1 and count 2 for them to release his wife Caroline Banda. Further the accused said he had to pay the CID details a bribe for them to release his wife and that he did

this in the presence of both Thomson Dube and Thabani Ngwenya who had helped him to jump start the now deceased's motor vehicle and had also been arrested as suspects in this matter.

In support of its case the State led evidence from 10 witnesses being Nyarai Matora an employee at Backpackers Lodge; Lucky Willard Dube the now deceased's assistant; Wellington Makola an employee of ZESA who gave accused and his wife a lift to town, Rashid Ndlovu a fellow taxi driver and colleague of the now deceased; Thompson Dube a fellow pirate taxi driver who was asked by accused to jump start the now deceased's motor vehicle; Thabani Ngwenya who accompanied Thompson Dube; Samuel Mutusva the owner of the said Fun Cargo motor vehicle; D/Sergeant Allen Tafirei of ZRP Beatrice whom accused gave a lift; D/Assistant Inspector Edwell Chipfakacha of CID Homicide Masvingo and the Investigating Officer D/Sergeant Pasca Musengezi.

The accused gave evidence by adopting his defence outline and called the owner of Sundowners Lodge Dr. Fradreck Kajesi. The accused also wanted to call his wife Caroline Banda but D/Sgt Musengezi who went to both accused's residence in Harare and Caroline Banda's rural home explained that the accused's so-called wife's whereabouts are non-unknown although it is believed she left for South Africa soon after her release by police in June 2019.

A total of 3 exhibits were produced being a post mortem report, Exhibit 1; Exhibit 2(a) to (d) photographs of the now deceased's lifeless body and Exhibit 3 accused's confirmed warned and cautioned statement.

Our brief comments about these 3 Exhibits are as follows;

Exhibit 2(a) shows the now deceased's injuries on the back of the head and neck.

Exhibit 2(b) shows the injuries on the now deceased's face and cloated blood on his face.

Exhibit 2(c) shows the now deceased's injuries on the cheek and facial bruises

Exhibit 2(d) shows the now deceased's lifeless body lying in a bushy area along a road leading to Sundowners Lodge.

As per Exhibit 3 accused outlined his defence to the police. The notable differences between this statement Exhibit 3 and accused's defence are as follows;

- (i) While in his Defence Outline the accused said he only assaulted the now deceased whilst in the room at Backpackers Lodge in Exhibit 3 he said he again assaulted the now deceased near Sundowners Lodge and that the accused and his wife were in company of some unnamed man who failed to restrain the accused.

- (ii) While in his Defence Outline the accused said the now deceased just bolted out of the motor vehicle while at Sundowners Lodge in his statement Exhibit 3 the accused said he left the now deceased lying in a bush along the road to Sundowners Lodge after assaulting him.
- (iii) While in his Defence Outline the accused said on 2 June, 2019 after the now deceased fled he spent night at Sundowners Lodge on 2 June, 2019 and 3 June, 2019 in his statement Exhibit 3 he said soon after assaulting the now deceased on 2 June, 2019 he managed to find guys to jump start the now deceased's motor vehicle and left for Harare after which he was arrested at Beatrice police road block.

What is important to note is that the accused's statement Exhibit 3 is confirmed. While the accused tried to disown parts of the said statement our view is that he dismantly failed to discharge the onus thrust upon him on a balance to show that he did not make the statement freely and voluntarily. These discrepancies remained unexplained.

The cause of the now deceased death in count 1 as per Exhibit 1 the post mortem report is not in issue. The evidence of Dr Zimbwa who compiled Exhibit 1 the post mortem report was admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Cap 9:07*] Dr. Zimbwa observed the following;

- “1. *Multiple neck and facial bruises*
- 2. *large haematoma on right frontal area*
- 3. *deformed right frontal and temperal bone*
- 4. *neck is loose and moves with crepitus*”

Dr Zimbwa concluded that the cause of the now deceased's death was “severe head injury and neck fracture.”

The evidence before us is that on 2 June, 2019 the now deceased was in perfect health and driving the motor vehicle hired by accused. It is clear that he was severely assaulted leading to these fatal injuries on the head and neck resulting in his death. Whoever assaulted him either intended to cause death or did foresee that death may result moreso as he was left most probably unconscious in the bush without any help on 2 June, 2019 leading to his death on 4 June, 2019.

We understand the accused's defence in count 1 to be that he admits to assaulting the now deceased at Backpackers Lodge but that the assault did not result in the injuries later observed by Dr Zimbwa and are on Exhibit 2(a) to (d) which are fatal. At most the accused pleads guilty to assault but blames a third hand for the deceased's demise as he said the now deceased was not

injured when he fled from accused at Sundowner's Lodge. The dispute in this regard therefore is simply a factual one rather than a legal one.

There is an eye witness Nyarai Matora to the assault of the now deceased in the room at Backpackers Lodge. However from her evidence that assault was not possibly fatal at all.

The second piece of evidence in count 1 is accused's confirmed warned and cautioned statement Exhibit 3. As already said the accused failed to distance himself from that statement in which he admits to have severely assaulted the now deceased in the bush leaving him helpless.

The last piece of evidence is circumstantial evidence which we shall deal with in considering the evidence of State witnesses and in respect of count 2. We now proceed to do so.

As already said the disputes in this matter are largely factual rather than legal, that is what exactly happened. These disputes are simply resolved by analysing the evidence before us.

Nyarai Matora (Nyarai)

Nyarai then an employee Backpackers Lodge narrated the accused and his wife's movements on 2 June, 2019 as she was on duty at Backpackers Lodge.

She first saw the accused and his wife at the Lodge on 2 June, 2019 and that they left in the morning saying they were going to Great Zimbabwe Monuments around 10.00 hrs.

Secondly, she saw accused and his wife around 16.00 hrs when they now returned to the lodge in the company of two other men whom we now know as the deceased and his assistant Lucky Willard Dube. This is the stage accused gave the now deceased some clothes and left for Dunira Complex.

Thirdly, Nyarai saw accused, his wife and the now deceased when they came from to the lodge or Dunira Complex now at about 20.00 hrs. Her evidence is that the accused told her he was leaving his wife and now deceased in their room to go and buy food but she was surprised when accused returned immediately without food. This means that the story to go and buy food was either an elaborate plan to find reason to attack the now deceased or accused genuinely believed the now deceased was attracted to his wife.

Nyarai said she was called by accused for her to also eavesdrop at the door of accused's room to confirm the accused's suspicions but she heard nothing incriminatory. Instead she said the accused budged into the room and accused the now deceased of proposing love to accused's wife as he questioned how his wife had changed clothes in that room in presence of the accused. Nyarai

said both accused's wife and the now deceased protested their innocence but a visibly angry accused assaulted the now deceased with open hands threatening to kill him. This caused other employees to rush to the room and they all reprimanded accused for his violent conduct as he was disturbing other guests. The now deceased apologised and accused said he had accepted the apology after which all the 3 left in the now deceased's motor vehicle.

Nyarai said at about 22.00 hrs only the accused's wife returned to Backpackers lodge in the company of another man who she said she wanted to give some items. The accused and the now deceased were not there. Thereafter accused's wife left the lodge with that man.

Nyarai said after about 30 minutes accused's wife again returned to the lodge in the absence of the accused. She then proceeded to check out of the lodge saying they were now going to the residence of accused's mother at Sisk in Mucheke as she said accused was still angry and that only his mother could control his temper. Nyarai said accused's wife then checked out of the lodge on 2<sup>nd</sup> June, 2019 at about 22.00 hrs promising to bid her farewell on 3 June, 2019 on her way to Harare. Nyarai said she never saw accused or his wife again until she received news of the now deceased's missing on 3 June, 2019 and his death on 4 June, 2019.

The cross examination of Nyarai was largely irrelevant just like that of the other witnesses. What arises from Nyarai's evidence is the frequent visits back to the lodge by accused's wife in the absence of both accused and the now deceased late at night on 2 June, 2019. Where was the accused and the now deceased at that time? The accused who gave a lengthy defence outline chose not to address this critical issue. Indeed there is no basis for Nyarai to fabricate her evidence. Further, the manner accused's wife checked out of the Backpackers lodge late at night on 2 June, 2019 is different from how accused said they checked out. Again this disparity remained unexplained.

#### Lucky Willard Dube (Lucky)

Lucky the now deceased's assistant basically outlined how accused, accused's wife, the now deceased and Lucky spent the day on 2 June, 2019 drinking beer at various places roasting meat after the accused hired their vehicle. They proceeded to Mashate. They were at Nemanwa growth point. They returned to Backpackers lodge. They proceeded to Dunira Complex in Mucheke at night. The impression Lucky gave or got was that accused was loaded with cash. He was freely spending the money. He donated clothes to the now deceased. He dished out cash to

them. In our view either the accused was genuinely in the mood of spending cash or simply wanted to lure the now deceased and Lucky so that he wins their confidence and cause them to drop their guard. They were offered intoxicated whiskey or spirits. To them Christmas had come earlier.

The suspicion arises from how accused and Lucky differ on how Lucky was dumped at Dunira Complex at night and separated from the now deceased. Lucky said accused bought meat and gave Lucky to roast it. As he was roasting meat, the accused and his wife and the now deceased just drove away. He waited for ages and they never returned. He did not know where they had gone. He ended up eating the meat alone and proceeding home to sleep. The question is why Lucky would be dumped like that at Dunira Complex. We now know accused, his wife and the now deceased returned to Backpackers lodge. Why would accused leave roasted meat at Dunira Complex and suddenly leave his wife and the now deceased in his room to go and buy food at Chicken Inn which food he never brought. Again was this not an elaborate plan to isolate the now deceased? We find no reason as to why Lucky who took accused as their benefactor to falsify his evidence.

#### Wellington Makola (Wellington)

On 2 June, 2019 at about 21.00 hrs Wellington was driving from Rujeko Township into town. The accused and his wife waived him down asking for a lift to town. We now know this was after accused and his wife had dumped Lucky at Dunira Complex and accused had assaulted the now deceased at Backpackers lodge after which accused his wife and the now deceased had left Backpackers lodge in the now deceased's vehicle. The question is where was the now deceased at this stage and his vehicle?

Wellington said the accused wanted to be helped to find a mechanic to fix accused's car which accused said had broken down. Now this was a lie because the motor vehicle in issue was the now deceased's vehicle not accused's. Why then was accused lying and why would he want to fix the now deceased's vehicle?

Wellington said he told the accused that it was late and could only take accused and his wife to Pick and Pay pirate taxi rank for them to make enquiries from pirate taxi drivers. Upon arrival at that taxi rank one Rashid Ndlovu a pirate taxi driver immediately recognised accused and his wife as persons he had seen during the day in the now deceased's vehicle. He tried to inquire if accused wanted to fix the now deceased's vehicle. The accused probably panicked. He

immediately asked Wellington to take them to OK pirate taxi rank. Wellington was surprised and he obliged. Accused paid him for his efforts. Now why would accused not confirm it was the now deceased's vehicle he wanted to fix? Why would he leave Pick and Pay taxi rank in a huff? Again Wellington's evidence is unchallenged.

Rashid Ndhlovu (Rashid)

Rashid was a fellow taxi driver and known to the now deceased and not known to accused.

Rashid testified that on 2 June, 2019 he had earlier on seen accused, accused's wife and the now deceased passing by Pick and Pay taxi rank in the now deceased's motor vehicle as they all looked happy enjoying themselves. At about 22.00 hrs the same day he then met Makola with accused and accused's wife looking for a mechanic to fix accused's motor vehicle said to have broken down at Sundowner's road. Naturally he recognised the accused and inquired if indeed the motor vehicle in issue belonged to the now deceased's pirate taxi. The accused said it was not but belonged to some man in Runyararo West. Rashid said he offered to help but accused was not interested and ordered Wellington to leave. Now why was accused lying that it was not deceased's vehicle he wanted to fix? Why did he spurn help from Rashid?

We are not taken in by accused's attempts to allege that Rashid was a suspect in deceased's death? How could this possibly be? Rashid dismissed as false that he was arrested as a suspect by police in count 1. The police never confirmed that. Rashid also denied bribing police or witnessing accused bribing the police. This fabrication by accused is poorly thought. Accused's reaction when accused met Rashid is simply corroborated by Wellington whose evidence accused did not challenge.

Thompson Dube (Thompson)

Thompson was not known to accused or the now deceased. He is also a pirate taxi driver plying the town to Mucheke route.

On 2 June, 2019 Thompson said he was making his last trip from town when accused and his wife sought help from him around 22.00 hrs to find a mechanic to fix accused's vehicle. We now know this was after accused had left Pick and Pay rank in a huff.

Thompson said he inquired the possible nature of the mechanical fault on accused's said vehicle. Accused said he had spent the day with his wife near Sundowners lodge playing music

from the said vehicle and the vehicle could now not start. Again this was a lie by the accused. Why?

Thompson said he figured it could have been a problem of a flat battery so he called his friend Thabani Ngwenya after dropping his passengers in order to go and jump start the said vehicle for a fee. The accused led them to a road towards Sundowners lodge where this vehicle was. They jump started it. Thompson was surprised when accused had problems in driving “accused’s” vehicle! The accused attributed his failure to drunkenness. This prompted Thompson’s friend Thabani Ngwenya to drive this vehicle and accused directed them to Backpackers lodge. At Backpackers lodge they were paid for other services and accused together with his wife drove away in the now deceased’s vehicle towards Masvingo General Hospital. Thompson later learnt of a missing taxi driver and vehicle and his interaction with accused and helped the police.

Faced with Thompson’s clear evidence accused sought to also imply that Thompson was a suspect in the now deceased’s death. How could this possibly be? Infact Thompson poked serious and fatal holes in accused’s case. He denied witnessing accused bribing the police as accused alleged.

Thompson was clear that accused said this vehicle was accused’s vehicle. In fact he said accused was mocking his wife as to why she had bought a vehicle with a malfunctioning battery and that accused’s wife played along to this lie retorting saying since she bought the car she had not checked the battery. Thompson said accused never said the vehicle belonged to the now deceased. Contrary to accused’s story Thompson said after jump starting this vehicle and proceeding to Backpackers lodge Thompson never took accused or accused’s wife back to Sundowners road or lodge but that accused and his wife drove away in the vehicle towards Masvingo General Hospital. Again Thompson denied getting accused’s contact details or giving accused his details. This puts to rest accused’s denial of requisite intention in count 2. All in all Thompson gave his evidence well and clearly explained how he got involved with the accused. He had no clue that the now deceased was involved.

Thabani Ngwenya (Thabani)

Thabani a friend of Thompson materially corroborates Thompson’s evidence.

He confirmed that on 2 June, 2019 late at night Thompson requested him to accompany him to Sundowners road to assist a person whose vehicle could not start. He was collected from his home. He met accused and accused's wife.

Thabani said accused explained that he had spent the day along Sundowners road with this wife playing music from the vehicle hence the flat battery.

Thabani said after jump starting the said vehicle accused surprisingly struggled to drive it. Thabani had to drive it to town carrying accused and accused's wife. He said accused explained that the vehicle belonged to accused's wife hence accused rarely used it. Thabani was directed to Backpackers lodge where accused and his wife picked their belongings and drove towards the hospital. Thabani said all accused told him was that he was a resident of Harare and had come to Masvingo for Ammara Brown's musical show. Thabani said accused handsomely paid them. He denied ever meeting accused again or taking accused to Sundowners lodge. It was clear to us that the accused had serious problems in cross examining the forthright Thabani. The question then is why would accused lie to Thabani that this vehicle belonged to accused's wife? Why would accused lie that Thabani and Thompson took him to Sundowner's lodge?

Samuel Mutusva (Samuel)

Samuel is the owner of the vehicle in issue a white Fun Cargo Registration Number AEO 2450 used by his employee the now deceased as a pirate taxi. Samuel did not allow the accused to take his vehicle. Infact he said on 2 June, 2019 the now deceased did not come to cash in proceeds of the day and was missing until he was found almost dead on 4 June, 2019. He confirmed the recovery of his vehicle valued at US\$3000 a Beatrice by CID details. His evidence is uncontroverted.

D/Sgt Allen Tafirei (D/Sgt Tafirei)

D/Sgt Tafirei was a CID detail based at ZRP Beatrice. He was central to the accused's arrest unaware of either count 1 or count 2.

On 4 June 2019 he was waiting for lifts to his workplace some 20 km before Beatrice along Masvingo – Harare road. He waived down accused driving this vehicle in issue. Accused was with his wife who was seated in front passenger seat. He was not in uniform as usual and lied to the accused he was a Beatrice Council employee. Accused gave him a lift to Beatrice for a fee of US\$1.00. D/Sgt Tafirei said his police instincts were aroused when the accused inquired from him

for possible routes to use in order to avoid police road blocks. He asked accused why accused wanted to avoid road blocks. In response accused said he was from Messina, South Africa carrying illegal skin lightening cream. However D/Sgt Tafirei could not see the said cream. He became more suspicious and texted his colleagues at ZRP Beatrice. As they travelled he said accused was very alert for any possible police road blocks disclosing that he had avoided the road block at Featherstone. D/Sgt Tafirei said he tried to coax accused to pass through the Beatrice police road block by assuring accused that he, D/Sgt Tafirei, was well known to Beatrice police but accused would have none of it.

D/Sgt Tafirei said as they approached Beatrice road block accused stopped the vehicle and disembarked. Accused asked D/Sgt Tarwirei to be helped to survey for alternative route to avoid the police road block. As a local person D/Sgt Tarwirei directed accused to use a dust road through Central farm. He alerted his colleagues again by texting them to intercept the accused. As they drove through Central farm they found the gate locked. The workers demanded US\$5.00 to open the gate. As accused negotiated for passage D/Sgt Tafirei's CID colleagues arrived and arrested them. A number of issues arose thereafter;

- (i) D/Sgt Tarwirei said even after arrest accused exhibited unparalleled confidence as he explained himself to Beatrice CID details
- (ii) the accused's explanation for avoiding the road block was that he did not have a driver's licence. This is contrary to what he had told D/Sgt Tarwirei
- (iii) a search of this vehicle only yielded 5 concrete bricks underneath driver's seat and few dirty clothes. There was no skin bleaching cream he had told D/Sgt Tarwirei about
- (iv) accused insisted the vehicle in issue was his and that its registration book was at his house in Harare. This again was another lie. A check by Beatrice CID details with Vehicle Theft Squad in Harare revealed that this vehicle had been reported missing in Masvingo
- (v) the accused lied to CID Beatrice details that his name was Tineyi Mawere and insisted that both himself and his wife had no personal particulars

D/Sgt Tarwirei said these revelations caused accused's arrest and ZRP Masvingo confirmed that the accused was wanted for offences in count 1 and count 2. The accused totally

failed to pose any meaningful question to D/Sgt Tarwirei. It probably dawned to accused that his poorly constructed story was just collapsing like a deck of cards.

D/Ass Insp Edwell Chipfakacha (D/Ass Insp Chipfakacha)

D/Ass Insp Chipfakacha is the Member in Charge of CID Masvingo Homicide. His evidence basically explains how police were made aware of count 1 and count 2.

On 4 June 2019 a report of missing person and vehicle was made. The vehicle was recovered the same day at Beatrice. A search of the now deceased by fellow taxi drivers following clues of his vehicle having been jump started along Sundowners road led to the discovery of the now deceased who died the same day. He was well known to the accused so when accused and his wife arrived from Beatrice accused could not continue using the false name Maxwell Mawere. Infact D/Ass Insp Chipfakacha said accused upon seeing D/Ass Insp Chipfakacha at CID Masvingo the accused said in Shona;

*“Ah zvadhakwa. Regai ndichitaura chokwadi”* Meaning “I am done. Let me tell the truth.”

The accused had no choice but to reveal his real name. Again the credibility of the accused’s fatally damaged by the fact that he even lied about his true identity to CID details at Beatrice.

D/Ass Insp Chipfakacha said they had to release accused’s wife Caroline Banda after the accused exonerated her in both count 1 and count 2 saying when he assaulted the now deceased for the second time in the bush his wife was not there. Our comment is that D/Ass Insp Chipfakacha as a senior and well experienced CID detail prematurely released accused’s wife on the mere say so of accused who was himself a suspect. Evidence from the State witnesses suggests some complicity of accused’s wife in either count 1 or count 2 or both.

D/Sgt Pasca Musengezi (D/Sgt Musengezi)

D/Sgt Musengezi is the investigating office in both count 1 and count 2 and his evidence simply ties up what is already now on record. He said;

- (a) a report of the missing now deceased and the vehicle was made to police on 4 June, 2019
- (b) police received pieces of information from Backpackers Lodge employees and some pirate taxi drivers which information police started to put together
- (c) as the police were busy trying to figure out this case in Masvingo accused was arrested in Beatrice while in possession of the missing vehicle and using false names

- (d) around the same time the now deceased was found unconscious along Sundowners road in bush and he died the same day from injuries inflicted upon him
- (e) the accused was handed over to him and accused wrote his own warned and cautioned statement Exhibit 3 on 4 June, 2019 which was confirmed on 6 June, 2019. The accused exonerated his wife Caroline Banda who was released.
- (f) Accused made indications at the scene along Sundowners road

No relevant questions were put to D/Sgt Musengezi at all.

A proper assessment of all the evidence we painstakingly outlined clearly shows that the accused has no discernible defence either in count 1 or count 2. It is clear that the accused lied to various State witnesses on many aspects as already stated. The *bona fides* of the accused is put into question. In fact the accused was so untruthful that he vehemently argued with D/Sgt Musengezi that no video was recorded when he made indications at the scene of crime in count 1. The accused had the temerity to challenge the police to produce the said video recording. When D/Sgt Musengezi brought the video recording the accused had no option but to concede that he was lying with a straight face to this court.

The accused also conceded that he used false names to CID details at Beatrice upon his arrest. He had no explanation for such conduct.

The accused grudgingly accepted that he took the vehicle in issue without the owner's consent in count 2. The reason he gave for attempting to drive this vehicle all the way to Harare in our view is not only clumsily presented but very ridiculous. The accused's intention in count 2 is betrayed by the lies he told various State witnesses about this vehicle as regards to its ownership. If accused acted in good faith why would he go out of his way to avoid police road blocks? Again why would all these witnesses not known to each other gang up to lie against the accused? The accused kept this vehicle from 2 June, 2019 to 4 June, 2019 until his fortuitous arrest en route to Harare. Its true owner was only known through Vehicle Theft Squad, Harare. The accused had left its driver virtually dead in a bush. Surely accused's intention to permanently take this vehicle is clear.

In respect of count 1 the accused cannot escape liability. The accused lied about his movements on 2 June, 2019 and the whereabouts of the now deceased. Even a kindergarten kid

cannot believe the accused's story that the now deceased just rushed into the bush leaving his motor vehicle for no reason.

The accused's confirmed warned and cautioned statement lays bare what happened in count 1. The accused even called Dr Fradreck Kajesi as a witness in a bid to perpetuate the lie that he booked in at Sundowners lodge on 2 June, 2019 and 3 June, 2019. Instead the accused ended up with an egg in his face when Dr Kajesi explained that Sundowners lodge ceased to operate in 2012. The accused's attempts to extricate himself from such a blatant lie by manufacturing the existence of another lodge of a similar name within the same vicinity was a sheer waste of time.

In count 1 all the direct and circumstantial evidence point to accused's guilty. It is the accused who fatally assaulted the now deceased. The only benefit we can give the accused is that he may not have had actual intention to cause deceased's death. However the accused did realise that his conduct may cause death but continued to engage in that conduct despite the risk or possibility. Severe injuries were inflicted including a broken neck. No help was rendered to the now deceased. The now deceased was left abandoned, possibly unconscious in a bushy isolated area. Surely accused who just left without alerting anyone did foresee the possibility of death.

In respect of count 2 accused's conduct betrays his intention. Accused had no defence at all to the theft of the said vehicle.

In the result we entered the following verdicts:

#### VERDICT

Count 1 – guilty of contravening section 47(1) (b) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] – murder with constructive intent.

Count 2 – guilty of contravening section 113(1) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] – theft.

#### SENTENCE

The accused stand convicted of two counts of murder and theft.

In this case the aggravating factors far outweigh the mitigatory factors.

Both offenses which are inter linked were committed in heinous circumstances. The now deceased did not only lose the vehicle he was using but lost his life in a very brutal and cruel manner. He was severely assaulted in the bush at night and left to die in pain after two days.

The accused ensured that the now deceased was abandoned in a secluded area and accused offered no help. Instead accused was keen to fix the now deceased's motor vehicle than to offer help to the now deceased.

The assault itself was brutal as deceased's bones in both head and neck were broken.

Throughout the trial the accused was not contrite at all. All he was keen to do was to give excuses and false explanations.

The sanctity of human life cannot be over emphasised. It is the duty of the courts to protect life. The accused was clearly determined to succeed in his criminal conduct.

The personal circumstances of the accused have been considered. He is married with 2 minor children. As an unemployed man the family relies on him to survive. Accused has neither savings nor assets.

The motor vehicle in count 2 was fortuitously recovered.

The accused suffered from pre-trial incarceration of 16 months.

There is no objective basis to treat both counts as one or to order the sentence in count 2 to run concurrently with the sentence in count 1. All we can do is to suspend part of the sentence in count 2 as accused is said to be a first offender.

In the result the accused is sentenced as follows:-

*“Count 1 – 18 years imprisonment.*

*Count 2 - 4 years imprisonment of which 1 year imprisonment is suspended for 5 years on condition accused does not commit with that period any offence involving dishonesty for which accused is sentenced to a term of imprisonment without the option of a fine.*

*Total effective :- 21 years imprisonment.”*

*National Prosecuting Authority, counsel for the State  
Mutendi, Mudisi & Shumba, counsel keeping brief for the accused  
Accused, in person*