

THE STATE

Versus

TIMOTHY BALOYI MUZAMANI

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 8 & 19 November, 2021

Assessors

1. Mr Nish
2. Mr Mutomba

*Mr B. E. Mathose*, for the state  
*Mr J. Ruvengo* for the accused

### **Criminal Trial**

MAWADZE J: The accused's limited plea to the lesser charge and permissible verdict of culpable homicide was not accepted by the state.

The accused is 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 6 January 2020 at Mufure Village, Headman Mpapa, Chief Sengwe in Chiredzi the accused unlawfully and intentionally caused the death of Lisimati Baloyi by striking him with a hoe handle at the back of the head, on the back and on the chest.

At the matinal time the accused was 31 years old and the now deceased Lisimati Baloyi 78 years old.

The accused and the now deceased are half brothers. They share the same father. They were both residing in the same village but different homesteads.

The state case is that the accused harboured a suspicion that the now deceased was responsible for a spate of illness and misfortunes befalling their extended family. The now deceased was accused of having fought and killed one Jetinosi in 2003 over a girlfriend and that Jetinosi's avenging spirit was allegedly tormenting accused and deceased's family members.

The state alleges that on 6 January 2020 the accused armed with a hoe handle and a knife proceeded to the now deceased's homestead at about 0900hrs. It is said the accused found the now deceased seated. The accused is said to have struck the now deceased at the back of the head, the chest and the back with a hoe handle killing him instantly. It is alleged that realising what he had done accused proceeded to Chibwedziva police base where he however did not report the murder but just the assault of the now deceased. The police later learnt of the now deceased's death and arrested the accused.

The now deceased is said to have sustained a skull fracture and blunt trauma on the chest. The cause of death is said to be severe head injury.

In his defence outline the accused said on the day in question he had a misunderstanding with the now deceased concerning an avenging spirit (Ngozi) which was causing a lot of misfortunes within the whole extended family. The accused said the now deceased was the author of this problem as the now deceased had killed one Jetinosi. The accused said Jetinosi's avenging spirit was now wreaking havoc tormenting many family members. Accused said what irked him was that the now deceased despite being the culprit was unwilling to appease this avenging spirit by paying compensation.

The accused in his defence outline said he indeed struck the now deceased three times with a hoe handle but did not specify where he directed the blows. Thereafter he said he pushed the now deceased to the ground. The accused said after realising he could have injured the now deceased, he went to report the assault to the police.

The accused concluded his defence outline by saying he regrets this unfortunate incident as he acted out of anger but without any intention to kill the now deceased. The accused said he

did not realise that death would result from such an assault hence he should be convicted of culpable homicide.

The state led *viva voce* evidence from only one witness Melusi Baloyi an 8 year old boy.

The evidence of Shalati Matsilele, Sgt Tichaona Gororo and Dr Keith Lavaia was admitted in terms of the section 314 of Criminal Procedure and Evidence Act [*Chapter 9:07*].

A total of three exhibits were produced by consent. These are the post mortem report Exhibit 1; accused's confirmed warned and cautioned statement Exhibit 2 and the certificate of weight of the said hoe handle and a knife Exhibit 3.

The hoe handle weighs 0,86kg and the knife weighs 0,17kg. These items were not physically produced in court.

The accused's confirmed warned and cautioned statement is on all fours with his defence outline. The only addition the accused makes in that statement Exhibit 2 is that the now deceased was now casting Jetinosi's avenging spirit to the accused young brothers despite that the accused had paid nine beasts as compensation and that only one beast and a woman were the outstanding issues to be paid to Jetinosi's family. In that statement Exhibit 2 the accused said this is what he quarrelled about with the now deceased on the day in question.

The cause of the now deceased's death is not in issue.

Dr Keith Lavaia examined the now deceased's remains on 9 January 2020 and authored the post mortem Exhibit 1. The doctor observed that the now deceased sustained "*occipital skull fracture and blunt chest trauma*." The doctor concluded that the cause of the now deceased's death is severe head injury.

What appears to be in contention is how the now deceased sustained the severe head injury. This can be discerned from the accused's evidence in chief and under cross examination.

With all due respect to the accused his evidence in chief and under cross examination was very difficult to follow let alone to comprehend. The accused gave a rumbling account of the events of the fateful day 6 January 2020 (which he was now consistently saying it was 3 January 2020) *Mr Ruvengo* for the accused had an equally torrid time in trying to ensure the accused's evidence remained relevant to the issue at hand. He too apparently fought a lost cause.

In rather winding way the accused said the family had prepared a family gathering on Christmas day in December 2019. The accused said as he was attending to his mentally ill brother

he failed to attend the Christmas family gathering. As a result, the accused said on the day in issue he went to explain his absence at the Christmas family party to the now deceased.

The accused said he quarrelled with the now deceased when the now deceased suggested that the accused should sell the accused's beast to raise money for the treatment of the accused's mentally ill brother.

In his evidence in chief the accused said he then fought the now deceased. In the process the accused said he hit the now deceased with a hoe handle on the chest causing the now deceased to turn and try to flee. The accused said he delivered a second blow on to the now deceased's back forcing the now deceased to turn back and face the accused. The accused said he then pushed the now deceased who in turn fell on his back and possibly hit on to some stones which were littered on the ground. This as per the accused possibly caused the now deceased's severe head injury observed by the doctor. Thereafter the accused said he fled from the scene and went to report the assault to the police.

The accused said the issue of Jetinosi's avenging spirit was never the cause of his misunderstanding with the now deceased on the day in question.

The accused denied going to the now deceased's home armed with a hoe handle and or a knife. He said he just picked the hoe handle at the now deceased's homestead as the two fought.

Under cross examination the accused said when he struck the now deceased, he was angry and was unable to tell the degree of force he exerted. He was said he also never bothered to check the extent of the injuries, if any, sustained by the now deceased. The accused said this was an emotional moment and all happened in the heat of the moment as the two fought. The accused was adamant that the now deceased fell and hit his head against some stones.

The accused steadfastly disputed that he struck the now deceased with a hoe handle at the back of the head. Instead he insisted that he only delivered two blows on to the chest and the back after which he pushed the now deceased.

The accused insisted that both Shalati Matsilele and Melusi Balaoyi did not witness this incident and were misleading the court. He could however not proffer any reasons as to why the two state witnesses would lie.

The practical challenge with the accused's evidence in chief and under cross examination is that it is at war or total variance with the accused's defence outline and accused's confirmed

warned and cautioned statement Exhibit 2. In his defence outline and the confirmed warned and cautioned statement the accused never mentioned that he fought the now the deceased. All he said is that he assaulted the now deceased without the requisite intention to cause death. Further the cause of his misunderstanding with the now deceased as per his defence outline and confirmed warned and cautioned statement was the avenging spirit not accused's failure to attend the family Christmas party or refusal to sell accused's beast. Lastly the accused in his defence outline and confirmed warned and cautioned statement never said the now deceased was fatally injured by by falling down and hitting against some stones.

It is therefore clear that when the accused took the witness stand he raised a whole range of new issues all together. It is as if he was now presenting a different set of events from those outlined in his defence outlined and confirmed warned and cautioned statement. This incredibility remain unexplained and is difficult to understand. It mortally damages accused's case.

The other aspect is that Shalati Matsilele's evidence was uncontested. Now what does she say?

Shalati Matsilele (Shalati) was 47 years old and both accused and the now deceased are her cousins. She said on 6 January 2020 she went to a well at accused's homestead to fetch water. At about 0900hrs she said accused arrived at the now deceased's homestead armed with a hoe handle. The deceased was seated. Shalati said the accused started shouting at the now deceased and proceeded to strike the now deceased at the back of the head with a hoe handle as the now deceased was seated. She said another blow was delivered on the back.

Shalati said the accused then advanced towards Shalati, chased after her, held her and threatened to kill her too. Shalati was left as accused said he was going to the police.

Shalati testimony is uncontested and it literally buries accused's case.

As per the investigating officer Sgt Gororo he recorded accused's confirmed warned and cautioned statement. The accused can not therefore distance himself at the eleventh hour from that statement. According to Sgt Gororo the accused made indications and led to the recovery of both the knife and the hoe handle relevant to the assault of the now deceased. This evidence was admitted with the accused's consent. The accused can not now deny that he had a knife.

The *viva voce* evidence of the young boy Melusi Baloyi (Melusi) is actually simply an icing on the cake. It was not meaningfully and materially challenged. No motive was suggested as

to why Melusi would fabricate his evidence. At his tender age the court can not believe that Melusi just dreamt up a story of what never happened.

Melusi testified that on the day in question he was at the now deceased's home with his young brother Ellie unyoking cattle. The now deceased was seated in the yard. He said the accused arrived shouting that the now deceased was bewitching the accused's children.

Melusi said the now deceased who remained seated did not respond. He said the accused immediately struck the now deceased with a hoe handle once at the back of the head. A second blow was delivered on the now deceased's back and the third one on the chest with the same hoe handle. Melusi said the accused who also had a knife proceeded to cut the now deceased between the thumb and the forefinger as the now deceased was already crying out in pain after the assault.

Melusi said the accused then ran towards Shalati who was near the garden and chased after her. He said accused caught up with Shalati and shouted at her to go and remove "her meat" [something Melusi said he did not understand what accused meant]. As Melusi fled from the scene to go and report to his other uncle Thusana he heard accused shouting that he, the accused, was going to Chibwedziva police station to report what he had done.

*Mr Ruvengo* had a herculean task in crossing examining Melusi. Melusi maintained his evidence on virtually all aspects including the manner accused attacked the now deceased at the back of the head, the chest and the back with a hoe handle. Melusi said he was close to the scene and saw all what happened.

It is clear that the accused assaulted the now deceased at the back of the head, the chest and the back. The now deceased at 78 years of age was clearly a frail old man. The accused delivered a blow at the back of the head with a weapon, a hoe handle. The degree of force used was excessive as the skull was fractured. The accused can not in all honesty say he did not realise that by striking a 78 year old man with such degree of force using a hoe handle at the back of the head could cause his death. The accused acted in that manner despite the risk or possibility of causing deceased's death.

The accused's later version of events is clearly false. The accused acted with legal intent. In the result we find the accused guilty of murder with constructive intent.

VERDICT

Guilty of contravening section 47 (i) (b) of the Criminal Law [Codification and Reform Act] [ *Chapter 9:23*] ÷ Murder with constructive intent.

SENTENCE÷

*"14 years imprisonment "*

*National Prosecuting Authority, counsel, for the state  
Ruvengo Mabke & Company, pro deo counsel for the accused*