

STATE  
versus  
ELTON MAKAZA

HIGH COURT OF ZIMBABWE  
MWAYERA J  
MUTARE, 07 October 2020

**Criminal Trial - Sentence**

ASSESORS: 1. MR CHIPERE  
2. Mr A. T. CHAGONDA

M Musaruwa, for the State  
*C Mukwena*, for the Accused

MWAYERA J: The accused pleaded not guilty to a charge of Murder as defined in s 47 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and proffered a plea of guilty to culpable homicide as defined in s 49 of the same Act. The state accepted the plea of guilty to culpable homicide and thus the matter proceeded on the basis of a statement of agreed facts.

This case involves sad loss of precious human life due to violence perpetrated by an uncle on his young nephew over alleged theft of a belt and wallet. The summary of the agreed facts is as follows. On 9 September 2019 at around 1000 hours, the accused found his wallet and belt in the deceased's bedroom. The accused, annoyed by this discovery picked sticks from a tea field and assaulted the deceased all over the body. The accused left the deceased in the room and notified the other relatives that he had assaulted the deceased. The following day in the evening the deceased was found lying dead on his bed. The remains were examined and the Doctor one Brian Makumbe observed multiple bruises on deceased's hand, thighs, back, torso and fracture on the occipital. The doctor concluded that the cause of death was head injury and under nutrition. The post mortem report was tendered in evidence as exh 1. Also adduced in evidence were the 6 small sticks and a certificate of weight reflecting weight and length of the sticks. Exhibit 2 and 2A respectively. Worth noting is the fact that the sticks were small ranging between 1cm and 1,5cm in diameter with weight of all being less than a kilogram

ranging between 4 grams and 22 grams. The accused admitted to having negligently assaulted the deceased whom he also left unattended lying in the room after the assault. Both counsel addressed us in mitigation and aggravation and we considered the totality of the submissions in assessing an appropriate sentence.

### **Sentence**

In reaching at an appropriate sentence we have considered all mitigatory factors submitted by Mr *Mukwena*. We have also considered all aggravatory factors submitted by the state counsel, Mr *Musarurwa*.

The accused is a first offender who pleaded guilty to negligently causing the death of his nephew a sister's son. The plea of guilty in itself should be credited for what it is worth. Whereas we are not applauding the accused for causing death of deceased. His plea of guilty is a clear sign of regret and remorse. The accused is aged 54 and thus lived a clean life as evidenced by not having any previous convictions. Also in mitigation is the fact that the accused is a family man with responsibilities as a bread winner for his wife and children. That the accused has episodes and bouts of epilepsy is a clear sign of not being in good health. We have also considered that by negligently killing his nephew over suspected theft the accused will live with the stigma of being a killer for the distinction of culpable homicide and murder is none existent in the community.

Further in mitigation is the fact that the accused spent almost a year in custody awaiting the finalisation of the matter. The pre-trial incarceration period is pregnant with anxiety and trauma. We have also considered the suggested sentences by both counsel and we are indeed alive to the fact that in passing sentence the court has to strike a balance between the offence and offender tempering justice with mercy while at the same time ensuring that the interest of justice is met.

In a bid to strike this balance we have considered the aggravatory factors and mitigatory factors and circumstances surrounding the commission of the offence. The deceased lost his life in a domestic set up and that aggravates the offence. The home is supposed to be on board for protection, love and patience. In this case the accused took the law into his own hands and severally and severely assaulted the deceased with sticks. Although the sticks going by their size and weight cannot be described as lethal weapons the intensity of assault of a malnourished person aggravates the offence. Worth noting however is the fact that the deceased's condition of being under nourished exacerbated the situation. However the fact that blows were aimed

at the head is aggravatory. The matter could have easily been resolved in a diplomatic manner to avoid taking away a God given and constitutionally guaranteed right.

The suggestion of the sentence of a fine for culpable homicide occasioned by physical assault on the back drop of the prevalent culpable homicide and indeed murder cases would make the society lose confidence in the justice delivery system. It would be a mockery to the sanctity of precious human life. A short prison term is appropriate and will send the right message to the community at large that violence related offences especially occasioning loss of life are not treated with kid gloves.

In this case we are persuaded by the highly mitigatory circumstances and health condition of the accused to pass a wholly suspended prison term taking into account the 1 year pre-trial incarcerating period.

4 years imprisonment wholly suspended for 5 years on condition accused does not within that period commit any offence involving the use of violence on the person of another for which he is sentenced to imprisonment without the option of a fine.

*Messrs Chibaya & Partners, Accused's Legal Practitioners*  
*National Prosecuting Authority, Respondent's Legal Practitioners*