

STATE  
And  
MUNYARADZI WIROSI

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 07 and 15 September 2021

ASSESSORS: 1. Mr Chagonda  
2. Mr Chipere

### **Murder Trail**

*M Musarurwa*, for the state  
*Ms N Garutsa*, for the accused

MUZENDA J: The accused is being charged for Murder as defined in s 47(1)(a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*], it being alleged that on 21 September 2020 at Dzekiwa homestead Buhera, accused assaulted the deceased by striking him twice on the head with a pick head intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which the now deceased died.

Accused pleaded not guilty.

In the precis of his defence accused tenders a plea of guilty to culpable homicide. He states that when he got to Dzekiwa's homestead where there was a traditional brew, the now deceased threatened to heavily assault him in the same way he had previously assaulted him two months back. He adds that now deceased was in the habit of bullying, assaulting, abusing and belittling him to the extent that accused was afraid of meeting up with deceased. Immediately after being threatened the accused resolved to ward off the threat but due to poor judgment arising out of intoxication, he picked a metal object and hit the now deceased twice with it. Accused thereafter fled from the scene and went to his home. Accused denies intentionally causing the death of the now deceased but concedes that he acted negligently. He also admits using excessive force in the circumstances but insists that he only intended to ward off the threat of assault which deceased had made. He also admits that a reasonable man in his

circumstances would have foreseen the risk of death from his conduct and he failed to guard against that risk. On that basis he prays that he be found guilty of culpable homicide.

The background facts of the matter as per Annexure A, the state summary is to the effect that on 21 September 2020 at around 1800 hours at Dzekiwa's homestead, Chief Chitauro, Buhera, accused assaulted deceased by striking him twice on the head with a pick-head weighing 2.220kg and 40cm long. Deceased sustained serious injuries as a result of the assault. Deceased passed on at 1900 hours. A post-mortem examination was performed and the Doctor concluded that the cause of death was due to (a) brain injury (b) right brain hemisphere and occipital subarachnoid haemorrhage and (c) severe head trauma. The pick-head was recovered and was produced in court as an exhibit and marked exhibit number 2(a).

Given the defence outline of the accused coupled with his evidence in chief most facts are not in dispute. Accused admitted being at the traditional brew drinking together with the now deceased. Accused admits attacking deceased in the manner described in the indictment and did so without prior warning to the deceased. Accused admitted using both hands to lift the pick-head and delivered the blow on the head. Accused admitted that at the time he attacked deceased there was no fighting, no exchange of words and that he was not under imminent attack nor danger from the deceased. To him he wanted to thwart an attack from deceased before deceased could attack him. Accused also admits that immediately after attacking the deceased and after the later had collapsed, he ran away from the scene. It is also not disputed by the accused that he used excessive force in attacking the deceased and further in his defence admitted that he would have foreseen the risk of death arising from his conduct and he failed to guard against that risk.

What is outstandingly in contention is the aspect of *dolus*. Did the accused have the necessary intention, actual or legal to cause the death of the deceased? The state called Ivene Mapurisa who happened to have been at the scene of the crime on the day in question. According to his testimony deceased was his young brother and was sitting with him partaking traditional brew. Accused suddenly hit the deceased twice on the head with a pick-head without saying anything. Deceased was not armed and he instantly fell and died shortly afterwards. Accused fled from the scene. All the witnesses whose evidence was admitted by the accused corroborates and confirms the version of Mr Ivene Mapurisa in all material respects.

It is now settled law that the aspect of intention can safely be inferred from the nature of the weapon used, the part of the body the fatal wounds were inflicted, the number of blows,

intensity and viciousness of the attack. The accused used a pick-head and struck deceased on a delicate part of the body, the head using both hands to lift a 2.2kg pick-head. Both blows were delivered with vicious force to such an extent that accused apparently intended to “fix the deceased” by causing him to die. We do not accept accused’s version that he picked the pick-head at the scene, from the circumstances of the case it appears accused brought the pick-head to the scene, waited for an opportunity to attack deceased and executed his plan. We were not told as to the basis of the grudge between deceased and accused but on this day accused had pre-planned to take revenge at the deceased. At the time accused arrived at the beer drink he had already formed a desire to attack the deceased to settle his vendettas whatever they were. Accused says he lived in fear of the deceased, the question is if it was so why did the accused choose to remain at the beer drink where deceased was present? In our view the logical thing was to walk away immediately upon detecting deceased’s presence, why accused stayed at the place for such a considerable period of hours baffles the court. If the accused is worthy to be believed by the court the moment he was threatened by deceased he should have been cautious enough to take heed and disappear from the scene. We are unable to accept accused’s version regarding the threats from deceased more particularly on that date. We conclude that accused’s attack on the deceased was pre-planned, deliberate, unprovoked and well-orchestrated. The accused though he had consumed alcohol was not very drunk, he perceived the weight of the pick-head and using both hands used it to assault the deceased. In any case accused was not forced to consume alcohol and the issue of provocation was not established by the defence, the two alleged defences of intoxication and provocation have no solid foundation and they are rejected. It is also important to note that the accused was not open to the court especially when he disowned his extra-curial statement which speaks of accused having been cut on his finger with a knife and accused gave that excuse as the motive behind his action. He totally abandoned that trajectory in court trying to rely on new defence of past and present threats from the deceased. The accused fared poorly as a witness in court and we reject his version totally on what moved him to attack the deceased.

The state had managed to prove its case beyond reasonable doubt. Accused is found Guilty of Murder with actual intent as charged.

**Sentence**

Accused is aged 24 years and the court will treat him as a youthful offender. He had been subjected to bullying by the deceased and on the day in question he had consumed alcohol. These aspects may have had an impact on his conduct and judgment. The family had paid retribution of 26 herd of cattle and the court will consider that in assessing an appropriate sentence.

However in aggravation the accused has been convicted of a very serious offence which may even attract capital punishment. Life was unnecessarily lost and members of the public must learn to use legal channels to resolve disputes than resorting to self-help. Deceased died a painful death of having his head crushed by a metal. He has left a young family and that death could have been avoided. Balancing the mitigatory and aggravating factors in this matter you are sentenced as follows:

20 years imprisonment.

*National Prosecuting Authority, state's legal practitioners*  
*Tandiri Law Chambers, accused's legal practitioners*