

STATE
versus
ENERGY BAISAI alias ENERGY CHIPINDA

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 1 and 2 February 2022

CRIMINAL TRIAL (Murder)

ASSESORS: 1. Dr Sana
2. Mr Chagonda

Mrs J Matsikidze, for the state
Mr C. N Mukwena, for the accused

MUZENDA J: A case of belief in witchcraft! Accused whose estimated age at the time the offence was committed in 2020 was 18 years is facing three counts of Murder as defined in s 47 (1)(a) or (b) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. On 3 December 2020 at Chitsanza Village Chief Chamutsa Buhera, in Manicaland. Accused assaulted Erina Hlabati using a log. He went on to assault Tafa Chitsanza using a burning piece of wood all over the body then using a stone brutally crushed Tafa Chitsanza's head. After these attacks he proceeded to assault Millia Chinotimba using a piece of burning firewood and using a stone crushed her head with a stone. It is alleged in all three counts that accused intended to kill his victims or realised that there was a real risk or possibility that his conduct might cause death but continued to engage in that conduct despite the risk or possibility resulting in injuries from which all the three perished.

Accused when asked to plead to the charges gave a blended answer stating that he admitted to the charges and also denies them. Pleas of not guilty were entered in respect of all the three counts.

In the summary of his defence, accused denies that he had the requisite actual or legal intent or acted negligently. The result of his conduct was the persistent dream from his late parents who died when accused was but merely a year old in 2002 allegedly as a result of witchcraft. These nightmares drove him to avenge the death of his parents. From the age of 9

years he had been dreaming about this and after consultation he was told that Elias Chitsanza and Emilia Chinotimba had spiritually caused the deaths. Accused added that according to his late mother's visions Elias Chitsanza gave accused's parents poisoned mealie-meal which they used to prepare food which led to their deaths.

On 3 December 2020 his parents woke him up from his sleep and led him to the scene. At the scene his parents identified people who were responsible for their death and his father possessed him and whilst possessed by his late fathers' spirit he killed all three people. During his evidence in chief he conspicuously explained how each victim of murder was attacked and where the blows landed. He was able to identify Anesu Mwatsikesimbe by name and allegedly shielded her from attack. He also spoke as possessed during cross-examination by the state and stated that it was the dead father who was now speaking through him whilst in court. Accused admitted in court in his evidence in chief and under cross-examination that it is him who fatally crushed all three victims to death and the intention was to kill them.

In addition to giving evidence in court, accused's confirmed warned and cautioned statement exh 2, is very clear and sheds light in the whole matter. It goes as follows:

"I admit to the charges being levelled against me, I arrived at the Chitsanza homestead and picked a burning wooden log from the fireplace outside the house. I entered into the kitchen and struck ERINA HLABATI with a burning wooden log all over the body and she ran outside. I followed her and picked a stone from the yard and crushed her head with it. I proceeded to where Tafa CHITSANZA was standing and struck him using the same burning wooden log all over his body and used the same stone to crush his head. Lastly I killed MILLIAH CHINOTIMBA using that same burning wooden log all over her body and that stone on her head. I killed Tafa CHITSANZA as a way of revenging since he killed my father and my mother by bewitching them when I was one year old. The other two fell victims to murder but I arrived there without the intention to kill them."

The state produced two stones, the bigger one weighs 10kg and the smaller one 2kg. The wooden log was 60cm long and weighed 4.9kgs. The photo album produced by the state with consent of the defence counsel shows heart wrenching pictures of victims' crushed heads, the pictures are not meant for people of nervous disposition. The heads of Tafa Chitsanza and Milliah Chinotimba show fatally deformed skulls, leaving the deceased almost headless. All the three victims died instantly after the attack.

All the evidence led by the state was not contested including oral testimony of Anesu. Infact accused agreed with all the facts stated by the state. In his extra curial statement he accurately captures what happened on 3 December 2020 and this prominently features in the state papers. There is no dispute on the facts and the only fascinating element of the defence is

that he alleges that all that happened on the date in question can never be perceived by an ordinary person. To the real world all the action would appear as if it was accused who did that yet he was not the one but the spirit of his late father who had taken his physical self. His defence was ingenious but on a second reflection of all the circumstances it curiously lost its glamour and creativity. How did accused remember where he was before going to the victim's homestead? How would he recall Anesu's name and save her? How would accused be able to tell the court who was attacked first and how, where and who next was attacked? How would a medium know what the spirit chronologically attacked the victims? When the extra curial statement was recorded by the police, how would a medium be able to give a vivid description of what happened at the scene. Even when giving evidence in court accused gave a logical well thought out narration of events. He was to the point. We also realised during cross-examination that accused wanted to behave as possessed by his late father yet in our view it was purely stage acting. We came to the conclusion that there is virtually no scientific evidence adduced before us to show that accused suffers from any mental problem. He is totally fit and in control of his mental faculties. He is able to recapture and relate what transpired on 3 December 2020 because accused went to attack the now deceased persons to avenge the alleged killing of his parents. The issue of being possessed by a deceased person is a piece of artistry which this court will reject totally. Accused is the one who fatally attacked all the three victims.

What is left for determination is whether accused had the *mens rea* to kill the 3 victims? Accused set out to kill in revenge and he repeated the same aspect in court. The injuries on the heads of the victims leave no doubt to adjudge accused's intention. He used fairly dangerous lethal weapons and exacted protracted deliberate attack on the vulnerable parts of the victims' bodies, he used a 10kg, 2kg stones and a 4.9kg log to attack the victims and went on to crush literally to pieces the skulls. He only stopped the assault when he realised that he had killed each of the victims. After the act he yelled out to the world boasting about the killing and even threatened who ever dared to come and stop him from killing the victims. The killing was heartless, callous, brutal and merciless. We have no difficulties in determining the mental element of the accused.

Accused intentionally embarked to go and kill the 3 victims and he did so. He had the necessary intention to commit Murder and accordingly the following verdict is returned:

Verdict: Count 1: Guilty of Murder with Actual Intent

Count 2: Guilty of Murder with Actual Intent

Count 3: Guilty of Murder with Actual Intent

Sentence

In arriving at an appropriate sentence the court will take into account what has been submitted on your behalf in mitigation and what the aggravating features are. You are a youthful offender, and this is your first brush with the law. You genuinely believed what you were told about how your parents were bewitched to death and it appears your grandmother misled you and later abandoned you. The court will also take into account the period you have been in custody awaiting completion of this matter.

In aggravation you have been convicted of 3 counts of murder. As I already pointed out in this case the offence was committed brutally and heartlessly. The court failed to fathom what was going on in your mind when you crushed the victims' heads the way you did. You showed no regards to the sanctity of life and acted like a barbarian of the Gothic period. If your parents had been bewitched their spirits should have fought their own war than putting you into a mess where you went to the victims and attacked them at night. You have been saved by your age. However in 2020 you told the remand court that you were 18 years old and you still tell this court that you are still 18 years 2 years after 2020. You should be 20 years now although when you committed the offences you were 18 years. Otherwise you deserved 3 death sentences. Due to your tender age, you will not receive capital punishment. You will be sentenced as follows:

Count 1: Life imprisonment

Count 2: Life imprisonment

Count 3: Life imprisonment

*National Prosecuting Authority, state's legal practitioners
Chibaya & Partners, accused's legal practitioners*