

THE STATE

Versus

KUDAKWASHE MTETHWA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
GWERU HIGH COURT CIRCUIT 24, 25 & 26 JANUARY 2012

Ms D. Msipha, state counsel
Ms D. Shirichena, defence counsel

Criminal Trial – Ex Tempore

KAMOCHA J: The 28 years old accused pleaded not guilty to two counts of murder. In the first count he was alleged to have, on 30 January 2009, unlawfully and with intent to kill, stabbed Meck Mtethwa a male adult aged 66 years with a knife several times on the chest and left arm pit thereby causing injuries which caused his death.

Secondly, he was alleged on the same day and at the same place to have unlawfully and with intent to kill, stabbed Freddy Mtethwa, a male adult aged 23 years once on the abdomen with a knife thereby inflicting injury which caused his death.

The deceased in the first count was the accused's biological father while the deceased in the second count was his half brother whom he shared the same father in a polygamous marriage.

The state outline was read and produced as exhibit one and I do not intend to read it again. I shall however, read the accused's defence outline which reads thus:-

"Facts

- 1) He resides at village Chikwangwadza, Chief Nyamhondo, Mberengwa Communal Lands.
- 2) On the 30th January, 2009, after retiring from the fields around 1pm he went for a beer drink in the company of the two deceased persons.
- 3) The beer drink was at his uncle's place in the same neighbourhood.
- 4) At around 1800 hours the trio returned to their homestead where there was also a beer drink. He continued to drink beer together with the two deceased persons.
- 5) Accused person will state that whilst they were drinking, his young sister Charity started jumping around where they were seated with the two deceased persons.

- 6) Accused then sought to discipline Charity his young sister by beating her with a sjambok as he regarded her behaviour as disrespectful.
- 7) The 1st deceased Meck Mtethwa then intervened assaulting accused person ordering him to stop beating his sister.
- 8) He will submit that the 2nd deceased person Freddy Mtethwa also joined in assaulting him overpowering him. He felt powerless as he was drunk.
- 9) At that stage the accused person then stabbed 1st deceased as he felt he had no other means of defending himself.
- 10) He will further state that when second deceased continued to assault him he also stabbed him on his abdomen.
- 11) Accused person will submit that the two deceased persons were the aggressors.
- 12) He will state that they provoked him. He had no other means of defending himself other than behaving in the manner in which he did.
- 13) Accused person will state that when he stabbed the two deceased persons he had been overpowered since he was very drunk.
- 14) He will state that at the time he wrestled and injured the two deceased persons he was rendered temporarily incapable by reason of intoxication and could not appreciate the consequences of his actions.
- 15) Alternatively, if it is shown that he was capable of appreciating consequences of his actions he will aver that he was incapable of directing and restricting his conduct in accordance with his appreciation.

Wherefore he prays that he be found not guilty and acquitted of murder and be found guilty of culpable homicide.”

The third exhibit was the accused’s confirmed extra curial statement made on 16 February 2009 when matters were still fresh on his mind. What he told the police then is at variance with what he told his legal practitioner in the above defence outline. His statement reads thus:

“I have understood this caution and I admit the allegations leveled against me that I murdered Meck Mtethwa and Freddy Mtethwa. I first stabbed Meck Mtethwa with a knife which was in my right hand on the chest and left armpit but I cannot remember how many times after a misunderstanding when we were drunk with “mukumbi”. I later stabbed Freddy Mtethwa with the same knife once on the stomach after he had got hold of me trying to stop me from further stabbing Meck Mtethwa. After I had stabbed them, I went away leaving them struggling with their lives. That is all I can say.”

The 4th exhibit was a post mortem report in respect of the 1st deceased. The doctor observed the following injuries on the remains of the 1st deceased:- 3 deep lacerations in the left axilla; 3 deep lacerations on the left pre-cardium; 1 deep laceration and 3 superficial lacerations on the left arm; and 1 deep laceration on the left eleventh intercostals space.

In conclusion the doctor was of the opinion that the cause of death was:-

- 1) Tension pneumothorax due to stab wound to the chest; and
- 2) Severe bleeding, resulting in hypovolaemic shock and cardiac arrest due to multiple stab wounds.

Exhibit 5 was a post mortem report in respect of the 2nd deceased Freddy Mtethwa. The doctor observed and recorded the following injuries:- abdominal stab wound on the left flank at least 7 cm in length with loops of intestines extruding through the open wound. He then concluded that death was due to hypovolaemic shock as a result of stab wound to the abdomen resulting in cardiac arrest. The 6th exhibit was the knife which the accused admitted to have used in inflicting the injuries on both the deceased persons. Its dimensions are these:-

Total length	-	25cm
Length of blade	-	14cm
Length of handle	-	11cm
Weight	-	88gm

The cutting side of the blade is very sharp and so is its tip.

The evidence of the following state witnesses was admitted by consent as it appears in the state outline in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07], the mother of the accused who is also called Marita Mtethwa; Farison Chenai; End Munetsi; Barnabas Jose; Sheunesu Zhou; Fainos Mukange and Dr T. Moga.

Viva voce evidence was adduced from two witnesses namely the other Marita Mtethwa and Charity Mtethwa.

I shall start with the evidence of Charity Mtethwa who, in my view, was the key state witness. She told the court that the accused is her half brother sharing the same father with him but they have different mothers. She is from the second house while the accused is from the first house. The first deceased was her father and was the father of the accused and the second deceased who was her blood brother.

On the fateful day i.e 30 January 2009 she and both deceased persons, the accused and her mother Marita Mtethwa were sitting in front of her mother's kitchen hut. They had been eating their evening meal but the accused did not partake.

The accused's wife brought some sadza for him and placed it near him and went back to her house. Shortly, thereafter, the accused instructed Charity to return the food to his wife without eating it. Charity refused to do so and asked him why he was asking her to do so when his wife had just left. She said if he did not want the food he should have told her to take it back. But the accused started to raise his voice and started to talk harshly. The second deceased said in order to avoid any trouble Charity should do what she was told to do by the accused.

She then went towards the accused and knelt to pick up the plates which had the food but the accused scratched her with a knife on her chest. She stood up and asked the accused why he had scratched her with a knife on her chest.

That infuriated the accused who stood up and started beating her up with a sjambok on her back and head. She ran behind her mother seeking refuge but accused followed her. She then went behind her father still seeking refuge thinking that would help but he still followed her. She ran away again going behind her mother who then got up and got hold of the accused. Her father also stood up and got hold of the accused and told her mother to move away.

As the father was holding him he asked him to produce the knife which Charity said he had. The accused then asked his father where he thought he could have got a knife and with that he struck the father with an open hand. As the father was still perplexed and asking the accused why he was assaulting him for asking him about the knife, the accused took out a knife from his pocket and stabbed him several times in the chest and pushed him until he fell down. She heard him gasping for breath. But the accused jumped up and stamped onto his chest.

The accused then started moving around brandishing the knife from side to side. She then told her mother that they should run away which they did and went to Farison Chemai's homestead. When they ran away they left the second deceased still in front of the kitchen hut.

The witness was emphatic that the accused was not drunk at all. She has seen him on several occasions when he was under the influence of alcohol. She said he usually becomes quite when he is drunk and goes to sleep.

In any case she said there was no beer at their homestead on that day. She said the accused's suggestion that there was some beer at home was false. No beer was brought to the homestead on that day.

She also emphasized that the two deceased did not assault the accused in any way. The suggestion that they did was false. Similarly the suggestion that the two had overpowered him and he had to defend himself was a lie. She further was emphatic that the accused had the knife on his person which he produced and stabbed both deceased persons with. Her evidence was corroborated in all material respects by that of her mother Marita Mtethwa who told the court that accused used a switch to assault Charity. She was mistaken on that point because the accused himself said he used a sjambok in his defence outline.

The witness said she does not drink alcoholic beverages as she is a member of the Zionist Church. She said there was no beer at her home on that day and that no beer had been brought to her home.

The accused himself corroborates the evidence of the state witnesses in his confirmed extra curial statement wherein he said he stabbed the deceased persons for trying to restrain him.

The court called Farison Chemai to give *viva voce* evidence although his evidence had been produced by consent. The witness clarified the point that there was no mukumbi drink at his homestead on that date. He denied ever seeing the two deceased persons at his home on that day. He had seen the first deceased at a church meeting at their church earlier that day. The only time he saw the two deceased persons together was when he found them dead at their homestead after being summoned by the 1st deceased's wives.

He said he himself did not drink beer and so did the 1st deceased and the second witness Marita Mtethwa.

The state witnesses gave their evidence well and in a clear manner. They were indeed credible witnesses who were worth to be believed.

The same cannot be said about the accused who gave three versions about the same event. When matters were fresh on his mind he made a confession. Three years later he altered his story when instructing his legal practitioner and raised self defence. His story changed when he gave *viva voce* evidence. He completely disowned his confirmed extra curial statement and even went as far as saying he had not made the statement but it was a creation of the police. He denied the statement was confirmed by a magistrate. He also denied instructing his lawyer to the effect that he had beaten up charity with a sjambok or at all.

The accused faired very badly when giving *viva voce* evidence. He was clearly being untruthful and is not worth to be believed. His story in court is rejected and so is what is contained in his defence outline. The truth lies in what he said to the police when matters were still fresh in his mind and he was a bit remorseful about what he had done.

Wherever his story conflicts with that of the well given evidence of the state witnesses I prefer that of the state witnesses.

The accused inflicted 8 stab wounds with the knife exhibit 6 on the first deceased manifesting a clear intention to kill and murder him. Similarly he also cut open the stomach of the second deceased clearly showing the intention to kill and murder him.

In the result I would find the accused guilty of murder with actual intent in respect of each count.

Extenuation

The accused attacked both deceased persons in brutal fashion without any provocation. Both deceased persons were stabbed to death for trying to restrain him. The father was mercilessly stabbed 8 times for trying to stop him from assaulting Charity with a sjambok. He stabbed his half brother for trying to stop him from continuing to stab his father. The assaults were brutal in that the blows were aimed at very vulnerable parts of the human body. The father was stabbed 8 times mainly in the chest. The accused cut open the second deceased's abdomen causing the intestines to protrude from the 7cm long stab wound.

The accused tried to mislead the court by suggesting that he was drunk when in fact he had not taken any alcohol on that day.

The attacks were completely unprovoked. The accused was carrying the knife a lethal weapon on his person. He also had a sjambok with him. He was prepared to use the weapons in case of trouble.

Although the crimes may not have been meditated they were not committed in circumstances of extenuation.

In the result this court holds that there are no extenuating circumstances in this matter.

Sentence

Count One

The sentence of this court is that you be returned to custody and that the sentence of death be executed upon you according to law.

Count Two

The sentence of this court is that you be returned to custody and that the sentence of death be executed upon you according to law.

*Criminal Division of the Attorney General's Office, state counsel
Chitere Chidawanyika & Partners, accused's legal practitioners*