

**THE STATE**

**Versus**

**MAKINA LIKONGE MUTAIPI**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
HWANGE HIGH COURT CIRCUIT 7 & 8 NOVEMBER 2012

*K. Ndlovu assisted by Ms Munsaka for the state*  
*E. Mashindi for the accused*

Criminal Trial

**KAMOCHA J:** The 77 year old accused pleaded not guilty to a charge of unlawfully, wrongfully and intentionally killing and murdering Michael Stali Simasiko on 25 May 2011 at his (deceased's) homestead.

The state outline was read and produced as exhibit 1 and I do not propose to read it here again. I shall, however, read the accused's defence outline. It was brief and reads as follows:

"The accused person will plead not guilty to the charge of murder and will state that:-

1. He lacked the requisite intent to kill
2. The deceased accused him of being a wizard and having killed his seven children (his own children)
3. The accused was intoxicated and failed to appreciate the consequences of his actions.

Wherefore he prays for his acquittal."

Exhibit 3 was the accused's confirmed extra curial statement which reads thus:

"I admit the charge against me of killing the deceased Michael Mtali Simasiko, after he insulted me. I got angry and followed and struck him with a stick at his homestead."

The next exhibit was an affidavit by Constable Binha who identified the deceased's body to doctor I. Jekonya at Mpilo Hospital. Doctor Jekonya examined the remains of the deceased and compiled the post mortem report exhibit 5. The summary of the history he received was

that the deceased had been assaulted several times with a log of 88 cm long and 2.5cm diameter on the head and all over the body by accused on 25 may 2011 around 19;00 hours.

The doctor observed the following marks of violence (a) Bruised right cheek region with several loose teeth on both lower and upper jaws. (b) Bruised right mid leg (front part 8 x 6cm). (c) Bruised right lower and posterior chest and (d) Some bruises of the neck.

The internal examination revealed the following: The right lung had collapsed due to a pneumothorax (air in the pleural chest cavity). There was haemothorax (blood clots) in the chest cavity) of about 400mls. There were multiple rib fractures on the right. Some ribs had double fractures.

The doctor remarked that the pneumothorax had been caused by the chest injury (trauma) and that severe forces were used to cause the rib fractures. He then concluded that death was due to pneumothorax resulting from chest injuries following the assault. Exhibit 6 was the stick the accused admitted he had used to assault the deceased with. Its measurements were: 88cm long; 2.5cm in diameter and weighs 480 grams. This court noted that the stick was now dry. It is a stick from a hardwood like a teak tree. The stick must have been heavier at the time it was used judging by the injuries it inflicted on the deceased.

The evidence of the following witnesses was admitted in terms of section 314 of the Code as it appears in the state outline and other documents filed of record. The evidence of David Moyo, Constable Simoko, Constable Binha and Dr I. Jekeny. The defence counsel also admitted that the stick exhibit 6 was the one used by the accused to assault the deceased.

*Viva voce* evidence was led from two witnesses namely Josiah Shoko and Constable Njabulo Mbangeni.

Josiah Shoko told the court that he lived at his own homestead in Siamuwele area at Mapucula in Jambezi. He knows both accused and deceased as they also lived in that same area as his neighbours. The accused was his brother-in-law. He said the accused and deceased regarded each other as brothers and they use to refer to each other as such.

On 25 may 2011, there was a beer party at Angela Tshuma's homestead for cutting thatching grass. He himself did not go to cut grass as he already had a bundle of grass at his home. He only proceeded to the beer party at around 2pm with his bundle of grass to join the party.

On arrival he found that drinking was in progress. He thought the participants could have started drinking as early as 0900 hours. He found both accused and deceased there. People sat in a circle as they drank and accused and deceased sat next to each other about 2meters away from the witness. Beer went round the circle.

As the drinking progressed he saw accused and deceased standing up wanting to engage in a fight. He did not know the reason why they were about to fight. He and other people stood up to go in between the two and pulled the deceased aside while accused was pulled aside by other people. The witness told the deceased not to engage in a fight. He said old people should not fight. Deceased was 72 years old while accused was 76 years old. Moreover the deceased was a member of the committee of elders. What they were doing did not befit their status as old people.

The deceased then told him the reason for the altercation. He said the accused had alleged that he was taking more beer than others and that did not go down well with him.

The witness said after he had stopped the altercation things seemed to be normal again and the beer drinking progressed. This is corroborated by the defence witness Mr Lameck Mporu. Both Lameck Mporu and Josiah Shoko said the accused had been drinking beer at the most he could have been moderately drunk. Court makes that specific finding.

Lameck Mporu told the court that the reason why there was an altercation was because when the beer was being drunk the accused wanted to regulate the way the deceased should drink as he accused him of taking large quantities of beer. He said the deceased told him that he was free to do so as he had worked for the beer. Then surprisingly the accused said if his children had not died deceased would not have been talking to him like that. The deceased allegedly asked accused why he was raising the question of his dead children at a beer drink when he himself killed and ate them. This was completely irrelevant and had no bearing at all to the beer talk.

Evidence before this court is that when the altercation was stopped the deceased went to sit down and later lay down and fell asleep. Afterward he woke up and left for his home.

After some time the accused followed him and armed himself with the stick exhibit 6. He went past his own home to go to the deceased's home. His intention was to go and attack him with the stick exhibit 6. On arrival he perpetrated a vicious and brutal assault on him. He had the full appreciation that there was a possibility that the vicious and brutal attack would result in the death of the deceased but he recklessly continued with the attack. This court finds the accused guilty of murder with constructive intent.