

THE STATE

Versus

THOKOZANI NDEBELE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
HWANGE HIGH COURT CIRCUIT 6 & 10 NOVEMBER 2014

N. Ngwashe state counsel
T. Nkala defence counsel

Criminal Trial

KAMOCHA J: The accused who is aged 23 years old pleaded not guilty to one count of attempted murder and one count of murder.

The allegations were that on 27 May 2014 at Sitambare Line, Sipepa he wrongfully, unlawfully and intentionally attempted to kill and murder Samson Ncube a male adult in his life time therebeing.

Secondly, on the same day at the same time and place he did, wrongfully, unlawfully and intentionally kill and murder Siphathisiwe Masuku a female adult in her lifetime therebeing.

The accused explained to the court that he did not intend to kill the complainant in the first count and the deceased in the second count.

List of exhibits

- 1) State outline which I do not propose to read again
- 2) Defence outline which reads:

“At the trial of the above matter the accused will plead not guilty to the charge of attempted murder and not guilty to the charge of murder but guilty to culpable homicide and will state as follows in his defence:-

- (1) That on the fateful day he visited his girlfriend as usual
- (2) That upon arrival at his girlfriend’s place he entered the bedroom hut of his girlfriend.
- (3) That his girlfriend was in the hut when he entered and after about 10 minutes his girlfriend went out leaving him in the hut with their child, Sithokozile Ndebele.

- (4) That his girlfriend, Barbra Ncube came back in the company of Samson Ncube and the now deceased Siphathisiwe Masuku.
- (5) That the three of them ganged up against him and started assaulting him.
- (6) That Samson Ncube was armed with a knife and he (Samson Ncube) attempted to stab him where upon accused grabbed the knife from Samson resulting in him being cut on the right forefinger.
- (7) That upon dispossessing Samson Ncube the knife he used it to defend himself.
- (8) That he accepts that he was negligent and exceeded the legal bounds of self defence.
- (9) That he did not intend to kill anyone.

Wherefore the accused person prays that the Honourable Court finds him not guilty in respect of count one and not guilty of the charge of murder but guilty to culpable homicide.”

The court observed that the defence outline lacks details of how he stabbed Samson Ncube and the deceased. He does not say how he defended himself after allegedly disarming him of the knife. Neither does he give the details leading to the fatal stabbing of the deceased.

Exhibit 3 was the accused’s confirmed extra curial statement he made to the police on 9 June 2014 and was confirmed by a magistrate at Tsholotsho Magistrates’ Court on 17 June 2014. The statement is detailed and reads thus:-

“I am pleading guilty to the charges laid against me. I went there to see my two year old child which (*sic*) I have with Babra Ncube. Babra Ncube is the now deceased’s daughter. As usual I got into Babra Ncube’s hut and she was there. Babra Ncube got out of the hut leaving me inside. On her return she was now in the company of the deceased Siphathisiwe Masuku and a herdsman Samson Ncube. They ganged up against me and started assaulting me with clenched fists. Samson Ncube produced a knife and stabbed me on the second finger of the right hand.

Through a struggle I managed to snatch the knife from him and I stabbed the now deceased Siphathisiwe Masuku and she fell to the floor. I also stabbed Samson Ncube and he again fell to the floor. Babra Ncube ran away and I also fled away through the bush to our homestead to collect my clothes and then proceed through the bush intending to go to Botswana via Maitengwe.”

The accused’s statement is also silent on why the three suddenly attacked him with clenched fists. They just set upon him without saying why they were doing so.

The statement is at variance with his defence outline as to how he sustained an injury on

his finger. In it he is alleged to have been stabbed on the finger while in the defence outline he alleged that Samson attempted to stab him but he grabbed the knife from Samson resulting in him being cut on the right forefinger. In other words he was cut by the knife as he was trying to disarm Samson of it which is different from Samson stabbing him on the finger.

Why did the accused have to run through the bush and try to flee to Botswana via Maitengwe if the people were attacking him and he merely acted in self defence and Samson had in fact stabbed him on the right finger? Why would he hide the knife which he disarmed Samson of? He would have been expected to take it to the authorities and tell them that he had been surprisingly attacked and he had to disarm Samson and defended himself by stabbing both him and the deceased. His actions were not the actions of a person who was acting in self defence.

Exhibit 4 was an affidavit by Constable Isaac Jacob who identified the body of the deceased to the pathologist who compiled the post mortem report exhibit 5. The doctor observed that deceased had a stab wound behind the left ear measuring 2 x 1 x 6cm. There was bronchial aspiration of blood weighing 600 grams in the right lung and 500 grams in the left lung. He remarked that the post mortem was consistent with a stab wound from a sharp object e.g. a knife. The stab wound went in the spine between C1, C2 causing injury to the cord. The doctor concluded that death was due to:

- (1) Broncho aspiration
- (2) Cervical spine cord injury
- (3) Stab wound
- (4) Homicide

This court observes that the injury was inflicted at the back of the left ear suggesting that the blow was delivered from behind the deceased.

Exhibit 6 is the medical report in respect of Samson Ncube. The doctor in that case observed that the degree of force used was very serious and the injuries caused were serious but did not pose potential danger to life.

Exhibit 7 was a medical report in respect of the accused who was only examined on 30 July 2014. The doctor noted a healed linear laceration on the right index finger measuring 13 cm long.

With the consent of the defence counsel the evidence of the following witnesses was admitted as it appears in the state outline in terms of section 314 of the Code, Fanuel Mumpande, Tafadzwa Muchabaiwa, Constable Isaac Jacob and Dr S. Pesanai. The evidence of Tichaiza Mutimodyo was expounded from the state outline and record of proceedings.

Viva voce evidence was adduced from Babra Ncube and Samson Ncube. Babra Ncube told the court that she was once in love with the accused and the two had a one year six months child called Sithokozile Ndebele. The accused had paid to her parents some introductory money known as “kangaziwe”.

However, on the fateful day the two had been on separation for a period of about 2 weeks and the accused had stopped visiting her. The accused had been making unsubstantiated allegations that she was in love with another man whom he did not name. That was the cause of the separation.

On the fateful day at around 2000 hours as she was getting ready to go to bed she was going to sleep with her mother – the deceased, she went to her own bedroom hut to collect her blankets. She had her child strapped at her back. When she got to her bedroom hut she found the accused inside. The accused who was already in a hostile mood closed the door and ordered her to remove the child from her back and place her on the bed. She complied. He then uttered words to the following effect:

“To day I am finishing what is between you and me. Today I am killing you, the child and myself.”

With those words he grabbed hold of her from behind by her neck. He lit his mobile phone. He then drew out his Okapi knife from one of his hand gloves as he wore gloves on his hands that evening.

She screamed out on seeing him opening the Okapi knife. Her screaming attracted the attention of Samson Ncube – “Samson”, who went there and pushed and opened the door. The accused was destructed by the sudden appearance of Samson at the scene and the witness got the opportunity to break free and bolted out of the house. She then ran to the homestead of Mavis Bore to seek shelter. It was her evidence that she felt that if she had run to her mother – the deceased the accused would follow her and still harm her as there was no male person at their

homestead.

While she was at Mavis Bore's home Samson arrived and reported that the deceased had been killed. Samson himself had also been stabbed and was full of blood.

The witness and some neighbours proceeded back to the deceased's homestead and found her lying facing upwards outside her bedroom hut. She was dead.

The witness was emphatic that Samson was not armed in any way when he pushed open the door to intervene. The Okapi knife was drawn out by the accused from one of his hand gloves. In the result, it was her evidence that the suggestion that accused snatched the knife from Samson was false. Similarly she also dismissed as false the suggestion that the three of them for no reason suddenly attacked the accused. It was further false that when the accused entered her bedroom hut he found her lying in bed with the child. The correct sequence of events was that she found him in the bedroom when she went to collect her blankets.

It came out in her evidence that her love affair with accused had been terminated and they had been on separation for a period of not less than two weeks.

The reason for the termination of the relationship was that the accused suspected her of going out with another boyfriend. When asked to substantiate the allegations by telling her who that other man was accused was unable to name the person. The alleged other lover remained nameless until they separated.

According to her the separation seemed amicable as the two continued to communicate thereafter.

She fairly told the court that accused had paid what is known as "kangaziwe" an introductory fee normally paid by a man to the parents of the girl to be known as a prospective son-in-law. He however had not paid any lobola as he had not yet been charged any lobola.

Babra's evidence was corroborated by Samson on all material points. He confirmed that he was not armed in anyway. The Okapi knife belonged to the accused. There was therefore no truth in the suggestion that he stabbed the accused on the finger. The suggestion that accused disarmed Samson of the knife was false.

Samson agreed with Babra that the 3 of them never beat up accused with fists. He said there was no truth in that suggestion.

Apart from some immaterial inconsistencies for instance that Samson heard Babra tell the accused to leave her alone before she bolted out of the hut the evidence of the witnesses remained coherent. The fact remains that Samson found the accused holding her by her neck after her screaming attracted Samson's attention.

Both witnesses gave their evidence well as a whole and were worth to be believed. This court accepts their evidence. The same cannot be said about the accused, who was clearly being untruthful. His story that the two witnesses and the deceased suddenly beat him up with clenched fists without saying anything was clearly false.

His story that Samson had attacked him with the Okapi knife which he snatched from him and defended himself by stabbing him and deceased was palpably false. The Okapi knife was his and had taken it to go and use in attacking Babra.

The accused was not defending himself from anything. He was the aggressor from start to finish. He had gone to that home to inflict harm on the people there. He stabbed the deceased who posed no danger to him. He wanted to kill Babra, the child and then commit suicide. When that did not work he decided to attack Samson and deceased.

The defence counsel finally made a proper concession that the accused no longer relied on self defence as the accused was not defending himself from anything.

The accused is found guilty of assault with intent to cause serious injury on count 1 and guilty of murder with constructive intent on count 2.