

THE STATE

Versus

JECONIA MOYO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 16 AND 17 JANUARY 2014

K. Ndlovu state counsel
V. Majoko defence counsel

Criminal Trial

KAMOCHA J: The 19 year old accused was charged with the crime of murder. It being alleged that on 9 January 2013 at Elliot Ncube's homestead in the Bazha area of Matobo he did wrongfully, unlawfully and intentionally kill and murder Evidence Thabani Ncube a male adult in his life time therebeing.

When the charge was read to him he told the court that he admitted killing the deceased but had no intention to kill him. A plea of not guilty was then entered on his behalf.

The state outline was read and produced as exhibit one while the defence outline which was also read was produced as exhibit two. I do not intend to reproduce these two exhibits again. I shall however, read the accused's confirmed extra curial statement which he made two days after the crime was committed.

It reads thus:

"When I arrived at home I got a message from my wife Thembelani Ncube that the now deceased Thembani Ncube, had said that I should visit his home. I took a knife from the kitchen and went to the now deceased's place.

I knocked at his bedroom, he refused to open. I went to my cousin's bedroom and woke them up. I asked Langelihle Ncube to wake my aunt Dorcas Ncube. I and Dorcas Ncube went to Thembani Ncube's bedroom but. I knocked and my aunt Dorcas Ncube called out and he opened the door.

We went inside. I talked to him rebuking him telling him to stop proposing love to my wife Thembelani Ncube. My aunt rebuked me and I went outside. The now deceased Thembani Ncube remained inside, insulting me. I went back and told him to come outside.

When he came outside I slapped him. He held me by my shoulders and pushed me back. I came back and hit him with a fist. When he was about to fight me I drew out the knife

with an intention of stabbing him on the arm but the knife slipped and stabbed him on the back below his shoulder blade.”

The fifth exhibit was an affidavit by Constable Edson Chikunguru who identified the body of the deceased to the pathologist Dr S. Pesanai who examined the remains of deceased on 10 January 2013 and compiled a post mortem report exhibit five.

The doctor observed that the body had a stab wound on the left back 2cm from the midline 40cm from the top of the head. The heart had a perforated artrium (4 x 2)cm. The lung had a left haemopnuemotharax 300mls. He opined that death was caused by:-

- (a) Haemorrhagic shock;
- (b) Stab wound to the heart;
- (c) Sharp force trauma and
- (d) Homicide

The sixth exhibit was the kitchen knife which the accused stabbed the deceased with. Its dimensions are as follows:-

Length of handle	-	9cm
Length of blade	-	16cm (like a spear)
Total length	-	25cm
Weight	-	0.145kg
Width at its widest point		2cm

The court observed that it is a double edged knife with very sharp edges i.e. both sides very sharp like a spear and a very sharp tip. The double edged sharp blade is soldered to a hard metal hollow handle. The knife is very lethal. It is deadly if pushed into a human body.

By consent the evidence of the following witnesses was admitted in evidence as it appears in the state outline in terms of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07] Nhlanhla Ncube, Blessing Masuku, Shelton Sibanda, Patrick Ngwenya, Garnet Ndlovu and Dr Sanganai Pesanai. It was also admitted that the knife exhibit 6 was the weapon used by the accused to stab the deceased.

Viva voce evidence was led from Dorcas Ncube. Her testimony was that she lived at Elliot Ncube’s homestead in the Bazha area of Matopo. She knew the deceased as someone who had been hired by someone from Mapaneni to look after his cattle. The cattle had been brought to the homestead of Dorcas where the pastures were better than Mapaneni. Deceased arrived in July 2012 with the cattle.

The accused is her nephew – the son of her older brother. On 8 January 2013, during the night around midnight or past midnight, the accused went to her sleeping hut and knocked at the door 3 times but she did not answer.

Having got no response the accused went to the bedroom hut of her daughters and woke them up. On arrival at the bedroom hut of the witness the accused knocked at the door again. This time the witness asked who was knocking and the accused identified himself by

name Jeconia.

The witness asked the accused why he was waking her up during the night. His answer was to the effect that he had been having trouble or fighting with the deceased for sometime. He then asked her to come out which she did.

The accused then went to the deceased's bedroom hut. He then shouted that the deceased should come out or else he would set the hut alight and burn him in the hut with his knobkerries. (Church ceremonial knobkerries)

Dorcas said she then asked the accused what the deceased had done to deserve that. The accused said the deceased knew what wrong he had done. He went on to complain that the deceased had taken his (accused's) home and turned it into his own. He alleged that the deceased was having sexual relations with his wife. Further the deceased had turned his home into a gambling school and had turned his wife into a post man. He said unbeknown to the deceased his wife used to tell him what deceased did. He further more complained that he did not pay money for his wife in order to share her with the deceased as if they were brothers.

I pause to observe that it was highly unlikely that his wife would have told him that the deceased was having sexual relations with her. Further, it is not true that brothers share their wives.

The witness told the accused that she had heard his story and advised him that the issue would be dealt with the next morning. But the accused would have nothing of that. He started harassing the deceased who was outside by that time. He wanted him to answer to the allegations.

The deceased apologized to the accused and so did Dorcas on behalf of the deceased. The accused turned and walked away as if he was going away but "U" turned and went back to the deceased.

This time the accused alleged that the deceased had made a clicking sound with his tongue in disrespect of him. He accused the deceased of disrespecting him. He went on to allege that the deceased had told his wife that he (accused) did not even know the cost of a pack of playing cards.

I pause to observe that Dorcas who was present did not hear the deceased making the clicking sound with his tongue in disrespect. All she heard was the deceased saying, "I apologise my brother" as the accused was walking away.

After saying the deceased had told his wife that he did not know how much a pack of playing cards cost, he struck the deceased with an open hand. The witness said she rebuked him and told him to leave the deceased alone. That fell onto deaf ears. Instead, the accused took the attack to higher level by striking the deceased with a clenched fist this time. The deceased told the accused to leave him alone and was getting ready to fight back. But suddenly deceased began to run away as if he had seen something in the accused's possession.

I pause to observe that the accused himself told this court that when he realized that the deceased was getting ready to fight back, he drew out the knife exhibit 6. In fact accused said he had to draw out the knife because he knew that if the deceased who was older than him

and had bigger body built had fought back he (accused) would come out of the fight second best (he would be over powered)

Dorcas herself said she did not see the knife as it was dark. She believed he had seen the knife that is why he ran away with the accused in hot pursuit. He ran towards her bedroom hut whose door she had left ajar. Accused caught up with deceased by the door way and a struggle ensued at the doorway. The deceased fell into the hut while accused remained standing by the door outside the hut. When she got there deceased was leaning against a table breathing heavily. He had been injured and was bleeding profusely. The accused had stabbed him with exhibit 6 and there was a pool of blood.

When Nomazwe Ncube asked the accused why he was killing the deceased the accused told her that she would die for him. As the accused stood by the door outside he threatened to kill anyone who would try to touch him. So everybody was scared of touching him let alone arresting him.

The witness told the court that the deceased was chased by the accused for a distance of about 12m. She was emphatic that the deceased did not make any clicking sound in annoyance. She was also emphatic that deceased did not insult or swear at the deceased.

The accused rendered no assistance when the deceased was being taken out of her bedroom hut.

The witness concluded her evidence in chief by telling the court that she had no reason to give false evidence against the accused. The accused is her nephew and there was no bad blood between her and him. She told the court that the accused had been drinking and appeared moderately drunk.

The witness was cross examined at some length but her story remained clear and intact and easy to follow.

She was asked under cross examination why her story that the accused ordered the deceased to come out or else he would set the hut alight and burn him with his church knobkerries did not appear in the state outline. Her response was that she had told that to the police. She cannot be blamed for not including that piece of evidence as that was the fault of the officer who wrote that summary.

The witness also told the court under cross examination that the deceased did not respond to any of the accusations the accused was making against him including the allegation that he was sleeping with the accused's wife.

The witness fairly told the court under cross examination that the accused did not open the deceased's bedroom hut and drag him outside. She reiterated that deceased came out when accused threatened to burn him and his church knobkerries in the house if he did not come out.

Dorcas was a fair witness who gave her evidence clearly, convincingly and in a straight forward manner. She is worth to be believed.

The second witness was the accused's wife whom he married in November 2012 at the age of 16 years. It was her evidence that she still loved her husband and would have no reason

to give false testimony against him.

It was her testimony that a month after she was married i.e. December 2012 the deceased approached her and proposed love to her. She told him that she was already married and rejected his proposal. He went away but returned after some days and made his proposal again. He got the same response. Undeterred by negative responses the deceased approached her for the third time and made the proposal again. This time he told her that he intended to elope with her to his home area at Maphaneni.

Worried by the deceased's persistence she told her husband (accused) about the deceased's persistent advances and suggested that accused should reprimand the deceased. The accused assured her that he would do so. She, however, did not know if the accused did as promised.

Her evidence was that all the three love proposals were made before Christmas 2012. As if that was not enough on 7 January, 2013 deceased went to the accused's home in the absence of accused with a pack of playing cards. While he was there he started playing cards with the accused's wife and accused's sister Sibonginkosi. The accused arrived and found a game of cards in progress. He sat down. Accused's sister – Sibonginkosi asked the accused's wife to dish food for the accused who said she should not as he was going to do it himself when he wanted to eat. At that point the deceased went out leaving the cards in the possession of the witness and Sibonginkosi.

The accused asked for the cards from the two girls which they handed over to him. The deceased returned shortly after and called the witness to give him back his cards. She told him that the accused had taken them. Deceased asked for his cards from the accused who said he would give them to him but did not give him that day until he left.

The next day the deceased returned to collect his cards in the morning which accused gave to him.

I pause to observe that the deceased's behaviour was provocative indeed. After proposing love to the accused's wife and the proposals were rejected he still went to the accused's home in his absence to play cards with his wife. The deceased did not only go to the accused's home to play cards once but he did so twice.

On 8 January 2013 accused went to Gobalitombo area and only came back home at night. On his arrival he called out his sister Sibonginkosi and asked her to cook sadza for him. Sibonginkosi, however, called the witness to do it.

I make an observation that the accused did what was unusual. It is difficult to understand why he would wake up his sister to cook for him when his wife was there. He seems to have had something against his wife at that time.

The wife said she woke up and went to the kitchen to cook for the accused. She did not see the accused as he had left. She started cooking and as she was about to finish cooking, she heard the last witness Dorcas pleading with the accused saying "Jeco, let go of Thembani." The witness then told the accused's sister Sibonginkosi about what she had heard. Sibonginkosi then ran towards Dorcas's homestead while the witness continued cooking. After she had

finished she retired to bed.

The witness did not see the accused when he returned that night. He did not talk to her. He only asked Sibonginkosi to cook food for him.

She denied that she gave him the message to the effect that the deceased had come to leave a message that he should go and see the deceased on his arrival. It was her evidence that there was no truth in that suggestion.

This court makes a specific finding that the suggestion was false. The deceased never went to leave such a message with accused's wife. The wife had no reason to tell lies to this court. The suggestion is *ipso facto* rejected.

The witness was briefly cross examined. It emerged in cross examination that she only told the accused about the deceased's proposal after the third occasion and that was a few days before the fateful night. When he took away the playing cards after finding deceased playing with his wife and Sibonginkosi he was aware that deceased had unsuccessfully proposed love to his wife on three occasions.

Although this witness was not talking clearly as she testified there was nothing to suggest that she was not being truthful. It was her evidence that she still loved her husband and would have no reason to tell lies against him. She is worth to be believed and this court accepts her evidence.

After this witness the state closed its case. Counsel for the state advised the court that he would not be leading evidence from Nomazwe Ncube and Sibonginkosi Moyo and tendered Sibonginkosi Moyo to the defence as it wished to use her as a defence witness. The defence counsel, however, abandoned her after interviewing her. The evidence of these witnesses was then expunged from the state outline.

The accused ended up having no witness to call but testified himself. He was a bad witness who is not worth to be believed. His suggestion that he went to wake up the deceased after midnight because he had left a message with his wife that he should go and see him is false. Further his story that he armed himself with exhibit 6 because of the invitation by the deceased is equally false. The truth is that after getting some Dutchman's courage from the alcohol that he had been drinking he decided to go and fight with the deceased and armed himself with the knife.

The accused's suggestion that the reason why he returned to assault the deceased was because the deceased made a clicking noise with his tongue in annoyance and swore at him by his mother's clitoris is also false. Dorcas who was there did hear anything of that nature. All that deceased did was to apologise. The accused's suggestion is rejected since it was false. Court finds that deceased did nothing of that sort.

Furthermore, his accusation that deceased was sleeping with his wife was false. The wife said she reported to him that deceased had proposed love to her not that he had slept with her. In any event, it is highly unlikely that she would tell him that the deceased was sleeping with her and had done so on three occasions.

There was a feeble attempt to deny that he chased the deceased as he ran towards the

bedroom hut of Dorcas. The truth is that after he drew out the knife the deceased ran away with accused in hot pursuit and stabbed him at the doorway of Dorcas's sleeping hut.

The accused told the court that he aimed the blow with the knife at the upper arm of the deceased but the knife slipped and landed below scapula. That does not make sense at all. A knife cannot slip and go upwards. He was being untruthful.

The truth is that he aimed his blow at the point it landed. This court rejects the accused's evidence. Wherever it conflicts with the evidence of the state witnesses the court prefers that of the state witnesses which was well presented.

What is the accused guilty of?

The accused used the knife exhibit 6 to stab the deceased. When he took the knife from his home he was going to wake up the deceased well after midnight and use the knife to assault the deceased. The accused knew that if he attempted to attack the deceased using his hands he would be overpowered. He said the deceased was older and had a bigger body built.

On getting to the deceased he first struck him with an open hand. The deceased pushed him away. He again advanced towards him and struck him with a clenched fist this time. The deceased pushed him away for the second time. This time the accused had angered him. He pushed him away and prepared himself to fight back. This is the stage that the accused wanted, he immediately drew out his knife which he knew was double edged. He knew the edges were very sharp and so was its tip.

The double edged sharp blade was 16 cm long and 2cm at its widest point. It was just as long as a spear blade. The accused was well aware of all this because it was used at his home.

The knife is indeed a lethal weapon. If pushed into the upper body of a human body death would invariably result as the upper part of the body houses all the delicate internal organs i.e. the heart, liver and lungs. That part of the body is very vulnerable indeed.

If a person plunges a spear into the upper body of a human being death is substantially certain to result. Similarly when a knife like exhibit 6 is pushed into the upper part of the body there is a substantial certainty that death will follow.

The accused aimed his blow with exhibit 6 at a point 40cm from the top of the head on the left back 2cm from the midline. Severe force was used and the knife went through the muscles at the back into the chest cavity and perforated one of the chambers of the heart causing a 4 x 2cm injury. The accused had the subjective foresight of substantial certainty of death resulting from his actions but continued all the same. He is clearly guilty of murder with actual intent.