

THE STATE
versus
BEKEZELA MAPHEPHA MPOFU

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 17, 18, 19 & 20 MARCH 2015

Criminal Trial

Ms. N. Ngwenya state counsel
I. Mafirakureva defence counsel

KAMOCHA J: The 46 years old accused was charged with the crime of murder. It being alleged that on 19 April, 2014 and at Mengezi Sibanda's homestead, Bulu Village, Mpoengs, Plumtree he did wrongfully, unlawfully and intentionally kill and murder Nkululeko Sibanda, a male adult in his lifetime therebeing.

When the charge was put to him he stated that he understood and admitted it. When asked by the court if he intended to kill the deceased he said it was not his intention to kill him and regretted having done so. A plea of not guilty was accordingly entered on his behalf.

The following exhibits were read, produced and filed of record. The first one was the state outline followed by the defence outline. Exhibit 3 was the accused's extra curial statement which was produced by consent since it had not been confirmed. In it the accused said this:-

"I admit to the allegations levelled against me of murdering Nkululeko Sibanda. The cause was that he was sleeping with my wife. I reprimanded him for the first and second time. On the third time, that is when I quarreled with him resulting in me stabbing him with a knife because he had a disease (AIDS). Realising the way they were behaving, I suspected that I could be infected and would die as well as my wife, were (*sic*) then would the children go."

The above statement was recorded on 15 may 2014 after his arrest. He had gone into hiding after the commission of the offence.

This court makes an observation that the statement varies from what is in his defence outline exhibit 2 wherein he averred that on the fateful day while he was at Makabe the deceased had phoned telling him to divorce his wife because she was a prostitute and went on to say he in fact had just finished having sexual intercourse with her.

In the evening when he was back home he confronted her about what the deceased had allegedly told him. An altercation broke out between the two of them during which the wife allegedly confessed having slept with deceased on different occasions but sought to minimize the part she played by alleging that the deceased had raped her during all those sexual encounters. Accused went on to state that he was certain that his wife and deceased had an affair behind his back.

As if to add salt to injury at around 10pm, just after the altercation between him and his wife had ended, deceased called the accused again repeating that he should divorce his wife who was a prostitute and that he had had sexual intercourse with her earlier that day. He asked if accused had asked her about that.

These serious and demeaning allegations by the deceased are not in the accused's statement made to the police when events were still fresh on the accused's mind.

Another material discrepancy in his defence outline is the suggestion that the deceased's girlfriend Flora Sibanda and his wife caught hold of his hands while deceased assaulted him. He was overpowered and had to draw out his knife and stabbed deceased, his wife and Flora Sibanda to defend himself. He did not realise whom he was stabbing because of darkness. This is totally different from what is in his statement where he state "... that is when I quarreled with him resulting in me stabbing him with a knife because he had a disease (AIDS)". This court observes that the reason for stabbing the deceased was because he suspected him of having infected him (accused) and his wife with (AIDS). Not because he was overpowered by Flora, his wife Bekezela and deceased.

The 4th exhibit was an affidavit by Constable S. Khumalo who identified the body of the deceased to Dr Sanganai Pesanai who compiled exhibit 5 the post mortem report.

The doctor observed multiple stab wounds mainly on the left side of the body. There were 13 stab wounds all together. There was one friction abrasion on the right forearm which was (23 x 2) cm. The stab wounds were concentrated on the left side of the deceased's body. There was a stab wound on the left side of the neck measuring 6 x 2 x 7 cm. This was a bad stab wound according to the measurements. It looks like that nearly severed the neck. As already stated most of the injuries were on the left side of the body and on the left rib cage. One of the wounds perforated the left chest. Another one perforated the left kidney. Five of them went into

the body through the intercostals spaces. The wounds which penetrated the chest cavity caused blood to collect in the left chest.

The accused also stabbed deceased twice on his left forearm and once on the left elbow. The only two injuries on the right side of the body were on the back of the right thigh and right knee.

The doctor opined that death was due to: (a) Bronchoaspiration; (b) haemorrhagic shock; (c) multiple stab wounds; and (d) homicide.

The post mortem report was produced by consent without the need to call the doctor.

Exhibit 6 was the knife which the accused admitted to have used in inflicting the stab wounds. It was produced by consent. The knife was double edged. Both edges and its tip were very sharp. It was a spear head fixed to a short handle of a plastic or rubber conduit pipe measuring 11 cm. The double edged blade was 16cm giving it a total length of 27cm weighing 0.220kg. The blade was exactly the size of a spear head. It was indeed a lethal and dangerous weapon.

The evidence of the following witnesses was admitted as it appears in the state outline by consent in terms of the provisions of section 314 of the Criminal Procedure and Evidence Act [Chapter 9:07]: Charity Ndlovu; Danger Mkombe; Constable Sehlistelo Khumalo and Doctor Sanganaï Pesanai. This was after the state had led viva voce evidence from Bekezela Ndlovu and Flora Sibanda.

Bekezela Ndlovu and accused happen to share the name Bekezela. The two have been married for 6 years. At the time of the alleged crime they had been living together for 5 years. The accused is 46 years while she is 26 years. She told the court that she had a child by another man before she married the accused.

Her evidence was that in the morning of the fateful day the accused suggested to her that she should go to Sifelani Sibanda's homestead where there was a memorial service. She agreed. She then prepared to go there by having a bath and also bathing the children. Before she left the accused said if he does not join others by 3pm at the memorial ceremony she should return home.

She left with the children. The accused did not arrive at the memorial ceremony by 3pm. She then decided to go back home and found the accused at home.

After greeting him he told her that her mother had called wanting to talk to her. He gave her his phone to beep her mother so that she could call back.

She did that and the mother called back. Surprisingly the mother reported that accused had called her complaining that the witness could not be located at the memorial ceremony. He said he had information that she had gone to the shops with a young man from Sifelani Sibanda's homestead. The witness felt that her mother may have misunderstood the accused because she was at the memorial ceremony and hung up and gave the phone back to the accused who then ordered her to prepare supper which she did.

They had their supper together. There after they sat whiling up time until the children fell asleep and she took them to bed. A visitor arrived and left after some time. She then retired to bed. Later accused went to the bedroom hut with bathing water and bathed in the bedroom hut where she was already in bed but was still awake.

Accused dressed up after bathing and went into bed fully dressed a thing he had never done before.

Trouble started. The accused asked her where she had gone. She told him she had gone to where he had suggested she should go and help. Whereupon the accused said some people had told him that she was not there. She told him that is where she was. He demanded to be told the truth but she gave him the same answer.

He then got off the bed and took hold of her hand and said "let us go so that you can tell me what is going on". He said they should go to the deceased's homestead.

They proceeded to go there while he still held her by her hand. On the way, as he force marched her, he struck her with a switch but she did not know where he got it from as it was dark.

On arrival at the deceased's bedroom hut the accused knocked at the door and identified himself on being asked who he was. The deceased opened the door. Accused then pushed her into the hut. It was dark inside. Accused also entered the hut. The deceased had been in bed with his girlfriend Flora Sibanda.

The witness alleged that Flora jumped out of bed and went out of the hut with the witness leaving the accused and deceased. They went to knock at Charity Ndlovu's door but got no response. The accused later came out of the house, where he had been with the deceased. The

witness and Flora ran away but the accused ran after his wife and stabbed her once on the hip with a knife - she ran away thereafter.

The accused had been telling her that people were telling him that he had an affair with the deceased but she used to tell him that the deceased had never proposed love to her and was therefore never in love with him. Accused repeatedly made the allegation and she gave him the same answer.

The witness denied that accused told her that the deceased had alleged she was a prostitute and he should divorce her and had further alleged that he had just had sexual intercourse with her. She also denied that she had taken hold of accused's hands with Flora while deceased assaulted him and he had been over powered. She further denied that accused said anything to the deceased before he attacked him with a knife. Her evidence was that accused and deceased did not say anything to each other as accused stabbed him. She denied the allegation that the deceased had in fact confirmed having had sexual intercourse with the witness many times and had in fact had sexual intercourse with her earlier that day.

The witness did not change her story under cross-examination. She was a fair witness who told the court that she did not witness the accused stabbing the deceased. She was emphatic that at no stage did she and Flora catch hold of the accused by his hands while deceased beat him.

The next state witness Flora Sibanda who corroborates her evidence on material points was also emphatic that at no stage did they hold his hands while deceased beat him.

The court finds that that suggestion is false. If his hands were held by the two witnesses how then would he have drawn out his knife from his pocket? The suggestion is rejected.

Flora also said the accused never said anything to the deceased who also did not say anything to him. All she heard was the deceased groaning in agony. She got up found them in bending position as deceased groaned in agony. She screamed and asked them what they were doing as she hit them on their bodies but none of them answered. So she ran out where she found the first witness at Charity's door. Accused went out. He ran towards them and stabbed Bekezela. The witness ran away fearing that accused would turn to her after stabbing his wife.

There is a discrepancy between the evidence of the two state witnesses relating to how they left the bedroom hut. The discrepancy is not material.

What is important is that the first witness Bekezela was stabbed when she was outside. Flora was not stabbed at all.

The witnesses gave their evidence well. They were credible witnesses who were worth to be believed.

The same cannot be said about the accused whose story was full of untruths. For instance it was not true that the deceased was having sexual intercourse with his wife. If it was true he would have reported the matter to the kraal head or headman. It is also not true that he had caught the two in *flagrante delicto* on two occasions and just reprimanded them without reporting to the authorities i.e. kraal head or headman.

It is also not true that the deceased had phoned him on that day and alleged that his wife was a prostitute whom he should divorce and he had in fact just had sexual intercourse with her on that very day. If it was true he would have put that in his extra curial statement to the police. That was the crux of the matter.

The accused is not worth to be believed. He even suggested that his legal practitioner was leaving out or adding up things he did not say.

This court rejects his story and accepts that of the state witnesses which was well given.

This court makes the following findings:

Accused suspected that his wife was having sexual intercourse with the deceased but he had no proof of that.

He decided, on the fateful day to go and confront the deceased.

He armed himself with the double edged spear head like knife to use in case of trouble.

He arrived at the deceased's bedroom hut. The deceased did not cause trouble. The accused decided to cause the trouble himself.

The deceased was not armed in any way.

The accused was the aggressor. He then inflicted multiple stab wounds mainly to the left side of the deceased rib cage and chest cavity.

He knew that death was a substantially certain and continued to drive a spear head of 16 cm into the human body no less than 13 times disregarding whether or not death ensued.

The accused is guilty of murder with actual intent.

Sentence

The fact that accused harboured a belief that his wife was having an affair with deceased does not justify the killing of the deceased. Accused had no proof of that. Courts always guard jealously the sanctity of human life.

The murder was committed in one of the most brutal fashions. In order to ensure that the deceased is dead the accused had to stab him no less than 13 times.

There is very little that I have found in accused's favour here – i.e. he is a first offender with 9 children.

The accused needs to be adequately punished for this brutal murder. He planned and armed himself with the knife.

Had it not been for the fact that he is sick and on anti retrovirals I would have sentenced him to life imprisonment. Let me clarify that by saying that the court has not held that his sickness was infected on him by the deceased. There is no basis to make that conclusion.

In the circumstances today the accused is sentenced to **THIRTY YEARS IMPRISONMENT.**

Prosecutor General's Office state's counsel
Messrs Moyo & Nyoni accused's legal practitioners