

THE STATE  
**versus**  
MAYFORD NDLOVU

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 24 & 25 MARCH 2015

### **Criminal Trial**

Miss *N Ngwenya* for the state  
Mr *K. Lubimbi* for the accused

**MOYO J:** The accused person is charged with the offence of murder. The allegations against him are that on 6 June 2014 at around 1600 hours, the accused person stabbed the deceased with an okapi knife at Chamunanga Primary School grounds. The deceased later died at Beitbridge Hospital on 7 June 2014.

The facts of the matter are largely common cause. The facts point towards two groups of people on the day in question, that is accused's group and deceased's group. These two groups were engaged in beer drinking. A misunderstanding occurred when beer belonging to Onias Moyo (one of the accused's group), was spilt. The beer issue was resolved amicably but the two warring groups still had arguments. At the end of it all the accused person stabbed deceased with a knife on the head.

Documentary evidence tendered in the matter was as follows:

The state summary was produced and marked Exhibit 1. The defence outline was produced and marked Exhibit 2. The affidavit of the police officer one Edson Chikunguru, who identified deceased's body to the pathologist was marked Exhibit 3.

The post mortem report by Dr Sanganai Pesanai was marked Exhibit number 4. The post mortem report gave the cause of death as:

1. brain damage
2. skull fractures
3. stab wound
4. homicide

It states that external marks of violence were a sutured wound on the right parietal region 4 cm. It states that the internal examination showed scalp haematoma ± 15cm x 6 cm parietal region fractured penetrating wound 3 cm right parietal region. It also states that a sharp object was used to inflict these injuries.

The knife was also tendered and marked Exhibit 5. It is a 19cm long knife, with the length of the blade being 8cm. It weighs 0,140 kgs and has an inscription “smith and wessol jack knife.”

The state called two witnesses, Mpho Nyoni and Onias Moyo. They confirmed the altercation between the two groups on the day in question. They also confirmed that both deceased and accused were drunk. They also confirmed that accused stabbed the deceased.

The evidence of the following witnesses was admitted into the court record in terms of section 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

1. Justin Sibanda

His testimony would be similar to and corroborative of the evidence of Mpho Nyoni and Onias Moyo.

2. Mutulisi Hove

He is a member of Zimbabwe Republic Police. He was at Chamunanga Primary School play grounds on 6 June 2014. He was doing police coverage duties whilst he patrolled the grounds, he observed that a lot of people were gathered under a Mthobi tree, he then went to investigate. He found deceased lying on the ground facing upwards, bleeding profusely from the head whilst a friend of deceased tried to stop the bleeding using a hat. He observed that deceased had a deep cut on his head, was not communicating and appeared to be intoxicated. He

then asked one Desmond Chikore to take deceased to hospital. He later learnt of deceased's death.

Rodwell Muchengandava was the investigating officer who handled the investigations in this case. He arrested accused and accused admitted to stabbing deceased, with a knife that belonged to one Given Sibanda.

Andrew Mangwani was a police officer who recorded the accused person's warned and cautioned statement and Takesure Buzu witnessed same.

Dr Sanganai Pesanai examined the deceased's body and prepared a post mortem report. The accused person's defence outline, paragraph 3 thereof states as follows:

"He will say he stabbed the deceased in self defence as the deceased was the first to stab the accused on his right hand middle finger leaving a permanent scar. The deceased also hit the accused with a bottle as the accused tried to restrain him and Mpho Nyoni from assaulting his brother Elton Ndlovu."

The accused's version is that deceased is the one who attacked him with a knife when he (accused tried to quell a fight.) In his evidence-in-chief he stated that in fact the knife belonged to the deceased and that the deceased first attacked him with it before they struggled with each other for the knife resulting in him managing to get the knife and then he stabbed the deceased on the head with it.

On the facts, there is just a single issue for this court to determine that is whether deceased attacked the accused person in the manner he alleges and whether deceased was the owner of the knife in question. We find that deceased never attacked the accused person in the manner he alleges and that the knife in fact belonged to accused for the following reasons:

- 1) Mpho Nyoni, told the court that the deceased never attacked the accused person and that the deceased was not armed. He also told the court that he saw accused remove the knife from his pocket and move towards deceased from behind the deceased.

Onias Moyo is accused's relative. He would obviously not nail the accused person on an issue that is untrue. Onias Moyo told the court that he did not see how deceased was stabbed but that deceased was not armed. He said he did not see deceased and Mpho Nyoni fighting Elton Ndlovu and when he was asked under cross examination if he disputed that fact, he replied by saying that he could not accept that as he did not see it. Asked if there was any other person who

caused trouble for him on the day in question he said he was the only person that caused trouble. It is our finding that if deceased had attacked Elton Ndlovu as alleged by accused and if deceased had attacked accused in the manner alleged, Onias Moyo who said he was about 3m from the Mthobi tree when all this occurred, would have seen it. Again the evidence of Rodwell Muchengandava who was the Investigating Officer in this matter was to the effect that he recovered the knife that was used in the commission of the murder from Given Sibanda in South Africa as per accused's information. Accused's defence outline also does not mention the critical point that the deceased was the owner of the knife and that in fact accused struggled with him before disarming him. This is vital information that could not have been omitted from the defence outline. We find that accused is not being truthful to this court. He had the knife on the day in question and he is the one who attacked deceased with it.

There is therefore no question of self defence on these facts. He did act wrongfully and unlawfully on the day in question. We therefore move on to find out what the accused person is guilty of.

It is our view that the accused person used a lethal weapon, aimed at a vulnerable part of the head inflicting severe injuries of the nature described in the post mortem report. His conduct in our view is far from being negligent. He had the legal intention required to sustain a murder charge for with legal intention the accused person does not mean to bring about death but he continues to engage in an activity after he foresees that there is a real risk that the activity will result in the death of a person. Accused stabbed deceased on the head with an okapi knife, inflicting injuries that the post mortem report give as  $\pm$  15cm x 6cm parietal region and a fractured penetrating wound 3cm on the right parietal region. Such injuries on a vulnerable part of the human anatomy could possibly result in death. There was a real possibility of death in such circumstances.

It is for these reasons that we find the accused person guilty of murder with constructive intent.

### Sentence

The accused person is convicted of murder. His personal circumstances are that:

He is a first offender. He was aged 17 at the time of the commission of the offence. He comes from a family with a broken background to the extent that he does not have a father. He was raised by a single mother. He did school up to Grade 7. The circumstances of the commission of the offence are that two groups of mainly youth, had a petty altercation at Chamunanga School, resulting in accused stabbing the deceased, (who had fallen down) on the head with an okapi knife. Both accused and deceased had been drinking beer on the fateful day. The misunderstanding could have resulted from boyish behavior as clearly this court can not appreciate what was worth fighting about from the facts presented before it. It is unfortunate that deceased lost his life in these unwarranted circumstances. Accused's personal circumstances and the circumstances under which the offence was committed indeed give weighty mitigation in favour of the accused person.

However, this court has to balance both sides of the coin. In this regard this court should be alive to the fact that an innocent life was lost, the fight resulted from boyish behavior by both sides but, the accused's moral blameworthiness is stretched by the fact that he carried a knife on his person. He also used it on a defenceless man who was now lying on the ground. Why carry an okapi knife, it is not only a dangerous weapon but it is also specified. The part of the human anatomy that accused aimed at was a vulnerable part of the body. Society needs to be protected from such conduct, these courts have on a daily basis bemoaned the loss of life over petty issues. Life is sacred, and as long as society doesn't seem to uphold the sanctity of life, it is the duty of this court to keep on sending loud and clear messages through the sentences passed, that society should accept and live this principle. It is clear from Exhibit 6, the probation officers report that accused comes from a broken family background, and that idleness and lack of direction in life might have landed him in this situation. It is an unfortunate development as society is made up of different households and if each of the households comprising society would uphold the basic principles of life, the moral decadence, that has befallen today's society would be curtailed. Parents, be they single or married should try and build children who will constitute a responsible adult generation. It is unfortunate that in many of these broken families children are let loose, to grow by themselves and no life skills are imparted to these innocent children at all. They then find themselves idle and idleness leads to all sorts of behavior including criminal conduct.

Whilst the accused person is clearly not the author of his personal circumstances, there is a limit to which one's background can be used in mitigation. It would only go to a certain extent as the court has to balance varying interests while passing sentence. It is for these reasons that this court finds that the sentence of corporal punishment coupled with a wholly suspended sentence as suggested in the probation officers' report would trivialize the offence. A life was lost and this court should not be seen to condone instances where life is lost through violence. It is only for the accused person's age that a sentence normally reserved for those convicted of culpable homicide will be passed. The accused person is sentenced to an effective 10 years imprisonment.

*National Prosecuting Authority*, the state's legal practitioners  
*Lubimbi and Partners*, accused's legal practitioners