

THE STATE
versus
GODFREY MLALAZI

HIGH COURT OF ZIMBAABWE
MOYO J
BULAWAYO 11, 12 AND 24 OCTOBER 2016

Criminal Trial

T Hove for the state
S Mlambo for the respondent

MOYO J: The accused person in this matter faces a charge of murder. It being alleged that on 8 December 2014 the accused, deceased and others were coming from a beer drink when the two (accused and deceased) had an altercation. By the time accused and deceased had an altercation the other people had separated from them. They fought, with deceased slapping the accused, and the accused then striking the deceased with a knobkerrie at the back of his head and neck.

This was when deceased had turned to flee as obviously a man can only hit another at the back of the head when the other one has their back to them, meaning they were not advancing anymore. The deceased collapsed after a short distance. The accused left and went his separate way. The deceased was never seen again until on 16 December 2014 when his decomposed remains were found by a searching party scattered in the bush.

The accused pleaded not guilty to murder but tendered a limited plea to the charge of assault. The state rejected this plea and rightly so as we shall reveal herein.

The postmortem report states that the cause of death could not be ascertained as the body was decomposed and some parts were missing most probably eaten by wild animals. The defence counsel tried to raise the defence of self in his submissions but could not substantiate it at all with the facts as the requirements in section 253 of the Criminal Law Codification and Reform Act [Chapter 9:23] could not be established from the facts before us.

The requirements for defence of self in terms of this section have been expanded to include that the accused could not otherwise escape or avert the attack through some other means and that the harm caused was not grossly disproportionate to that liable to be caused by the unlawful attack.

This is where the accused's problem is, for despite being under an unlawful attack, no evidence was given, neither do the facts on their own show, that he could not otherwise escape for there was no confinement where these two were fighting.

Again, the accused cannot tell this court that after being slapped, retaliating with a knobkerrie is proportionate to the harm the accused was liable to receive from the deceased.

Also, his conduct must have been necessary to avert the unlawful attack, it cannot be necessary to hit a man at the back of his head or neck, as obviously unless the evidence points to the contrary, the only reasonable conclusion would be that with deceased's back facing accused, there was no more attack, the attack had commenced with the slap and ended. Deceased was no longer attacking accused and was then most probably fleeing, so the accused was no longer under attack, neither did he have any reasonable grounds to believe that he was still under an attack. Accused was then retaliating when he hit the deceased with a knobkerrie. The defence of self is not therefore available to the accused for the aforesaid reasons.

Counsel for the defence also submitted that there is doubt as to the cause of death as there is evidence to the effect that a dip fluid bottle was found next to the body. Unfortunately, counsel's submission is not substantiated by the facts in the court record. There is no evidence in the court record to the effect that a dip fluid bottle was found near the deceased' body. The assertion that this evidence is contained in the post mortem report is unfounded as the Doctor never observed a dip fluid bottle next to the deceased's body, neither does he say that he saw it and examined it.

The postmortem report just provides in the summary of history that:

"It is said deceased went missing on 8 December 2014 and his remains were recovered in a paddock with most of the body parts missing. A bottle of dip fluid was found with the remains." (my emphasis)

The Doctor did not observe what he gives in the summary of history which is why he says it is said, we do not even know by who, this is hearsay and the Doctor certainly did not put

it there so that it becomes of any evidential value. Its obviously of no probative value. On the other hand, on this point, the investigating officer gave evidence in court that what was found near the deceased's body per his own observations was a bottle of liquor (with hot stuff). That is the real evidence before the court and it is not controverted by any other evidence. The assertion by defendant counsel is therefore not founded on any fact and is accordingly dismissed. We find that the only reasonable conclusion is that the deceased died as a result of the injuries sustained in the assault by the accused as it is the only reasonable inference that can be drawn from the facts for the following reasons:

- 1) The deceased was last seen on 8 December 2014, the date he fought with accused.
- 2) The deceased had been assaulted at the back of his head with a knobkerrie and at the back of the neck.
- 3) Soon after being assaulted the deceased moved for a short distance and then fell.

In terms of section 53 (1) (b) of the Criminal Law Codification and Reform Act (*supra*)

“In deciding whether or not there is a causal link between a person's conduct and the death of another person, a court shall be guided by the following factors in addition to any others that are relevant in the particular case:

Where the result of the conduct was to inflict a mortal or serious injury upon the other person, there is normally a causal link between the conduct and the other person's death.”

We accordingly find that the deceased died from the injuries he sustained in the assault as reasoned herein.

In terms of section 49 of the Criminal Law Codification and Reform Act (*supra*), a person who causes the death of another person negligently failing to realize that death may result from his conduct shall be guilty of the offence of culpable homicide.

Accordingly the accused person is found not guilty on the charge of murder but is found guilty of the offence of culpable homicide which is a competent verdict.

National Prosecuting Authority, applicant's legal practitioners
Majoko and Majoko, respondent's legal practitioners