

THE STATE

Versus

ELIJAH KHUMALO

IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr T.E. Ndlovu & Mr J. Sobantu
HWANGE CIRCUIT COURT 3 & 4 JULY 2017

Criminal Trial

Miss M. Munsaka for the state
N. Ndlovu for the accused

BERE J: After the deceased left her homestead on 7th of September 2016 going to collect her belongings from her husband with whom she was having a matrimonial discord she was never seen alive again. The accused Elijah Khumalo stands charged of the murder of the deceased in contravention of section 47 (1) of the Criminal Law (Codification and Reform) Act Chapter 9:23.

The facts which are not in dispute are that on the 1st of September 2016 Sithembiso Mathwasa (the deceased) had farewell to one Diana Nxumalo on the 7th of September 2016 under the pretext of going to collect her belongings from the accused with whom she was in a matrimonial union. The accused and the deceased had been having a matrimonial discord. This was the last time the deceased was seen alive. By sheer luck, the deceased's remains were only discovered in a bush by Patricia Dube of Menyezwa Village, Jotsholo District who had gone to look for her cattle. The witness alerted the police leading to the recovery of the deceased's remains which had decomposed and were now in the form of human bones together with her clothes which played a part in her identification through one Diana Nxumalo, a 63 year old villager who happened to have known the deceased during her life time. The involvement of Diana was crucial in the subsequent arrest of the accused.

When the deceased's remains were taken to the pathologist for a post mortem examination there was not much help derived from those remains in so far as the determination

of the cause of the deceased's death because of the advanced stage of decomposition of the recovered bones. The pathologist opined that the cause of death was due to a depressed skull fracture due to head trauma in unknown circumstances. When examining the incomplete human skeleton presented to him the pathologist observed a circular depressed fracture of 2 x 1,5cm on the right parietal bones.

The accused has offered a limited plea of voluntary intoxication leading to provocation and prayed that he be acquitted of the main charge of murder and be found guilty of culpable homicide.

The accused's story was that since the beginning of 2016 he and deceased were encountering serious marital problems and that on the date of her murder the accused cellphoned the deceased to meet in an attempt to forge reconciliation between the two.

At the rendezvous things took a dramatic turn between the two. The accused said the deceased who was almost twice his age spurned his efforts towards reconciliation by indicating to him that she was now focused on a new love relationship with another man who was much better than him. The accused also stated that it was at that stage that the deceased revealed to the accused that she had infected him with the HIV virus. The accused, who had had some home-made illicit beer referred to as "munjunju" or "tototo" lost it and in a fit of anger hit the deceased with a small hunter's axe produced in this court as exhibit 3 weighing 610 grams. The accused said he hit the deceased on the central region of her head thereby rendering her unconscious. The accused said he panicked after this incident and tried to resuscitate her by rendering basic first aid but to no avail.

The accused said after this incident he did not report to anyone because he had panicked.

There was not much of assistance that could be derived from the evidence which was led by the state in unraveling the circumstances under which this murder was committed because of the absence of direct evidence. The state case was therefore largely built around the evidence as given by the accused person.

It would appear that upon his arrest, the accused fully co-operated with the police leading to the recovery of the murder weapon exhibit 3, as well as exhibit 4 and 5.

Upon his arrest police were also able to record a warned and cautioned statement from the accused person. The warned and cautioned statement gave some insight into the possible circumstances of the murder but in that statement, is carried the provocation of the accused as the cause of the conduct of the accused person on the date of the murder. The accused's version in court as regards the manner in which he committed the murder seems to be consistent with the findings of the post mortem report. Practice has taught us that when one is dealing with the defence of provocation or any defence whatsoever, there is need to avoid adopting an arm chair approach.

Purely guided by the accused's direct evidence in this case as regards what took place at the scene of the accident and largely guided by the two-stage approach in assessing the extent of the accused's provocation one is inclined to give the benefit of doubt to the accused person.

The accused's uncontroverted testimony is that on the day of the murder he had partaken of an illicit beer but his ability to remember almost all the minute details surrounding the murder itself would seem to suggest that despite his drunken state the subjective element to murder is satisfied.

It does seem to us that it is the second rung approach that must tilt the balance in favour of the accused. Here is a man who had gone out of his way to reconcile with the deceased whom he knew had been cheating on him. Right in his face the deceased disclosed to him that she was not prepared to reconcile with him despite having infected him with an HIV virus.

Our view is that if what transpired is what was given to court by the accused, (which version is highly probable as it could not be controverted by any other competing evidence other than trying to indulge in inferences the accused) or any other person in his position would have lost self control in the manner the accused person did.

In our view, the accused's explanation that after the incident he got troubled by the deceased's death to the extent that he just decided to keep it to himself is quite probable given the fact that the accused now had to deal with his illness which was apparent even when he gave evidence in court as confirmed by his request to give evidence whilst sitted.

The fact that when the police eventually caught up with the accused, the accused had nothing to hide confirms that indeed he was troubled by the deceased's death and was relieved to get the opportunity to get the world know how the deceased had lost her life.

Under these circumstances the accused is found not guilty of murder but guilty of culpable homicide.

Sentence

In assessing sentence we will take the following factors into consideration.

The accused is a first offender and qualified to be regarded as a youthful offender whose lack of sophistication is supported by his limited access to basic education having gone as far as grade 2. The accused committed this offence under the influence of alcohol.

The accused has endured 8 months in custody awaiting the conclusion of this case.

The fact that the accused has the usual family responsibilities has not escaped our attention.

As a strong factor in mitigation the court will accept the scar left on the accused by the deceased in the form of his troubled health which might be of a permanent nature. The accused is clearly not in good health.

This is largely a crime of passion where the accused negligently assaulted the deceased because of his attachment to her.

It is further mitigatory that the age disparity between the deceased and the accused probably meant the deceased was the one who was in a stronger position than the accused and could have handled the whole case in a better way than she did.

In aggravation we accept as submitted by the state counsel that this death could have been easily avoided had the accused sought to involve the elders of his community.

We are disturbed by the fact that the accused, after having committed this offence appears to have adopted a carefree attitude of just leaving the deceased's remains to rot in the bush. It was purely fortuitous that the remains were recovered.

The fact that the accused had to wait to be arrested by the police to reveal the death of the deceased does not put the accused in good position. He should have owned up by disclosing to his close relatives about this offence. Issues of domestic violence are of concern to this court and domestic related issues must not end up in violent deaths like what happened in this case.

Sentence: 6 years imprisonment 3 years of which are suspended for 5 years on condition the accused does not within that period commit any offence of violence upon the person of another and for which upon conviction the accused will be sentenced to a term of imprisonment without the option of a fine.

Effective sentence – 3 years imprisonment.

*National Prosecuting Authority, state's legal practitioners
Ndove, Museta & Partners, accused's legal practitioners*