

THE STATE**Versus****HLONIPHANI NKOMO**IN THE HIGH COURT OF ZIMBABWE
BERE J with Assessors Mr J. Sobantu & Mr T.E. Ndlovu
HWANGE CIRCUIT COURT 26 JUNE 2017**Criminal Trial***Mrs C. Gorerino* for the state
G. Mvhiringi for the accused

BERE J: In this case the accused was initially charged with the deceased's murder. Upon being asked to plead the accused tendered a plea of guilty to culpable homicide in circumstances summarised in Annexure I which reads as follows:

- “1. The accused was aged 20 years at the time of the commission of the offence and he resides at Khumbulani Nkomo's homestead, Banda Village, Jotsholo, Lupane.
2. The deceased was aged 19 years at the time he met his death. He used to reside at Moses Mpofu's homestead, in the same village.
3. Accused and deceased were not related but were both employed as herdmen in the same village.
4. On the 3rd day of February 2017 and at around 1700 hours, accused was at Banda village grazing area near Gwayi River herding cattle in the company of Leroy Nyoni and Lloyd Mpofu when they met the deceased who was in the company of Willet Mpande who were also driving their cattle towards Gwayi River.
5. Accused and deceased reciprocally teased each other and in the process accused pluck off a switch from a Thetshani tree whilst at the same time deceased picked a log from the ground as they walked towards each other.
6. Deceased threw the log to the ground and grabbed accused with both hands intending to disarm him of the switch but accused overpowered him and pushed him away.
7. Accused held the switch with both hands and struck deceased twice on the abdomen, once on the right side of the head behind the ear causing deceased to fall to the ground. Accused further assaulted deceased once on the buttocks.
8. Accused was refrained from further assaulting deceased by Leroy Nyoni.
9. An attempt was made to resuscitate deceased who was unconscious by Sizwe Ndlovu and Nokuthula Khumalo who were passing by as well as the accused but their efforts were fruitless.
10. Deceased was ferried to St Lukes Hospital where he died upon arrival.

11. The accused person pleads not guilty to murder but pleads guilty to culpable homicide in that he negligently caused the death of the deceased.”

The post mortem report which was tendered as exhibit I is consistent with the summary of the case. Also tendered in support of this case were exhibits 2 and 3 being the switch which took away the deceased’s life and the small log which the deceased had intended to use against the accused but abandoned the idea before he was overpowered by the accused during the course of trying to disarm him of the murder weapon.

After considering the submissions made as a court we were unanimously agreed that this offence, despite having been authored by the accused, was committed in very unusual circumstances. It occurred with minimum negligence and it appeared to have taken all those who witnessed it by surprise including the accused person who also joined others in the abortive attempt to resuscitate the deceased’s life.

Having considered the facts in this case we are agreed that the accused be found not guilty of murder but culpable homicide as advised.

Sentence

In mitigation we accept that the accused has genuinely tendered an unequivocal plea of guilty to culpable homicide and that he projects himself as remorseful.

The accused and deceased were of the same age and friends and because of this, this murder will obviously affect the accused probably for as long as lives. The accused has to live with the stigma of having murdered someone in Khumbulani Nkomo’s homestead in Jotsholo. We consider this as punishment on its own.

We accept that there is no evidence of pre-meditation in this case and that the murder happened unexpectedly.

The accused has a young wife who is expecting their 1st born child.

It is commendable that the accused's employer contributed to the deceased's burial.

Despite this, however, the accused is advised to find permanent peace with the deceased's relatives by engaging them in the usual way by opening lines of communication through the traditional leadership of the village involved.

Ever since the accused's arrest in February this year he has been kept in custody roughly for 5 months awaiting the conclusion of this case. Again this is some form of punishment.

In aggravation we do accept as submitted by both legal practitioners that a young life was needlessly lost in circumstances which merely called for restraint of both the deceased and the accused.

It was wrong for the accused to assault the deceased after he had rendered him harmless by overpowering him as he made an unsuccessful attempt to disarm the deceased of the murder weapon. The accused could simply have walked away and avoided the spilling of deceased's blood. Our youths must learn to exercise restraint in times of provocation.

We agree with the observations made by the state prosecutor that this age group requires to be constantly reminded of the inherent dangers of putting their faith in violence. There are no positives of any kind to be derived from engaging in violence.

Sentence: 4 years imprisonment 2 years of which are suspended for 5 years on condition the accused does not within that period commit any offence involving violence upon the person of another and for which upon conviction will be sentenced to a term of imprisonment without the option of a fine.

Effective: 2 years imprisonment.