

THE STATE**Versus****ENOCK CHIVEYA**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr Sobantu and Mrs Moyo

BULAWAYO 1 & 2 FEBRUARY 2018

Criminal Trial*Miss N. Ndlovu* for the state*Miss N. Mlotshwa* for the accused

MAKONESE J: The accused has been arraigned in this court on a charge of murder. The state alleges that on 25th July 2012 and at Bush Stick Mill, Mphoengs. The accused intentionally and unlawfully killed the deceased Kwanele Ncube by kicking him in the chest and abdomen with booted feet. The accused denies the charge of murder and tenders a limited plea with respect to culpable homicide. The state has conceded that the plea to the lesser charge of culpable homicide is indeed appropriate. A statement of agreed facts has been tendered into the record of proceedings. The brief facts of the matter which are by all accounts common cause are that on the 25th July 2012 at around 2100 hours the deceased was at Bush Stick Stamp Mill drinking alcohol with his colleagues. Later that same evening the parties moved to Khethiwe Ndlovu's tuck shop to continue their consumption of alcohol. They sat around a bonfire, whereupon the deceased arrived speaking in a high pitched voice, much to the chagrin of the accused. Accused boasted that he was a war veteran and that he had once worked as a security guard. The accused who had joined the group of men sitting around the fire enjoying their drink accused the deceased of being a "ngxozza", meaning a member of the neighbourhood watch group. A misunderstanding ensued and at the point accused charged aggressively towards the deceased. The accused was restrained by one Luckson Dube. When everyone had settled down, accused once again advanced towards the deceased and poked him on the shoulder. Without warning, accused stood up and kicked the deceased once in the stomach with booted feet. The deceased fell to the ground groaning in pain. The deceased was later ferried to Brunapeg Hospital, was complaining of severe pain. The deceased died in hospital on 27th July 2012.

The state tendered a post mortem report compiled by Dr Sanganyai Pesanayi at United Bulawayo Hospitals on the 30th July 2012, which lists the cause of death as:

- (1) Septic shock
- (2) Severe peritonitis
- (3) Ruptured transverse colon
- (4) Assault

From the evidence that has been placed before the court we are satisfied that the accused negligently cause the death of the deceased. The accused is accordingly found not guilty and acquitted on the murder charge. The accused is however found guilty of culpable.

Sentence

The accused stands convicted of culpable homicide. The loss of human life can never be condoned. The courts frown upon violent conduct that results in the loss of life. The courts have a duty to impose sentences that are fair and just and that reflect the seriousness with which the courts view the needless loss of life that usually leads to untold suffering to the victim's family. In assessing an appropriate sentence the court takes into account the weighty mitigating factors that have been articulated by accused's defence counsel. The accused is now aged 34 years. He is married with 6 children. He is a self employed miner earning \$180 per month. He has moderate assets and is the sole breadwinner for his family. The court takes into consideration the fact that accused spent a period of 8 months in remand prison before he was released on bail. To some extent the accused has already served a sentence for his wrongful conduct. This offence occurred in July 2012 and a period of over 5 years has elapsed ever since. The court does take into cognizance the fact that the prolonged delay in finalizing this matter has caused anxiety to the accused. From the submissions made by state counsel the accused person was not to blame for the delay in the prosecution of this matter. This is one of those cases which could not be heard earlier due to the backload of cases awaiting set down at that time. To that, extent the court shall endeavour to keep the accused out of custody. The accused is a first offender who has pleaded guilty and has shown remorse. He has taken full responsibility for his conduct by

pleading guilty to the lesser charge of culpable homicide. He has been out of custody and could have simply decided to avoid prosecution by crossing into neighbouring Botswana. The court observes that accused resides in Mphoengs in an area in close proximity to the Botswana, and the temptation must have been there for the accused to simply skip bail and avoid trial. The accused, however, to his credit, decided to attend court and in that manner has assisted in the smooth administration of justice. It is the view of this court that taking into account the personal circumstances of the accused and the aggravating factors, a custodial sentence would be wholly inappropriate. For the foregoing reasons, the court finds the following to be an appropriate sentence:

“Accused is sentenced to 2 years imprisonment of which 1 year imprisonment is suspended for 5 years, on condition accused is not within that period convicted of an offence involving violence and for which upon conviction accused is sentenced to a term of imprisonment without the option of a fine. A further 1 year is wholly suspended on condition accused performs 420 hours of community service at ZRP Mphoengs.”

National Prosecuting Authority, state’s legal practitioners
Ndove & Associates, accused’s legal practitioners