

THE STATE
Versus
MEKETO SIZIBA AND 6 OTHERS

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 19 SEPTEMBER 2017

Judgment

T. Muduma for the State Counsel
K. Ngwenya for the Defence Counsel

MOYO J: The 5 accused persons are charged with murder, it being alleged that on the 31st of March 2009 they assaulted the deceased Kelvin Kodwane Mlauzi and he died as a result of the assault. The accused persons have pleaded Not Guilty to the charge of murder, they have however, tendered a lesser plea to a charge of culpable homicide. The state counsel accepted the limited plea. A statement of agreed facts was drawn and tendered, it was marked exhibit 1. It reads as follows:

The State and defence are agreed that the following are common cause:

1. The deceased was 27 years old at the time he met his death.
2. On the night of the 30th of March 2009 the deceased visited his girlfriend who resided at the first accused's homestead.
3. On arrival at the 1st accused's homestead, the deceased met his girlfriend Bekezela Siziba behind the hut at first accused's homestead.
4. The first accused was informed of the deceased's presence at his homestead who then proceeded to confront the deceased, who was squatting behind a kitchen hut with his girlfriend Bekezela Siziba. The 1st accused was holding a knobkerrie when he confronted the deceased.
5. On seeing the 1st Accused advancing towards him the deceased started running away. In the process of running away from the 1st Accused the deceased was tripped by the wire fence of the 1st Accused's homestead and he fell to the ground resulting in 1st Accused catching up with him.
6. The 1st Accused then tied the deceased's hands and assaulted the deceased with a stick under his feet.

7. The 7th Accused was called by Constance Sibanda and the 7th accused also assaulted the deceased with open hands.
8. The deceased was then taken to the homestead of Graves Nare who was the Village head on the intervention of Sibonakele Dube.
9. At Graves Nare's homestead the deceased was further assaulted by the 1st Accused under his feet with a stick, by the 7th Accused with a stick on his buttocks and by 3rd Accused on his back.
10. The 2nd Accused arrived at the homestead of Graves Nare and assaulted the deceased with a sjambok whilst the 4th Accused was holding the hands of the deceased.
11. The deceased confessed that he had stolen some clothes from the village and had hid them in Mapate Mountain. It was then agreed that the villagers contribute donkeys and a scotchcart so as to be used in the recovery of the said stolen goods.
12. The deceased passed away when he was being ferried to the 4th Accused's homestead to collect the scotch cart enroute to where the stolen property had been hidden by the deceased.
13. The cause of death of the deceased could not be determined due to the advanced state of decomposition of the deceased's body.

VERDICT

Accused 1,2,3,4 and 7 are accordingly acquitted on the charge of murder but are found guilty of the offence of culpable homicide.

SENTENCE

The five accused persons are convicted of Culpable homicide. They pleaded guilty to the charge of Culpable Homicide. They are all first offenders. They are family man and bread winners in their households. A peculiar weighty mitigatory feature is that of the delay in bringing the matter for prosecution. It has been submitted by the defence counsel that the delay of 8 years is not of the accused person's own doing but that they have been available for trial. The state counsel did not make any counter submissions against that and the court takes it that, that is the position. This court has to emphasise that loss of life in any circumstances whether negligent or intentional is not in the public interest. Life is sacred and should be preserved with utmost care. Deaths as a result of violence are a cancer in our society, that has become a cause for concern.

In sentencing an offender this court has to look at the interests of justice and the interests of justice constitute the accused person's personal circumstances, the circumstances of the commission of the offence and the public interest as well as any other factor that may be relevant. In this case the circumstances of the accused persons are that they are all first offenders. The majority of them are aged between 51 and 83 years old. They pleaded guilty and have waited for trial for 8 years when they were not at fault in that regard. The anxiety of waiting, for justice and the suspense for 8 years as well as the fact that had they been sentenced 8 years ago even to custodial terms they most likely would have served all their sentences. If the accused persons had been given custodial sentences at the material time they would have served their sentences and they would have been rehabilitated and assimilated back into their communities.

Also in favour of the accused persons are the circumstances of the commission of the offence. There is evidence that the deceased also fell by himself before he was assaulted. The post mortem report does not state the cause of death but of significance is that the deceased had no fracture as per the post mortem report. Again the nature of the assault as given in the statement of agreed facts is not a brutal one as the deceased was mainly assaulted underneath his feet. Both counsel suggested a fine coupled with a wholly suspended prison term. Of the three cases that were cited by defence counsel two of them are distinguishable from this one because

- 1) In *S Vs Chipika* High Court Bulawayo 129/2017 involved a mother killing her biological daughter and the other one that is
- 2) In *S Vs Mutopa* High Court Bulawayo 137/17 the matter related to a grand mother killing her grand child.

The two are not similar to the case before me for obvious reasons as one who kills their biological relative in culpable homicide cases is considered as having already been heavily punished by fate as they would have lost their own blood and would also live with the stigma of having caused the death of their own relative. The only case that is some what related to this one is the case of *S Vs Tshuma* High Court Bulawayo 156/17 although the facts of the Tshuma matter are also different as in the Tshuma matter the deceased was the aggressor and he first struck the accused with an axe. That case actually bordered on the defence of self. Each case depends on its own facts in sentencing matters. There are factors that are peculiar to the three cases that were cited to by defence counsel which are not in this

particular case as I have already shown. In cases of mob justice and in those cases where people take the law into their own hands this is a practice that this court has a duty to discourage through appropriate sentences.

This is so because the courts have a duty to uphold the sanctity of life and not trivialise matters where a life has been lost. In such matters as the circumstances that are in this case ordinarily an effective imprisonment term in the region of about 3-4 years would be given to an accused person. However, the only factor that would sway the court away from this kind of sentence is the fact that these accused persons have waited for justice for 8 years. Giving them a custodial sentence now becomes unfair as it reverses their fate and their lives back to 8 years ago. Yet their personal circumstances are now different from that time. An example is the age of the five accused persons who are now in the advanced years of their lives which may not have been the position 8 years ago. Coupled with this factor is the delay to prosecute them through no fault of their own. It is for these reasons that this court would be persuaded not to give the accused persons the usual sentence of imprisonment in the region of about 3-4 years effective. Defence counsel suggested a fine in the region of \$200, coupled with about 12 months imprisonment wholly suspended. This court however, realises that the penalty clause in section 49 of the code stipulates a fine up to level 14 or exceeding level 14. Therefore the legislature views this offense seriously and it is not for this court to trivialise it.

Accordingly the accused persons are sentenced as follows:

Each accused person is sentenced to pay a fine of \$500 or in default of payment 6 months imprisonment. In addition, each accused person is sentenced to 3 years imprisonment wholly suspended for five years on condition each accused person is not within that period convicted of an offense involving violence where upon conviction he shall be sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
TJ Mabhikwa & Partners, accused's legal practitioners