

THE STATE

Versus

DZINGAI MUTONGA

And

REASON MUTONGA

And

ELSON MABUTO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J with Assessors Mrs C. Baye & Mr Shumba
GWERU CIRCUIT COURT

Criminal Trial

M. Shumba for the state
Mrs D. Shirichena for 1st accused
Mrs R. B. Munemo for the 2nd accused
A. M. Sakunje for the 3rd accused

MAKONESE J: The accused persons have been arraigned in this court on a charge of murder. It is alleged by the state that on 8th November 2017 at Village 17B, Nyarungwe, Chief Chireya, Gokwe, the accused persons one or more of them caused the death of Stephen Muzenda a male adult aged 33 years by striking him with logs and kicking him with booted feet all over the body. The accused persons deny the charge of murder and tender pleas of guilty to the lesser charge of culpable homicide. The accused persons' defence counsels confirm that the accused persons indeed tender plea of guilty in respect of the lesser charge. The state has conceded that on the facts before the court, there is insufficient evidence to show that accused persons intended to bring about the death of the victim.

The statement of agreed facts tendered into the record confirms that on the day in question the deceased was at his house in a kitchen hut seated on a wooden stool. The accused persons arrived at accused's residence around 11:00 hours and upon their arrival entered the

kitchen. The accused then accused deceased of having stolen a radio belonging to the 1st accused and an Okapi knife belonged to 3rd accused. The deceased refuted these accusations. The accused persons would have none of it and proceeded to assault the deceased. They assaulted the deceased indiscriminately using booted feet and logs all over the body. At some point and due possibly to the intensity of the assault accused 3 instructed his associates to aim the blows at the buttocks. The deceased sustained serious head injuries as a result of the assault. The deceased was found dead by a neighbour one Onias Muchowe. The body of the deceased was ferried to United Bulawayo Hospitals for a post mortem examination. The pathologist Dr S. Pesanai examined the remains of the deceased on 13 November 2017 and concluded that the cause of death was: (a) asphyxia; (b) Bronchoaspiration; (c) assault.

From the evidence placed before the courts, we are satisfied that the accused caused the death of the deceased. No evidence has been adduced before the court that the accused persons possessed the requisite intention to kill in the form of either *dolus directus* or *dolus eventualis*. In the result, the accused persons are found not guilty to the charge of murder. The accused persons are found guilty of culpable homicide.

Reasons for sentence

In assessing an appropriate sentence this court must emphasise that the law of the jungle has no place in our society. Acts of self help which lead to unnecessary loss of life will not be condoned. This court has a duty to protect the society of human life. The accused persons are all credited for having tendered pleas of guilty to culpable homicide. They have not wasted the court's time. They are all first offenders. They have served time of up to ten months in custody pending trial, particularly in the case of accused 3. The court takes into consideration all the mitigating features of the case as outlined by accused's defence counsel. This court accepts that first offenders are treated with a measure of leniency. The court however, has to balance the interests of the accused, those of society and pass sentences that do not tend to trivialize the offence. The sentence imposed in this case must be just and fair. The court notes with regret that the accused persons had no reason to assault the deceased indiscriminately with logs and

booted feet. This was a form of a gang attack. I reject the notion that there was any form of provocation. The accused persons took it upon themselves to become the enforcers of the law. They meted out instant justice and caused the loss of life. Their moral blameworthiness is high. A sentence of imprisonment is unreasonable called for. In all this the accused persons tend to pay little or no regard to the consequences they brought about upon the dependents of the victim's family. Because of the nature of the assault which was evidently unprovoked, an exemplary sentence is called for. This court shall however suspend a large portion of the custodial sentence to take into account the mitigating features of the case:

Sentence:- Each accused 6 years imprisonment of which 2 years imprisonment is suspended for 5 years on condition accused persons are not convicted of an offence involving violence and for which they are convicted and sentenced to a term of imprisonment without the option of a fine.

Effective sentence 4 years.

National Prosecuting Authority, state's legal practitioners
Chitere Chidawanyika, 1st accused's legal practitioners
Hlabano & Associates, 2nd accused's legal practitioners
Pundu & Company, 3rd accused's legal practitioners