

THE STATE
versus
APHET MUDIMBA

HIGH COURT OF ZIMBABWE
MOYO J
HWANGE 13 NOVEMBER 2018

Criminal Trial

Miss *M Munsaka* for the state
M Ncube for the accused person

MOYO J: The accused person faces a charge of murder, it being alleged that on the 14th day of April 2018, accused stabbed the deceased Mike Munenge several times resulting in his instant death.

The following were tendered into the court record and were duly marked

- the state summary
- the defence outline
- the accused's confirmed warned and cautioned statement
- the post mortem report

.....the case of inter.... As laceration right atrium, stab wound in the chest. And all in all it gives six stab wounds.

- The knife allegedly used in the commission of the offence.
- three logs

The evidence of Shadreck Tamuka, Cuthbert Shonhiwa and Dr S Pesanai was admitted into the court record as it appears in the state summary. Silvia Munenge and Choolwe Muleya gave *viva voce* evidence for the state.

The accused person gave evidence for the defence. The facts of this matter are largely common cause. The accused and deceased were cousin. Accused looked after their grandfather's cattle. The grandfather owned the cattle and dealt with them as he pleased. The grandfather had the cattle kept at accused's parents homestead. Accused left to look for work in Bulawayo. The grandfather then decided to give a beast to the deceased. This beast was one of those that the accused looked after and it appears to have been the last remaining. Accused come back from town to discover that deceased had been given this beast by the grandfather who owned the beast. This did not go down well with him resulting in him going to confront the deceased and seeking to retrieve the beast. It would appear once at the kraal, the deceased resisted the accused's intentions and sought to block accused from recovering the beast. This is where deceased was resultantly assaulted leading to his demise.

According to the first state witness, accused confronted deceased at his homestead about the beast, deceased said he had been given the beast by the grandfather. Deceased also told accused that he had already been given his own beast that he has used to pay lobola with. Accused insisted that he would repossess the beast and drive it back to his homestead. Accused went to the kraal and the deceased followed, deceased was armed with a small log. Accused tried to open the kraal, deceased blocked him, accused tried again, deceased blocked him. Accused tried to open and deceased pushed him away, accused tried again and deceased pushed him again. That's when accused took a pole and struck deceased once on the head. That's when deceased picked a pole and tried to strike deceased but missed. That's when accused then picked one of the poles and struck deceased on the neck. Deceased staggered backwards, that's when accused removed knife and stabbed deceased on the forehead. Accused then pushed deceased further and pressed deceased on the kraal. He then grabbed deceased by the neck while holding a knife. He then stabbed deceased on the chest. Deceased tried to push off accused and accused advanced and stabbed deceased on the left abdomen. Deceased later fell on the ground face down, and thus when accused stabbed him on his back.

Accused in his defence pleads both provocation and he says he was pained by the conduct of his elders of giving deceased and not him the beast being the subject matter of the dispute. He further alleged that deceased uttered words to the effect that he is not the one who had requested him to look after the cattle.

The gist of the accused's defence is that he lost self-control resulting in him acting in the manner that he did because of provocation. It is trite that accused person's defence should be allowed to stand in so far as it is reasonably possibly true in the circumstances. The defence of provocation is provided for in section 239 of the Code and the gist of the defence is that where on accused has been provoked to the extent of losing self-control, he will either be found not to have the requisite intention or having found to have the requisite intention will be held to have been clouded by anger to the extent that his moral blameworthiness will render him culpable of a lesser offence in this instance culpable homicide.

For the defence of provocation to be sustained the facts must in themselves establish such a defence. In other words, the provocation, should be such that the facts before the court allow an accused person to state that indeed he was provoked. In other words it is not the accused person's mere say so that goes. It is the totality of the facts before the court as juxtaposed with the law namely section 239 of the Code, for the court to first establish that there was provocation and whether such provocation could in the circumstances lead to loss of judgment on the accused.

In this matter, the accused looked after cattle, the cattle were not his, neither did he have any entitlement to them. The cattle simply belonged to the owner. It cannot be held to be provocative that an owner seeks to alienate his assets in a manner he deems fit. Even if it can be accepted that perhaps accused thought he did have some entitlements looking at the events that unfolded, accused need not have a gripe with the deceased, deceased did not provoke the accused person by being given a beast by his grandfather, if indeed it were to be argued that there was provocation, then it is not by deceased but by the grandfather. So if accused be provoked by the grandfather, what does that have to do with the deceased? He had to channel whatever issues he had with the grandfather. The deceased did not provoke the accused in any way by accepting a beast that was offered to him by its owner.

Accused if anything is the one who was being provocative in the circumstances resulting in deceased's death. The beast belonged to the grandfather, the grandfather alienated it.

On being told this accused decided to accost the deceased and disposes him of a beast that did not belong to him (accused). In such circumstances the court cannot hold that there was any provocation at all for the defence of provocation to be sustained not only does an accused just say I was provoked and the court takes his word for it. Now the facts must indeed show that provocation did exist.

It is for these reasons that this court finds that there is no defence of provocation since such a defence is only available to the provoked not to the ones who go about breaking the peace of others and then claiming to have been provoked in the circumstances.

Accused simply did not like the fact that his grandfather had given deceased the beast and he was not provoked by anybody. He acted violently himself, he accosted the deceased, breaching the peace and further assaulting the deceased for seeking to defend himself from the commotion that he accused was causing unnecessarily. Accused did act wrongful on the day in question.

Whilst the state counsel also submitted that the requirements of self defence have not been, met, this court will not assess that part as clearly self defence was not pleaded. Neither did accused's defence counsel submit that self defence existed in the circumstances. Defence counsel stated that the nature of the stabbing is suggestive of lack of self-control. However for lack of self-control, there must first be provocation which we have found not to exist.

What is the accused person guilty of?

The accused person stabbed the deceased in a vulnerable area in the chest and abdomen, and from the Choolwe Muleya's testimony this was after he had stabbed the deceased on the forehead. After stabbing deceased on the vulnerable parts of the body using excessive force that can be inferred from the post mortem report details, accused further stabbed deceased on his back while he lay face down. Accused could have desired one thing from such a scenario and that is death. Even if it were to be held that death might not have been his aim or object, he must have foreseen death as a substantive/real possibility from his actions. It is for these reasons that accused is found guilty of murder with actual intent.

Sentence

The accused person is convicted of murder. He is a first offender, seems to be unsophisticated, He was 23 years at the material time and therefore immaturity must have reigned on him. He has spent 7 months in pre-trial incarceration. He killed his own cousin. However, accused acted in a rowdy manner on the day in question, he was unnecessarily aggressive and unreasonable, leading to an unnecessary loss of life.

These courts frown as the loss of life through violence. Appropriate sentence should be given in the interests of justice. The accused person although young, started at the deep end. A lengthy custodial sentence will meet the justice of this case.

The accused person is accordingly sentenced to 25 years imprisonment.

National Prosecuting Authority, state's legal practitioners
Ncube Attorneys, accused's legal practitioners