

**THE STATE**

**Versus**

**KUDZAI NCUBE**

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J with Assessors Mr E Ndlovu and Mr J. Sobantu

HWANGE CIRCUIT COURT 5 JULY 2019

**Criminal Trial**

*M Munsaka* for the state

*C Manyeza* for the accused

**MAKONESE J:** This is yet again one of those crimes of passion that has led to the increasing and tragic loss of human life. The accused appears in this court on a charge of murder. The allegation in the indictment is that on the 6<sup>th</sup> August 2018 and at Lovemore Dube's homestead, Hammilton Village 8, Mambo, Inyathi, the 28 year old accused stabbed Tusime Munkali with a spear in the neck thereby causing his death. The accused pleads not guilty to the charge of murder and tenders a plea of guilty with respect to the lesser charge of culpable homicide. The state has no eye witness and the only state witness who could shed light on what transpired cannot be located. Faced with this predicament, and with the version of the accused as the only available evidence, the state has conceded to the limited plea of culpable homicide. It is our view that the concession by the state was properly taken. The matter proceeded on the basis of a statement of agreed facts. Accused's defence counsel confirmed that the essential elements of the offence of culpable homicide had been explained to the accused. As part of its case the state tendered into the record a statement of agreed facts in the following terms:

- "1. The accused was aged 28 years at the time of the commission of the offence and resides at his own homestead, Hammilton Village 8, Mambo, Inyathi..
2. The deceased was aged 24 years at the time he met his death. He used to reside at Lovemore Dube's homestead, Hammilton Village 8, Inyathi.
3. Accused and deceased are not related.
4. On the 5<sup>th</sup> August 2018 accused proceeded to Bhebhe mine, Mhotshane area, Inyathi where he would do gold panning.
5. On the same day at around 23330hrs Brenda Tshuma, accused's wife proceeded to Lovemore Dube's homestead where deceased who was her boyfriend resided.

6. Accused returned home in the middle of the night and found his wife Brenda Tshuma not at home. The accused followed Brenda Tshuma's foot prints which subsequently led him to Lovemore Dube's homestead where deceased resided.
7. Whilst the deceased and Brenda Tshuma, accused's wife were in deceased's bedroom, accused arrived and knocked on the door. The deceased however opened the door while he was only wearing an under pant.
8. The accused tried to force entry into the house but deceased blocked the accused from entering. Deceased who was armed with a metal chain then struck the accused on the left side of the shoulder twice.
9. Accused then rushed to the gate at deceased's homestead and armed himself with a spear. Deceased was still armed with a metal chain.
10. Deceased then threw down the metal chain and the two wrestled for the spear. Deceased held the pointed end of the spear while accused held the other end to which deceased was stabbed on the neck. The deceased then fled from the homestead.
11. The deceased was discovered by one John Nkosana lying on the ground by John Nkosana's gate. Deceased was wearing an under pant and he was bleeding heavily from the side of the neck after which he died.
12. 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 state tendered a post mortem report compiled by Dr Roberto Lara Diaz at United Bulawayo Hospitals following an examination of the remains of the deceased. The cause of death is listed as:

1. Acute anemia
2. Stab wounds on the subclavia
3. Stab wound (spear)

On marks of violence, the post mortem report reflects that there was a wound measuring 3cm located above the sternal cleft entering the cavity with an up and down direction and with a slight inclination from left to right. Further there are surface wounds located in the anterior part of the left forearm.

The next exhibit produced by the state is a metal chain affixed to a metal pipe with the following dimensions:

Length of metal pipe	33.5cm
Circumference of the pipe	6.5cm
Length of chain	68cm

Total measured length of the chain and pipe	68cm
Weight of chain and pipe	375 grams

The spear that was to inflict the injuries that led to the death of the deceased is a homemade spear with the following dimensions.

Weight	1.360 kg
Length of spear	113cm
Length of handle	6.5cm
Width of the blade at widest point	5.12cm
Width of blade at its tip	2mm
Length of blade	31.5cm

This then is the evidence presented before this court. As clearly explained in this judgment the only version available to the court is the accused's version. There is no other evidence controverting accused's version. We are satisfied that on this evidence, the accused is entitled to an acquittal on the murder charge. The accused is accordingly found guilty of culpable homicide.

### **Sentence**

The accused has been convicted of a serious offence. In assessing an appropriate sentence the court shall take into account all the mitigating features of the case as outlined by accused's defence counsel. Accused is a family man with the usual responsibilities. Any sentence this court shall impose will lead to loss of support on the part of accused's dependents. The accused has spent 11 months in remand custody pending trial. He has thus served part of his sentence. The accused has pleaded guilty to the offence and has thus assisted in the speedy resolution of this matter. The court shall therefore impose a moderate sentence that has a rehabilitative effect. There were no independent witnesses in this case but the accused has accepted responsibility for his conduct. Accused has shown some measure of

remorse. Crimes of passion have risen in recent years. The court must not send a message to society that will encourage self help as a method of resolution of domestic disputes. The accused caught his wife in *flagrante delicto* inside the deceased's bedroom. Upon knocking at deceased's bedroom the deceased emerged in his underpants. The deceased was armed with a metal rod with a bicycle chain at its end. It would seem that the deceased engaged the accused in a physical confrontation. The deceased was subjected to extreme provocation. He was supposed to exercise self restraint in the midst of such provocation. Whilst the court must not take an armchair approach, the court must ensure that the sentence imposed is just and fair in all the circumstances of the offence. This court condemns the use of violence in the resolution of marital disputes. Those faced with a situation where a wife or partner is in an adulterous relationship must not resort to violence. This leads to the unnecessary loss of life. These courts have a sacred duty to protect the loss of human life. In the matter before us the accused ought to have used other means of resolving this dispute. He chose to take matters into his own hands. The result was the loss of human life. This court shall, however, impose a sentence that shall create a balance between the interests of the accused and the ends of justice.

“Accused is sentenced to 10 years imprisonment of which 3 years is suspended for 5 years on condition accused is not within that period convicted and sentenced to an offence involving violence and for which is sentenced to imprisonment without the option a fine”.

**Effective sentence: 7 years**

*National Prosecuting Authority*, state's legal practitioners  
*Ndove And Partners*, accused's legal practitioners