

THE STATE  
**versus**  
TAWANDA MASIYA

HIGH COURT OF ZIMBABWE  
MOYO J with Assessors Ms C. J Baye and Mr A. B Mpofu  
GWERU CIRCUIT 27 MAY 2019

### **Criminal Trial**

*C Chikuni* for the state  
*A Chingwe* for the accused

**MOYO J:** Accused faces charge of murder it being alleged that on the 22<sup>nd</sup> of September 2010 he assaulted the deceased Tambudzai Mpofu with clenched fists and an iron bar resulting in the deceased later dying from the injuries sustained in that assault. He pleaded not guilty to the charge, he however tendered a limited plea to the charge of culpable homicide. The state counsel accepted that plea and the parties drew a statement of agreed facts. It was tendered and marked Exhibit 1.

It reads as follows:

1. Tawanda Masiya (hereinafter called the accused) was aged 35 years at the time of the commission of the offence. He reside at village Ronga Chief Chireya, Gokwe North in the Midlands Province.
2. Tambudzai Mpofu (hereinafter called the deceased) was aged 35 years when she met her death. She stayed together with the accused as his second wife.
3. On 22<sup>nd</sup>September 2010 in the evening, the accused arrived home from a beer drink. He had a misunderstanding with the deceased over an issue that the deceased had used some money to buy school uniforms for one of their children.
4. The accused began assaulting the deceased with fists, all over the body. He also used an iron bar and struck the deceased with it once on the back just over the buttocks.

5. Due to the assault the deceased was complaining of back ache, she also had a swollen hand and abdomen.
6. Deceased was ferried by her brother in a scotch cart to her maiden home, where she died two days later.
7. A report was made to the police leading to the accused's arrest.
8. On the 29<sup>th</sup> September 2010 Dr E. T Manyarara conducted a post mortem examination which revealed that the cause of death was fracture of the cervical spine vertebrae.
9. The accused accepts the evidence of the state witnesses and contents of the post mortem report. The accused denies having requisite intention to kill in the form of *dolus directus* or *dolus eventualis*. Rather, the accused acknowledges that through his conduct aforesaid, he was negligent in causing the death of the deceased.
10. The state concedes to the fact that the accused was negligent in the manner he assaulted the deceased, and therefore accepts the accused's plea of culpable homicide.

The post mortem report was also tendered and marked Exhibit 2. It gives the case of death as a fracture of the spine. The iron bar that was allegedly used in the commission of the offence was also tendered and marked Exhibit 3.

From the evidence before this court, the accused person is acquitted on the charge of murder but is accordingly convicted on the lesser charge of culpable homicide.

### **Sentence**

The accused is convicted of culpable homicide. He is a first offender. He pleaded guilty to the appropriate charge. He is a family man and a bread winner. It has taken 9 years through no fault of his own to bring him to justice. He paid compensation of 11 herd of cattle to deceased's family. He has been in pre-trial incarceration for a period of 11 months.

The accused killed his spouse over a domestic dispute. Domestic violence is now a cancer in our society wherein spouses are butchered at the slightest of misunderstandings.

Sentencing is a broad spectrum exercise where the court has to look at the accused's personal circumstances, the circumstances of the commission of the offence and the interests of society at large. A delicate balance has to be struck in weighing these. Of course certain aspects

will have more weight than others. It would be inappropriate for the court to emphasise the prevalence of domestic violence, and the need for deterrence, and in the process ignore that the accused has waited for justice for nine years. Had the accused person been tried timeously and sentenced to an effective sentence of about 3-4 years imprisonment, he would have long served his sentence and completed it by 2014 at the latest. It therefore becomes unfair and unjust in my view to send him to prison 5 years after the expected completion of his sentence had he been tried on time. At this juncture it becomes imperative to mention that it is the duty of the state to ensure that available accused persons are tried on time. Justice delayed is justice denied. The state cannot take its time to prosecute available accused persons, thereby denying them justice and then expect these courts to accept that an accused whose trial has delayed through no fault of his should be subjected to the same punishment he would have been given had he been tried on time. That certainly cannot be in the interests of justice. A delay of 9 years taxes an accused person emotionally, for 9 years he was anxious about what would happen to him at the trial.

A custodial sentence is certainly not justifiable in these circumstances. The accused person is accordingly sentenced to 5 years imprisonment wholly suspended for 5 years, on condition he is not within that period convicted of an offence, of which violence is an element whereupon conviction he shall be sentenced to imprisonment without the option of a fine.

*National Prosecuting Authority, state's legal practitioners*  
*A Chingwe, accused's legal practitioners*