

THE STATE
versus
TOENDEPI KIZITO

HIGH COURT OF ZIMBABWE
MOYO J with Ms C. J Baye and Mr A. B. Mpofu
GWERU CIRCUIT 23 MAY 2019

Criminal Trial

N Chikuni for the state
H Magazine for the accused

MOYO J: The accused person faces a charge of murder, it being alleged that on the 8th of February 2013 he caused the death of Pepukai Toendepi by striking him once on the head and once on the top of the left eyebrow with an adze.

The deceased was accused's biological son. The accused person pleaded not guilty to the charge of murder and instead tendered a limited plea to the charge of culpable homicide. The state accepted that plea and a statement of agreed facts was drawn and tendered by the parties. It was marked Exhibit 1. It reads as follows:

1. Kizito Toendepi (hereinafter called the accused) was aged 58 years at the time of the commission of the alleged offence. He resided at Village Manembe Chief Jiri Gokwe South in the Midlands Province.
2. Pepukai Toendepi (hereinafter called the deceased) was aged 26 years at the time of his death. The accused is his biological father and he stayed with the accused.
3. On the 8th of February 2013 in the afternoon, the accused and deceased were at home, when they had a misunderstanding which ended in both of them exchanging harsh words.
4. The accused's wife advised the two to stop quarrelling, the accused person obliged but the deceased kept on shouting on top of his voice.
5. Deceased then armed himself with an axe and advanced towards the accused.

6. Accused retreated into the main house and closed the door, deceased broke the main door with an axe and entered the main house.
7. Accused then sought refuge in the main bedroom and deceased still armed with the same axe proceeded to the main bedroom and broke the main bedroom door using the same axe.
8. At that moment the accused's wife grabbed the deceased from behind, the two struggled and ended up falling to the ground.
9. The accused then emerged from the bedroom armed with an adze. The deceased broke free and ran away leaving the axe on the veranda, with accused following in hot pursuit.
10. The deceased began to run around the main house and reached the point where he had dropped the axe, but before he picked up the axe, the struck him with an adze on the back of the head and he fell down.
11. Deceased managed to get hold of the axe intending to strike the accused, but accused was quick to strike another blow with an adze just above the left eye. Deceased fell to the ground and started groaning.
12. Deceased later died that evening. A report was made to the police and accused was arrested.
13. On 20 February 2013 Dr. S. Pesanai examined the remains of the deceased and concluded that the cause of death was:
 - brain damage
 - depressed skull fracture
 - sharp force trauma
 - homicide
14. 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 *doluseventualis* or *dolusdirectus*.
15. Rather the accused acknowledges that, through his conduct aforesaid, he was negligent in causing the death of the deceased.
16. 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 cause of death as brain damage, depressed skull, fracture, sharp force trauma. The adze that was allegedly used in the commission of the offence was also tendered and marked Exhibit 3.

The accused person is accordingly found not guilty of murder but is instead convicted of the lesser charge of culpable homicide.

Sentence

The accused person is convicted of culpable homicide. He is a first offender. He is aged 64 years old. He has waited for 6 years for justice through no fault of his own. He is a family man and a breadwinner. He has health issues. He caused the death of his biological son. He shall forever live with this stigma.

He twice tried to hide away from the deceased who was the aggressor. Deceased acted very unreasonably on the day in question by breaking doors in a bid to assault the accused. Deceased was very disrespectful of his own father and he persisted in this unacceptable conduct.

However, these courts do not accept the loss of life under any circumstances. In this case however, surely a man had been pushed to the limit, running away, hiding twice with the deceased persistently pushing him and breaking doors. An assault on the deceased, although not justifiable and unlawful, was inevitable in the circumstances. The accused is also in the afternoon of his life and sending him to prison considering his age and the entire circumstances of this case, cannot be in the interests of justice.

The accused person is accordingly sentenced to 3 years imprisonment, wholly suspended for 5 years on condition the accused person is not within that period convicted of an offence involving violence, whereupon conviction, he shall be sentenced to imprisonment without the option of a fine.

National Prosecuting Authority, state's legal practitioners
Mkushu, Foroma & Maupa Legal Practitioners, accused's legal practitioners